No. 24A884

IN THE

Supreme Court of the United States

DONALD J. TRUMP *et al.*,

Applicants,

v.

CASA, INC. *et al.*,

Respondents.

On Application for a Partial Stay of the Injunction Issued by the United States District Court for the District of Maryland

OPPOSITION TO APPLICATION FOR A PARTIAL STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

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INTRODUCTION

There is nothing "modest" about the government's request for emergency relief in this case. Appl. 1. On his first day in office, the President issued an Executive Order that purports to upend birthright citizenship by executive fiat. But birthright citizenship is at the core of our Nation's foundational precept that all people born on our soil are created equal, regardless of their parentage. Following this Court's infamous decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and the Civil War that decision helped ignite, Congress passed and the States ratified the Citizenship Clause of the Fourteenth Amendment to enshrine birthright citizenship in the Constitution, where no President could unilaterally take it away.

The Executive Order purports to reinterpret the Fourteenth Amendment to limit citizenship by birth on our soil to only those children who have at least one parent who is a citizen or lawful permanent resident. But that is not birthright citizenship at all. The Order's rule of citizenship by blood is inconsistent with not only the plain text of the Citizenship Clause, but also common law history, this Court's precedent, a federal statute codifying the long-settled interpretation of the Citizenship Clause, and well over a century of consistent Executive Branch practice. More fundamentally, the Order conflicts with the bedrock principle that ours is "a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

As every court to have considered the issue has concluded, the Executive Order facially violates the Constitution. "The plain language of the Citizenship Clause—as interpreted by the Supreme Court more than a century ago and routinely applied by all branches of government since then—compels a finding that the plaintiffs' challenges to the EO are nearly certain to prevail." App. 88a. The district court in this case enjoined the Order after finding that the plaintiffs "easily"

meet the standard for a preliminary injunction, including "a very strong likelihood of success on the merits." App. 26a. Another district court ruling on a similar challenge observed that it was "not a close case." App. 109a.

The government does not challenge any of that before this Court. It does not argue that it is likely to succeed in defending the constitutionality of the Executive Order. And yet, the government asks this Court to intervene to lift the injunction so that the government may begin applying the facially unconstitutional Order against nearly everyone. That is not a modest request.

Nor does the government identify any emergency that merits relief on this Court's emergency docket. The Executive Branch has been complying with the settled interpretation of the Citizenship Clause for 125 years, and the government has demonstrated no urgent need to change now. The lack of any exigency requiring this Court's immediate intervention is by itself sufficient grounds for the application to be denied.

The universal injunction in this case preserves the uniformity of United States citizenship, an area in which nationwide consistency is vitally important. Whether a child is a citizen of our Nation should not depend on the state where she is born or the associations her parents have joined. A universal injunction is also necessary to provide complete relief to the two organizational plaintiffs, CASA, Inc. and the Asylum Seeker Advocacy Project ("ASAP"). Between them, they have more than 800,000 members, spread across all 50 states. The only workable way to ensure that the government respects the constitutionally guaranteed citizenship of all children born to those members during the pendency of this litigation is through a universal injunction.

Because case-specific considerations support the scope of the injunction issued here, the Court should not reach the government's complaints about the universal injunctions issued in other cases. But in any event, the government is wrong that relief benefiting nonparties violates Article

III and principles of equity. If that were true, the courts could not have granted remedies for school segregation or racial gerrymandering. Nor could courts issue facial relief in response to a facially unconstitutional law. And the government does not stop there. It also attacks associational standing. The government argues that the organizational plaintiffs cannot obtain relief for all of their members, in direct conflict with this Court's recent reaffirmation of associational standing doctrine. Far from modest, the government's position would require radical departures from this Court's precedent.

If the Court were to grant the government's motion, chaos would ensue. As the Fourth Circuit explained below, today "virtually every child born in the United States becomes a citizen at birth—allowing us to prove our citizenship with our birth certificates, which identify our place of birth but not the citizenship status of our parents." App. 70a. The Executive Order "will do away with that longstanding practice." *Id.* "Even for children born to two citizen parents, a standard birth certificate will no longer suffice to prove citizenship—not under the Executive Order, and not for any other purpose." *Id.* "Existing administrative systems will fail, states and localities will bear the costs of developing new systems for issuing birth certificates and verifying citizenship, and anxious parents-to-be will be caught in the middle." *Id.*

The Court should not exercise its equitable powers to reach such an inequitable result, especially when the government does not claim in its application that the policy it seeks to enforce complies with the Constitution. "When a party comes into a court of chancery, seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity." *King v. Hamilton*, 29 U.S. 311, 328 (1830).

STATEMENT

I. Legal Background

A. The Executive Order

On January 20, shortly after taking office, President Trump issued an Executive Order titled "Protecting the Meaning and Value of American Citizenship." *See* Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025). Rather than announcing a new Executive Branch policy and then explaining how that policy is consistent with existing law, the Order purports to redefine existing law. Section 1 identifies "categories of individuals born in the United States" that the Order claims "ha[ve] always [been] excluded from birthright citizenship" under the Fourteenth Amendment. Order § 1. Specifically, the Order says that "the privilege of United States citizenship does not automatically extend to persons born in the United States" (1) whose mothers are unlawfully present in the United States and whose fathers are neither lawful permanent residents nor citizens, and (2) whose mothers are lawfully but temporarily present in the United States and whose fathers are neither lawful permanent residents nor citizens. *Id.* Section 1 sets no effective date for its new interpretation of the Citizenship Clause, and as a result, it is unclear whether the government would give this section only prospective effect.

Section 2 directs departments and agencies of the United States to stop "issu[ing] documents recognizing United States citizenship" or "accept[ing] documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship" to people covered by Section 1. *Id.* § 2(a). The directives in Section 2 apply only to babies born after February 19, 2025. *Id.* § 2(b).

Section 3 is titled "Enforcement." It directs the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Commissioner of Social Security to "take all appropriate measures to ensure that the regulations and policies of their respective departments

and agencies are consistent with this order." *Id.* § 3(a). Section 3 also directs the heads of "all executive departments and agencies" to issue public guidance within 30 days "regarding this order's implementation with respect to their operations and activities." *Id.* § 3(b).

B. The Citizenship Clause of the Fourteenth Amendment

The Fourteenth Amendment guarantees citizenship to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof." U.S. Const. amend XIV, § 1. The text of the Citizenship Clause is broad: it applies to *all* children born in the United States, with the sole condition that such children be "subject to [U.S.] jurisdiction." *Id.* At the time the Fourteenth Amendment was ratified, the meaning of that phrase would have been understood much as it is today. It means to be subject to a sovereign's authority. Michael Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L. J. 405, 437–40 (2020); *see* Noah Webster, *An American Dictionary of the English Language* 732 (Chauncey A. Goodrich & Noah Porter eds., 1865) (defining jurisdiction as "[p]ower of governing or legislating," "the power or right of exercising authority," the "limit within which power may be exercised," or "extent of power or authority"). The Framers of the Amendment intended for the phrase to carry its ordinary meaning, not a special secret one. Following the Civil War, it was paramount "that citizenship should be placed on unquestionable ground—on ground so plain that the humblest man who should inherit its protections would comprehend the extent and significance of his title." 2 James Gillespie Blaine, Twenty Years of Congress 189 (1884).

This Court's precedents confirm that ordinary meaning. Long before ratification of the Fourteenth Amendment, this Court had held that the "jurisdiction" of the United States was closely tied to its territorial bounds, and that nearly everyone within that territory, including merchants and temporary visitors, was "amenable to the jurisdiction of the country." *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch.) 116, 144 (1812) (Marshall, C.J.). There were only limited

exceptions to that territorial rule, such as for "foreign ministers," who entered a country's territory as representatives of their own sovereign and were thus immune from local authority. *Id.* at 138–39. The Framers of the Fourteenth Amendment would have understood "jurisdiction" to mean exactly the same thing.

Interpreting "jurisdiction" to mean power over a person is also consistent with the common law understanding of birthright citizenship. Under the English common law principle of *jus soli*, or right of the soil, newborn children's entitlement to birthright citizenship was based on the King's obligation to protect all infants born within the realm, without distinction based on parental nationality or domicile. *E.g., Calvin's Case* (1608) 77 Eng. Rep. 377, 384 ("[L]ocal obedience being but momentary and uncertain, is yet strong enough to make a natural subject, for if he hath issue here, that issue is . . . a natural born subject . . . ."). To the extent "allegiance" was required, it was only "such as is due from all men born within the king's dominions immediately upon their birth." 1 Blackstone's Commentaries on the Laws of England 357 (1st ed. 1765). Like the text of the Fourteenth Amendment, the common law thus focused on the status of the child, not that of the parent.

The rule of birthright citizenship for the child regardless of the parents' immigration status was incorporated into U.S. law before the Fourteenth Amendment. James Madison described the concept that "birth is a criterion of allegiance" as an "established maxim" that "applies in the United States." 1 Annals of Cong. 404 (1789) (Joseph Gales ed., 1834). In accordance with that common law concept, this court in the early case of *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 119–20 (1804), assumed that all persons born in the United States were citizens thereof. And in a decision that was well-known to the Framers of the Fourteenth Amendment, the Chancery Court of New York found it "an indisputable proposition" that a child

"born in this state, of alien parents, during their temporary sojourn . . . was a natural born citizen of the United States." *Lynch v. Clarke*, 1 Sand. Ch. 583, 638–39 (N.Y. Ch. 1844). *Lynch* "conclusively show[ed] . . . that all children born here are citizens without any regard to the political condition or allegiance of their parents." Cong. Globe, 39th Cong., 1st Sess. 1832 (1866) (internal quotation marks and citation omitted). Congress intended to ratify that understanding. *Id.*

To contest this history, the government cites sources noting that shortly after the Founding, some countries were moving away from birthright citizenship and toward the alternative model of *jus sanguinis*, or right of blood. But that was never the law in the United States. For instance, the European scholar Vattel posited a rule where "[t]he country of the fathers is then that of the children," regardless of where the children are born. M.D. Vattel, The Law of Nations, §§ 212–13, at 162 (1805). A country "will be only the place of [a child's] birth, and not of his country," if his father is "a stranger" in the land, including a "stranger permitted to settle and stay in the country." *Id.* §§ 212–13, at 162. That is not an interpretation of birthright citizenship at common law in the United States, but rather a repudiation of it. The government also invokes Justice Story's conflict of law treatise, which proposes denying citizenship to the children of temporary visitors. Appl. 8. But in the very next sentence, Justice Story candidly concedes that "[i]t would be difficult, however, to assert, that in the present state of public law such a qualification is universally established." Joseph Story, Commentaries on the Conflict of Laws § 48, at 48 (1834). No matter what was happening abroad, U.S. law remained firmly rooted in *jus soli*.

The Court shamefully departed from the ancient principle of birthright citizenship in *Dred Scott*, concluding that African-Americans were ineligible to become citizens. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1857). Following the Civil War, Congress made it a priority to overturn *Dred Scott* and enshrine birthright citizenship in the Constitution, where

neither political winds nor prejudices could erode its guarantee. In crafting the Amendment, Congress well understood that the Citizenship Clause "declare[s] that the children of all parentage whatever, born in [the United States], should be regarded and treated as citizens of the United States." Cong. Globe, 39th Cong., 1st Sess. 2891 (1866). Those who opposed the Amendment did so for that very reason, objecting that it would confer citizenship on the children of "Gypsies," whom they believed "settle as trespassers wherever they go." *Id.* at 2890–91.

Any doubt about the meaning of the Citizenship Clause was settled by this Court's decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). In that decision, the Court interpreted the phrase "subject to the jurisdiction thereof" to carve out "by the fewest and fittest words" only the limited common law exceptions to birthright citizenship for children born to foreign ministers or occupying armies, *id.* at 682, "with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes," *id.* at 693. The Fourteenth Amendment otherwise "affirms the ancient and fundamental rule of citizenship by birth within the territory." *Id.* Applying that reasoning, the *Wong Kim Ark* Court held a child born within the United States was a citizen even though his parents were "subjects of the Emperor of China," were ineligible to ever become citizens, and eventually returned to China. *Id.* at 652. This Court rejected the argument that Wong Kim Ark could be denied U.S. citizenship because his parents owed allegiance to another country. *Id.* at 694.

The government's attempt to defend the Executive Order by reading a parental allegiance requirement into the Citizenship Clause is inconsistent with history and the Clause's plain text and cannot be reconciled with the reasoning or holding of *Wong Kim Ark*. The government contends that "jurisdiction" means "political jurisdiction," and that "only" a person who "owes primary allegiance to the United States rather than to an alien power" is subject to the jurisdiction in that

"political" sense. Appl. 7 (internal quotation marks omitted). But that interpretation of the Citizenship Clause is inconsistent with its plain language, which focuses on whether the person born in the United States (and not her parents) is "subject to the jurisdiction thereof." And it is inconsistent with the common law rule, which recognized birth within the dominion of the sovereign as sufficient proof of allegiance. The government's allegiance requirement would also have been fatal to Wong Kim Ark's claim of citizenship. His parents were citizens of China and thus owed primary allegiance to that country. Indeed, the government's arguments about political jurisdiction and allegiance closely track the reasoning of Justice Fuller's dissenting opinion in *Wong Kim Ark*. *See* 169 U.S. at 731 (Fuller, J., dissenting). Those arguments did not carry the day in 1898, and they should not carry the day now.

The government's domicile argument fares no better. The government contends that because Wong Kim Ark's parents were domiciled in the United States, the decision is necessarily limited to children born to domiciled parents. Appl. 9. A domicile requirement is nowhere to be found in the text of the Citizenship Clause or in any preratification legal authorities. And although the Court in *Wong Kim Ark* mentioned that his parents were domiciled in the United States at the time of his birth, before later returning to China, the Court's reasoning undercuts any claim that it intended to add a new limit to the Fourteenth Amendment beyond the exceptions that it explicitly listed. Parental domicile was a fact of the case, but it was no more vital to the court's reasoning than the fact that Wong Kim Ark was born in California or that his parents were Chinese.

In the years since, this Court has repeatedly reiterated or applied the understanding that the Fourteenth Amendment confers citizenship on the children of parents who are undocumented or in the country temporarily. For instance, in *Hirabayashi v. United States*, the Court observed that tens of thousands of Americans of Japanese descent were "citizens because born in the United

States." 320 U.S. 81, 96 (1943). In *United States ex rel. Hintopoulos v. Shaughnessy*, the Court said that a child born in the United States was "an American citizen by birth," despite his parents' "illegal presence." 353 U.S. 72, 73 (1957). And even though both sets of respondents in *INS v. Errico* had obtained admission through fraud, the Court acknowledged that their U.S.-born children became U.S. citizens at birth. 385 U.S. 214, 215–16 (1966). This Court's decision in *INS v. Rios-Pineda* similarly involved noncitizen parents whose child became "a citizen of this country" at birth, even though they had "enter[ed] . . . without inspection." 471 U.S. 444, 446 (1985). The government's only response is a dictum from the Supreme Court of New Jersey, which the government neglects to mention was not that state's court of last resort at the time. *See Benny v. O'Brien*, 32 A. 696, 698 (N.J. Sup. Ct. 1895); *see also* App. 45a n.4.

C. 8 U.S.C. § 1401(a)

Section 201 of the Nationality Act of 1940, codified at 8 U.S.C. § 1401(a), provides that all those "born in the United States, and subject to the jurisdiction thereof," "shall be nationals and citizens of the United States at birth." The government all but ignores this statutory provision, *see* Appl. 5, but it provides an independent basis for enjoining the Executive Order. When Congress enacted that provision in the middle of the 20th Century, it was universally understood that the phrase "subject to the jurisdiction thereof" carved out only the narrow exceptions identified in *Wong Kim Ark* and otherwise conferred citizenship on all children born in the United States. The government concedes that this was the prevailing interpretation of the Citizenship Clause throughout the 20th Century. Appl. 10. Congress plainly intended to codify that prevailing interpretation in the statute. Because the Order conflicts with that meaning, it violates the statute, separate and apart from the violation of the Constitution.

A statute must be "interpret[ed] . . . in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County*, 590 U.S. 644, 654 (2020). When

"Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George v. McDonough*, 596 U.S. 740, 746 (2022) (internal quotation marks and citation omitted). In Section 1401(a), Congress intended to codify the "old soil" principle of *jus soli*. A report that President Franklin D. Roosevelt sent to Congress urging passage of the Nationality Act noted that this provision "is in effect a statement of the common-law rule, which has been in effect in the United States from the beginning of its existence as a sovereign state." Staff of H. Comm. on Immigr. and Naturalization, *Nationality Laws of the United States: Message from the President of the United States*, 76th Cong. 418 (Comm. Print 1939). Citing both this Court's decision in *Wong Kim Ark* and the New York Chancery Court's decision in *Lynch v. Clarke*, the report explained that birthright citizenship under Section 1401(a) extends to "a child born in the United States of parents residing therein temporarily" because "it is the fact of birth within the territory and jurisdiction, not the domicile of the parents, which determines the nationality of the child." *Id.*

Congressman Dickstein, the House sponsor of the Act and the chairman of the Committee on Immigration and Naturalization, agreed: "There are others who, through accident of birth and circumstances have been born in the United States of alien parents, yet can claim citizenship." 86 Cong. Rec. 11944 (1940). Similarly, a State Department official who was among the drafters of the 1940 Act had written that "persons born in the United States of aliens who are mere sojourners or transients are citizens of this country." Richard W. Flournoy, Jr., *Dual Nationality and Election*, 30 Yale L. J. 545, 552–53 (1921). The American conception of birthright citizenship, Flournoy noted, was "taken from the common law of England," which "makes no distinction between persons born in the country of alien sojourners and those born of domiciled aliens." *Id.* at 553.

Statutory context confirms that Section 1401(a) confers citizenship on the classes of children covered by the Executive Order. The Immigration and Nationality Act creates a comprehensive scheme governing the citizenship and immigration status of every person within the United States. But if the government's argument is correct, the statute completely ignores millions of people who have been born in the United States to undocumented parents or parents who are lawfully but temporarily present. That is an implausible reading.

Moreover, several provisions of the immigration laws would be rendered nonsensical by the government's reading of Section 1401(a). For instance, Section 1408 would provide greater benefits to children born to undocumented parents in American Samoa than children born to undocumented parents in any of the 50 states. That provision confers nationality (but not citizenship) on children "born in an outlying possession of the United States," regardless of the citizenship or nationality of their parents. 8 U.S.C. § 1408(1). But on the government's reading, the same child if born in Indiana to undocumented parents would be given neither citizenship nor nationality. Or consider the statutory provisions governing the citizenship of children born in Alaska and Hawaii. A child born in either of those states "is a citizen of the United States at birth," without qualification. *See* 8 U.S.C. § 1404 (Alaska), 8 U.S.C. § 1405 (Hawaii). There is no reason to think Congress intended to treat children born in Alaska and Hawaii differently from children born in other states, and every reason to think those provisions reflect Congress's understanding that universal birthright citizenship applies in every state.

II. Procedural Background

On January 21, the plaintiffs filed this lawsuit and moved for a preliminary injunction seeking to enjoin implementation and enforcement of the Executive Order. The individual plaintiffs are Maribel, Juana, Trinidad Garcia, Monica, and Liza. All five are pregnant, reside in the United States, and fear that their children will be denied United States citizenship under the

Executive Order based on their immigration statuses and those of their children's fathers. The organizational plaintiffs are CASA, Inc. and ASAP. They are immigrant-rights organizations, each with hundreds of thousands of members. Among those members are thousands of people, in all 50 states, who fall into the categories of parents covered by the Executive Order and who are likely to give birth to a child in the United States in the near future.

Members of CASA and ASAP, like the individual plaintiffs, fall into immigration statuses covered by the Executive Order. Many are in the country legally, including those with pending asylum claims, pending applications for permanent residency, or Temporary Protected Status. Others are undocumented people who have lived in the United States for years. Many have older children who are U.S. citizens. The Executive Order threatens to deny their future children the birthright citizenship that the Constitution guarantees.

On February 5, the district court issued an order and accompanying opinion granting the preliminary injunction. App. 25a–59a. The district court held that "[t]he plaintiffs easily have met the standard for a preliminary injunction." App. 26a. First, the court held there is "a very strong likelihood of success on the merits." *Id.* The Executive Order's attempt to reinterpret the Citizenship Clause "contradicts the plain language of the Fourteenth Amendment and conflicts with 125-year-old binding Supreme Court precedent." App. 35a. The court also concluded that plaintiffs demonstrated significant irreparable harm. Absent an injunction, they "will face instability and uncertainty about the citizenship status of their newborn babies, and their children born on U.S. soil will be denied the rights and benefits of U.S. citizenship." App. 53a–54a. Finally, the court determined that the balance of equities and the public interest "weigh very strongly" in favor of the plaintiffs, in light of the Order's significant "collateral consequences." App. 54a–55a.

The district court therefore issued an injunction barring implementation or enforcement of the Order. App. 58a–59a.

As to the scope of the injunction, the district court reasoned that "[o]nly a nationwide injunction will provide complete relief to the plaintiffs," given that "ASAP's members reside in every state and hundreds of them expect to give birth soon." App. 56a. A nationwide injunction was also appropriate to maintain the uniformity of United States citizenship. *Id.*

The government waited six days, until February 11, to file a notice of appeal and motion to stay the preliminary injunction in the district court. Supp. App. 159a–160a. In its stay motion, the government did not claim a likelihood of success in defending the legality of the Executive Order or ask for the injunction to be lifted entirely. Supp. App. 161a–168a. Instead, it challenged the scope of the injunction, arguing that the injunction should cover only the five individual plaintiffs and 11 other members of CASA and ASAP who are included in the complaint. Supp. App. 162a; *see also* Supp. App. 35a. The district court denied the stay motion on February 18, App. 60a–64a, and the government moved for a stay in the court of appeals on February 19, Supp. App. 35a–57a. The Fourth Circuit denied a stay on February 28. App. 65a–70a. The government then waited nearly two more weeks, until March 13, to file its application for a stay in this Court. Here, too, the government challenges the scope of the injunction without claiming that it is likely to succeed in defending the Citizenship Clause on the merits.

Meanwhile, the government did not ask the Fourth Circuit to expedite briefing in its appeal of the preliminary injunction. Instead, the government filed a motion, which the Fourth Circuit granted, requesting that the court set oral argument in September.

STANDARD OF REVIEW

"A stay is an intrusion into the ordinary processes of administration and judicial review and accordingly is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [this Court's] discretion." *Id.* at 433–34. In deciding whether to grant a stay, the Court considers "(1) whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio v. EPA*, 603 U.S. 279, 291 (2024) (citing *Nken*, 556 U.S. at 434). The applicant must also demonstrate a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," which is a prerequisite to ultimate success on the merits in this Court. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see also Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).

ARGUMENT

I. There Is No Emergency Warranting Extraordinary Relief.

Stays pending appeal are designed to address "the dilemma" that arises "when there is insufficient time to resolve the merits and irreparable harm may result from delay." *Nken*, 556 U.S. at 432. Accordingly, to obtain a stay, an applicant must show it will be irreparably injured absent relief. *Id.* at 434. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959). Here, the government has failed to show that a stay is necessary to prevent irreparable harm. And the public interest strongly supports the preliminary injunction. The Court should deny the stay application on that basis alone.

A. The Government Cannot Show Irreparable Harm.

The government invokes this Court's emergency docket without identifying any emergency. In cases involving challenges to government policies, "often 'the harms and equities [will be] very weighty on both sides.'" *Ohio v. EPA*, 603 U.S. 279, 291 (2024) (alteration in original) (quoting *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 929 (2024) (Kavanaugh, J., concurring)). But this is not that sort of case. The government can show no harm whatsoever from the district court's injunction, which merely requires the Executive Branch to continue complying with the settled interpretation of the Citizenship Clause during the pendency of this litigation. Because "the moving party has not demonstrated irreparable harm," the Court should deny the government's stay application on that basis alone and "can avoid delving into the merits." *Poe*, 144 S. Ct. at 929 (Kavanaugh, J., concurring).

A universal injunction preserving the status quo as it has existed for well over a century will further the public interest without harming the government. As the government concedes, Appl. 10, throughout the 20th Century and up to today, the Executive Branch has consistently recognized the birthright citizenship of the categories of children covered by the Executive Order. The government cannot show that it will suffer any harm, much less irreparable harm, from an injunction that simply requires it to continue complying with the settled interpretation of the Citizenship Clause until this case can be decided. Although the status quo may be difficult to define in cases involving "new laws," *see Poe*, 144 S. Ct. at 930 (Kavanaugh, J., concurring), the status quo is evident here. Rather than a new law, this case involves a 417-year-old common law rule, *Calvin's Case* (1608) 77 Eng. Rep. 377; a 157-year-old constitutional amendment, U.S. Const. amend XIV, § 1; a 127-year-old Supreme Court precedent, *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); an 85-year-old statute, 8 U.S.C. § 1401(a); and more than a century of consistent Executive Branch practice, *see Legislation Denying Citizenship at Birth to Certain Children Born*

in the United States, 19 Op. O.L.C. 340 (1995). The President cannot rewrite the Constitution or the Immigration and Nationality Act by executive fiat, and the government has certainly shown no extraordinary need to do so immediately.

Remarkably, the government asks this Court to lift the district court's injunction without either challenging the plaintiffs' standing or claiming a likelihood of success on the underlying merits. Given the lack of any argument from the government to the contrary, the Court should assume for purposes of resolving this stay application that the Executive Order is facially unconstitutional. The government cannot show any harm from an injunction merely preventing the government from violating the Constitution: "All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882). None of the cases cited by the government in which this Court stayed a preliminary injunction involved an applicant who challenged neither standing nor the underlying merits. *See, e.g.*, Emergency Appl. for Stay Pending Appeal at 13–26, *McHenry v. Texas Top Cop Shop, Inc.*, 145 S. Ct. 1 (2025) (mem.) (No. 24A653) (arguing the Supreme Court was likely to reverse the lower courts on the merits); Emergency Appl. for Stay Pending Appeal at 21–27, 33–34, *Poe*, *supra* (No. 23A763) (arguing the plaintiffs had failed to meet the standard for a facial challenge on the merits and lacked standing to challenge "most" of the law in question); Appl. for a Stay of the Judgment at 15–28, *Garland v. VanDerStok*, 2023 WL 4834604 (mem.) (No. 23A82) (arguing the government was likely to succeed on the underlying merits). The government may prefer to focus on its remedial arguments, but the Citizenship Clause "cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020).

Rather than identifying an injury attributable to this particular injunction, the government argues that "universal injunctions" generally speaking "irreparably harm the Executive Branch"

by violating the separation of powers. Appl. 35. But to obtain a stay, the government must identify irreparable injury on the facts of this case. And in this case, it is the Executive Order, not the district court's injunction, that violates the separation of powers. The Order trenches on the authority of the other two coequal branches of government. Start with Congress. The government proclaims, without citation, that "[t]he Executive Branch exists to carry out [the President's] policies." Appl. 35. The Constitution disagrees. It is Congress that exists to set policies through the "formulation of generally applicable rules of private conduct." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment); *see also* U.S. Const. art. I, § 1. The Executive's role, meanwhile, is to "take Care that the Laws" Congress enacts are "faithfully executed." U.S. Const. art. II, § 3, cl. 5. Here, Congress has created a comprehensive scheme for determining who qualifies as a citizen, and it has assigned the President no policymaking role in delineating the scope of citizenship. Yet the Order disregards Congress's decision to protect birthright citizenship in 8 U.S.C. § 1401(a), as a foundational cornerstone of the immigration laws.

The Order also arrogates power from the courts. To ensure that the Executive acts within the bounds set by Congress, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). But in the Executive Order, the President purports not to be making new law, but rather to be reinterpreting the Constitution. And he advances a new interpretation of the Citizenship Clause at odds with this Court's precedents definitively construing it. Concern for the separation of powers is thus a powerful reason to leave the preliminary injunction in place.

The government also complains about harms arising from universal injunctions issued in other cases. The government laments "universal TROs," "de facto universal damages," injunctions that apply "not just nationwide, but worldwide," and "conflicting nationwide obligations with

respect to the same policy." Appl. 27. But those complaints have nothing to do with this case. To the extent the other injunctions described in the government's application are improper and impose irreparable harm, the government should seek appropriate relief. But this would be a poor vehicle for addressing those questions, given that none of them arise in this case.

Along similar lines, the government points to an uptick in universal injunctions during the first months of President Trump's second term. But the frequency of universal injunctions must be understood in proportion to the number of major policies announced through Executive Orders. President Trump has already issued more than 100 Executive Orders in his second term, far and away the most ever for this point in a presidential term. Laura Doan & Julia Ingram, *Trump Issues Record 100th Executive Order Within First 100 Days of Term. Here's a Breakdown.*, CBS News (Mar. 26, 2025), perma.cc/RPJ5-Z98X. Indeed, according to the Federal Register, President Trump has already issued more Executive Orders in the past six weeks than any President has in an *entire year* since President Truman in 1951, in the midst of the Korean War. *See* Executive Orders, Federal Register, https://www.federalregister.gov/presidential-documents/executive-orders. As in prior administrations, many of the President's significant orders have been challenged in court. Some have been enjoined, while others have not. Of the injunctions entered against the government, some have been stayed,[1] while others have not. The judicial process is functioning as it should, and the raw number of injunctions must be considered in the context of a significant increase in the number of Executive Orders.

[1] The Fourth Circuit recently stayed two preliminary injunctions issued against the government. *See* Order, *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 25-1189 (4th Cir. Mar. 14, 2025), Dkt. 29; Order, *Does 1–26 v. Musk*, No. 25-1273 (4th Cir. Mar. 28, 2025), Dkt. 18. The court below is taking seriously its obligation not to issue more relief than necessary against the government.

Finally, the government suggests the district court's injunction "impair[s] the President's efforts to address the crisis at the Nation's southern border." Appl. 36. That argument is flawed in several ways. First, this is not a case about immigration. It concerns the rights of natural-born U.S. citizens. Second, if border security is the goal the Order is meant to address, it is substantially overbroad. The children of parents on student or work visas are covered by the Order but have nothing to do with the southern border. Many undocumented people, likewise, did not enter the United States through the southern border and have been living, working, and paying taxes in the country for years. Third, it is Congress, not the President, that has "plenary power" to set immigration rules. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (internal quotation marks and citations omitted). Congress proposed and the states ratified the Citizenship Clause because they believed birthright citizenship was the best policy for our Nation. And through 8 U.S.C. § 1401(a), Congress codified the interpretation of the Citizenship Clause that this Court announced in *Wong Kim Ark*. Both the Citizenship Clause and that statute bind the President.

B. The Injunction Serves the Public Interest by Preventing Chaos and Confusion.

The public interest also supports leaving the district court's injunction in effect. As the district court explained, in the absence of an injunction, the plaintiffs "will face instability and uncertainty about the citizenship status of their newborn babies, and their children born on U.S. soil will be denied the rights and benefits of U.S. citizenship." App. 53a–54a. Permitting the Executive Order to go into effect would cause chaos across the country for expecting parents, no matter their immigration status. Because our society has operated on the assumption of birthright citizenship for so long, a birth certificate is considered adequate proof of citizenship by local, state, and federal governmental bodies for a multitude of purposes. But if the Order goes into effect, that will no longer suffice, no matter whether a child's parents are citizens or noncitizens. "Existing

administrative systems will fail, states and localities will bear the costs of developing new systems for issuing birth certificates and verifying citizenship, and anxious parents-to-be will be caught in the middle." App. 70a. Allowing the Order to go into effect only in part would cause even more complications. Birthright citizenship would depend on where a child is born or whether their parents are members of ASAP or CASA. And officials would have to ascertain whether a person is part of this or another lawsuit in order to determine whether their children are citizens.

Matters on the ground would be even worse if an injunction were to apply in some states but not others. Such an arrangement would threaten to fundamentally fracture the country. If a child's citizenship depended on the state in which they were born, it would create a situation much like the one that existed between slave and free states, which produced *Dred Scott* and ultimately the Civil War. An infant would be a United States citizen and full member of society if born in New Jersey, but a deportable noncitizen if born in Tennessee. The Reconstruction Amendments, including the Citizenship Clause, were intended to prevent that sort of division between the states from ever occurring again. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438–39 (1968). The Court should not now exercise its equitable power to re-create a situation in which a person's fundamental right to citizenship depends on the state in which they are born.

Adding to the potential disruption that the Executive Order would cause, it is far from clear the government intends for the Order to apply only prospectively. Although Section 2 sets an effective date for agencies' denial of citizenship, Section 1 includes no time limitation. If the Order is allowed to go into effect, the government could attempt to retroactively strip citizenship from millions of American children and adults, going back generations. The government could assert that U.S. birth certificates no longer serve as proof of citizenship, even if issued more than a century ago. The government's interpretation of the Fourteenth Amendment and 8 U.S.C.

§ 1401(a) could force all U.S. citizens to show evidence of their U.S. citizenship beyond their birth certificate, their parents' birth certificates, their grandparents' birth certificates, and so on. Through that process, millions of current U.S. citizens could learn they are no longer U.S. citizens at all. A 70-year-old could show up to vote, or to renew a passport, or to adjust Social Security benefits, only to be told she was never a citizen under the Fourteenth Amendment or 8 U.S.C. § 1401(a). The government does nothing to disclaim these possibilities. The potential that the Order could strip millions of Americans of their citizenship is another reason that this Court should not lift the preliminary injunction, even in part.

Because the government cannot show any need for emergency relief, and because the public interest supports the district court's injunction, the Court should deny the government's stay motion without reaching the merits of their arguments about the scope of the injunction.

II. A Nationwide Injunction Is Necessary to Remedy Plaintiffs' Injuries.

The government is unlikely to succeed on the merits of its claim that the district court's preliminary injunction improperly benefits nonparties. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579 (2017) (*IRAP*) (per curiam). A nationwide injunction is necessary in light of the exigencies of this particular case. As the district court recognized, only a universal injunction can ensure that the government will respect the constitutionally guaranteed citizenship of all children born to members of CASA and ASAP during the pendency of the litigation. This Court's precedent provides ample support for broad equitable relief in these circumstances.

A. Only a Universal Injunction Can Provide Complete Relief to Plaintiffs.

First, the district court's universal injunction is necessary to remedy Plaintiffs' injuries. It is well-settled that an injunction may properly benefit nonparties when "necessary to provide

complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The government conceded this point in the Fourth Circuit. *See* Supp. App. 204a, 208a–209a. For instance, in a racial gerrymandering case, the remedy is redistricting—not just for the voters who sued, but for everyone. *Allen v. Milligan*, 599 U.S. 1, 41 (2023). Nothing else would redress the plaintiffs' injuries. Similarly, in a school desegregation case, the only way for a court to grant complete relief to the plaintiffs is to order the defendant school district to integrate its schools as to all children. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). A universal injunction may also be necessary for complete relief if a narrower injunction would not adequately prevent government defendants from enforcing an enjoined law against plaintiffs by mistake. *E.g.*, *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501–02 (9th Cir. 1996) (upholding universal injunction barring enforcement of motorcycle helmet law as only means of preventing named plaintiffs from being pulled over). The government is thus simply wrong to suggest that a court can never "reach beyond the litigants" when crafting a remedy, at least when necessary to make the plaintiffs whole. Appl. 16–17.

To provide complete relief to a plaintiff, a court must take account of "what is necessary, what is fair, and what is workable," in accordance with "well-known principles of equity." *North Carolina v. Covington*, 581 U.S. 486, 488 (2017) (internal quotation marks and citations omitted). In particular, workability may counsel in favor of a universal injunction in order to provide complete relief to an associational plaintiff that has many members, such that an injunction limited to those members would be impractical to administer. *See Florida v. HHS*, 19 F.4th 1271, 1282 (11th Cir. 2021) (explaining that universal injunctions can be necessary when a court would have "trouble fashioning a remedy that was certain to include all the plaintiffs" because they are "dispersed among the United States"); *Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022)

(granting a universal injunction because party-specific relief "would be impractical and would fail to provide complete relief to the plaintiffs"); *City of Chicago v. Barr*, 961 F.3d 882, 916 (7th Cir. 2020) (explaining that "universal injunctions can be necessary to provide complete relief to plaintiffs" (internal quotation marks omitted)); *Doe #1 v. Trump*, 957 F.3d 1050, 1069–70 (9th Cir. 2020) (upholding a universal injunction as necessary to provide complete relief to plaintiffs).

As the district court correctly found, that is precisely the situation here. Only a universal injunction would adequately ensure that relief reaches all members of the organizational plaintiffs. Plaintiff CASA has more than 175,000 members. Plaintiff ASAP has more than 680,000 members. They reside in all 50 states. An injunction requiring the government to recognize only the citizenship of children born to those members would be burdensome, inefficient, and unworkable. In a recent stay application in another case, the government candidly conceded, with respect to an organization with 300,000 members, that the government "would have no way to know whom an injunction protecting those members covers." Emergency Appl. for Stay Pending Appeal at 36, *McHenry v. Texas Top Cop Shop, Inc.*, 145 S. Ct. 1 (2025) (mem.) (No. 24A653). In these circumstances, only a universal injunction can fully protect members of CASA and ASAP.

These concerns are especially acute in the context of citizenship. Under current law, a birth certificate alone is sufficient proof of United States citizenship, and birth certificates do not list whether a child's parents are members of CASA or ASAP. Requiring newborns covered by the Executive Order to show that their parents are members of CASA or ASAP to obtain the benefits of the injunction would impose an enormous burden on expecting parents, membership organizations, government employees at all levels, and hospital staff. Those determining a baby's citizenship status would be tasked with confirming parentage, the citizenship or immigration status of both parents, and membership in specific organizations. Further, thousands of employees across

numerous federal agencies may need to be trained to recognize CASA and ASAP membership cards as proof of citizenship. For members, an injunction limited to the parties would require them to reveal their membership in a voluntary association in order to claim their child's citizenship, raising serious constitutional concerns. *See NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (describing the "hardly novel" proposition "that compelled disclosure of affiliation with groups engaged in advocacy may constitute" an "effective . . . restraint on freedom of association"). That is not a workable solution, and a universal injunction is necessary to provide complete relief to the plaintiffs.

B. A Universal Injunction Is Appropriate Because the Order Facially Violates the Citizenship Clause and 8 U.S.C. § 1401(a).

The scope of the district court's injunction is also appropriate because the Executive Order is facially unlawful. As this Court has repeatedly reaffirmed, in a facial challenge, a law "may be struck down in its entirety." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024); *see also Reed v. Town of Gilbert*, 576 U.S. 155, 165–66 (2015) (holding a content-based speech restriction unconstitutional "on its face"). The difference between as-applied and facial challenges depends on "the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010); *see* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1327–28 (2000). And the Court has consistently "allowed [facial] challenges to proceed under a diverse array of constitutional provisions." *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015) (collecting cases). The mere existence of facial challenges demonstrates that, in a proper suit, the equitable and constitutional power of the federal courts can prevent lawless government action that harms nonparties.

Facial relief is particularly appropriate in this case because the government has announced a categorical policy that flouts constitutional and statutory text, this Court's precedent, and historical practice. Notably, this is not a case where the district court developed a new rule of law; instead, the district court merely applied this Court's binding decision in *Wong Kim Ark*. The government's stay application does not challenge that ruling on the merits, and the government concedes that, "of course, this Court's decisions constitute controlling precedent throughout the Nation." Appl. 18–19. Given its holding that the government directly violated controlling precedent, the district court properly exercised its discretion to enjoin that action nationwide. Facial relief is also appropriate because the President is usurping judicial power. The Executive Order purports to reinterpret the Constitution, but "the final 'interpretation of the laws'" is "'the proper and peculiar province of the courts.'" *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (quoting The Federalist No. 78, at 525 (A. Hamilton) (J. Cooke ed. 1961)). The Order's flagrant violation of the Fourteenth Amendment, a federal statute, and the separation of powers calls for a facial remedy.

C. A Universal Injunction Is Necessary to Preserve the Uniformity of United States Citizenship.

A nationwide injunction is also appropriate to preserve the equal treatment of newborn babies under the Citizenship Clause. Citizenship is a matter of special nationwide concern and requires nationwide consistency. The injunction preserves the uniformity of this most fundamental right. Absent a nationwide injunction, a baby's entitlement to birthright citizenship would depend on whether her parents were part of this or another lawsuit. That would risk creating a permanent underclass of people deprived of the fundamental right to citizenship, even as similarly situated individuals who came to court obtained that benefit. "To punish babies, much less to proscribe and entirely outlaw them, because of the perceived sins of their parents"—or here, based on whether

their parents joined a lawsuit—"is alien to our moral and ethical tradition." Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 Am. U. L. Rev. 331, 371 (2011). Equity cannot possibly countenance such an inequitable result. The district court's universal injunction was thus appropriate in the unique circumstances of this case and well supported by this Court's precedent.

As already explained, lifting the district court's injunction as to anyone will cause harm to everyone. If the Executive Order goes into effect, a birth certificate will no longer be adequate proof of United States citizenship. Even citizen parents may struggle to provide the documentation necessary to prove their newborns' citizenship. App. 70a. And if the Order is enjoined in some places but not others and as to some people but not others, U.S.-born children will be denied their constitutionally guaranteed United States citizenship based on whether their parents or their state is involved in this or another lawsuit. Meanwhile, anyone with the means to file an individual lawsuit to protect their child's citizenship will rush to the courthouse door. For citizenship to depend on such arbitrary factors would be antithetical to everything for which our country stands.

D. Nonparty Relief Is Consistent with Article III and Traditional Principles of Equity.

In light of those case-specific considerations, the Court should not reach the government's more sweeping arguments for why nonparty relief in other circumstances may violate Article III and traditional principles of equity. But in any event, those arguments prove far too much. Broad injunctions are nothing new, as even their critics acknowledge. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 437–45 (2017). In numerous cases, this Court has recognized that injunctions that accrue to everyone harmed by an unlawful policy are appropriate. *E.g.*, *IRAP*, 582 U.S. at 582; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510, 530, 533 (1925). "Article III courts have issued injunctions that extend beyond just the plaintiff for well over a century." Mila

Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 924 (2020) (collecting cases). If the Court wants to revisit this longstanding precedent, it should do so only after full briefing and argument.

None of the government's arguments for departing from this history withstand scrutiny. First, nothing in Article III supports a flat prohibition on injunctions benefiting nonparties. The government observes that "federal courts [may] exercise only 'judicial Power,' which extends only to 'Cases' and 'Controversies,'" Appl. 16, and that only injured parties may invoke the power of the court, Appl. 17 (quoting U.S. Const. art. III, § 2, cl. 1). Those requirements are readily met here: there is no question that the plaintiffs face an imminent Article III injury caused by the Executive Order and redressable by the district court's injunction. Once those requirements are met and a justiciable case exists, a court's constitutional authority to enjoin defendants, who are indisputably parties to the case and subject to the court's authority, is not and never has been limited to relief that will affect only the named plaintiffs in the case. To the contrary, federal courts have always had the power to address the interests of individuals who are not parties and provide appropriate relief. *E.g.*, *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (courts can adjudicate interests of privities); *Alexander v. Hillman*, 296 U.S. 222, 238 (1935) (corporate officers); *Childress v. Emory*, 21 U.S. (8 Wheat.) 642, 669 (1823) (administrators).

The logic of the government's position is inconsistent with numerous forms of well-established remedies that are commonplace in the federal courts and that the government does not challenge. For instance, the government fully concedes, as it must, that class actions "compl[y] with Article III." Appl. 38. But the government provides no explanation for why its theory would not apply to class litigation, which is *not* "conducted by and on behalf of the individual named parties only," but instead involves adjudication of the rights of many absent class members. *Wal-*

Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011) (quoting *Califano*, 442 U.S. at 700–01). Article III indisputably permits injunctive class actions, so it must authorize nonparty relief.

The government's position is also in tension with the power of federal courts to universally vacate administrative rules, which the government expressly asks the Court not to consider in this case. Appl. 20 n.2. Universal vacatur provides benefits to nonparties, yet "this Court has affirmed countless decisions that vacated agency actions . . . rather than merely providing injunctive relief that enjoined enforcement of the rules against the specific plaintiffs." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 831 (2024) (Kavanaugh, J., concurring) (collecting cases). That same logic must apply to other forms of nonparty relief. In adopting the APA, Congress sought merely to codify the pre-existing remedial practices of the federal courts, which developed in equitable suits like this one. Mila Sohoni, *The Past and Future of Universal Vacatur*, 133 Yale L. J. 2305, 2327–36 (2024); *see also* U.S. Dep't of Justice, Attorney General's Manual on the APA 108 (1947) (noting that the APA's judicial review provisions "restate[]" pre-existing principles). In the period before enactment of the APA, courts used common law writs to provide remedies that "were sometimes thought to disable an illicit course of government action as a general matter, thereby conferring benefits on similarly situated nonparties." James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 Stan. L. Rev. 1269, 1278 (2020). The APA merely reflects what has always been true: federal courts have Article III power to stop a government defendant's unlawful action.

Nonparty relief is also well-supported by the history of equitable remedies. The Constitution explicitly vests the federal courts with jurisdiction over cases arising in "Equity." U.S. Const. art. III, § 2, cl. 1. And unlike common law courts "compelled to limit their inquiry to the very parties in the litigation before them," courts of equity "can adapt their decrees to all of the

varieties of circumstances, which may arise," including by "adjust[ing] the rights of all, however numerous." 1 Joseph Story, Commentaries on Equity Jurisprudence: As Administered in England and America § 28, at 27–28 (1st ed. 1836). "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs," including eliminating unconstitutional intrusions "in a systematic and effective manner." *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

Equity included the power to issue "bills of peace," through which a single court could issue relief to not only the plaintiffs in a case but also others facing a similar injury, thereby preventing a "multiplicity of suits." *Trump v. Hawaii*, 585 U.S. 667, 717 (2018) (Thomas, J., concurring). For example, a bill of peace might issue "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (quoting *West v. Randall*, 29 F. Cas. 718, 722 (C.C.D.R.I. 1820) (Story, J.)). In such cases, the court may "grant [equitable relief] without making other persons parties," instead considering them "as quasi parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeoparded." *West*, 29 F. Cas. at 723.

American courts embraced bills of peace and recognized that their logic applied to other cases "which are not technically 'bills of peace,' but 'are analogous to,' or 'within the principle of' such bills." 1 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 269, at 293 (1st ed. 1881) (internal quotation marks omitted). As Pomeroy explained: "[T]he weight of authority is simply overwhelming that the jurisdiction may and should be exercised . . . on behalf of a numerous body of separate claimants against a single party," so long as "there is merely a

community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained." *Id.*

A suit in equity could be brought "by any number of taxpayers joined as co-plaintiffs, or by one taxpayer suing on behalf of himself and all others similarly situated, or sometimes even by a single taxpayer suing on his own account, to enjoin the enforcement and collection" of an illegal tax. *Id*. § 260, at 277. In such a case, "complete and final relief may be given to an entire community by means of one judicial decree," sparing nonparties from the burden of "an indefinite amount of separate litigation." *Id.* § 260, at 278.

Pomeroy forcefully rejected the government's notion that "a single decree of the court can not settle the rights of all." *Id.* § 269, at 294. He responded: "This objection has been repeated as though it were conclusive; but like so much of the so-called 'legal reasoning' traditional in the courts, it is a mere empty formula of words without any real meaning, because it has no foundation of fact, it is simply untrue." *Id.*

It may be true that broad injunctions are more common against the federal government today than they were in the 19th Century, but that reflects other changes to our governmental structure. The Executive Branch's size and scope is far greater today than it was in 1800, and that expansion has brought with it far greater potential for broad injury. *See New York v. United States*, 505 U.S. 144, 157 (1992). Other developments in law, such as expanding federal question jurisdiction, 28 U.S.C. § 1331, and the United States' waiver of sovereign immunity in 1976, 5 U.S.C. § 702, expanded the scope of disputes within the cognizance of the federal courts.

Ultimately, the Government's complaints about universal injunctions rely less on legal argument and more on policy concerns, such as the potential for forum-shopping, conflicting injunctions, and asymmetrical preclusion. *See* Appl. 18–20, 27–28. Those concerns have little

purchase here, where courts have unanimously held that the Executive Order is unlawful—and readily so. *E.g.*, App. 26a (explaining that the plaintiffs in this case had "easily" met the standard for a preliminary injunction). The only "one-way-ratchet effect" in this case, Appl. 21, is that every court to consider the unconstitutional Executive Order comes out the same way.

III. At a Minimum, the Injunction Must Cover All Members of Organizational Plaintiffs CASA and ASAP.

Even if the Court were to narrow the preliminary injunction—and as just explained, the Court should not do so—any party-specific injunction must at least cover all of the parties. That includes the two organizational plaintiffs, CASA and ASAP, as representatives of their members. The government asserts, without citing any authority supporting its position, that the preliminary injunction should be limited to "the identified members of the organizational plaintiffs." Appl. 4, 16, 37. The Court should dismiss this argument out of hand given the government's failure to develop it. "[I]f the government had arguments" for why relief should be limited to only those members of CASA and ASAP who are identified in the record, "it did not make them." *Ohio v. EPA*, 603 U.S. 279, 298 (2024).

In any event, the government's argument conflicts with this Court's settled precedent on associational standing, which the government does not ask the Court to revisit. As this Court has recently reaffirmed, an association can "assert 'standing solely as the representative of its members.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023) (*SFFA*) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). To do so, the association must demonstrate only (1) that one of its members would have standing to sue in her own right, (2) that the litigation is germane to the organization's purpose, and (3) that neither the claim asserted nor the relief requested requires the participation of individual members. *Id.* Once that showing is made, the organization may "invoke the court's remedial powers on behalf of its

members" in order to obtain an injunction that "will inure to the benefit of those members of the association actually injured." *Warth*, 422 U.S. at 515. No precedent suggests that each injured member must be specifically identified before an injunction can reach them. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718 (2007) (explaining that plaintiffs sought an injunction "on behalf of Parents Involved members whose elementary and middle school children may be denied admission to the high schools of their choice when they apply for those schools in the future" (internal quotation marks and citations omitted)); *see also Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 932 (2024) (Kavanaugh, J., concurring) (noting the "widespread effect" of an injunction issued to "an association that has many members").

The government's contrary position is irreconcilable with the Court's decision in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). There, a statewide commission filed suit on behalf of apple growers and producers throughout Washington to challenge the constitutionality of a North Carolina statute. *Id*. at 335. The district court issued a permanent injunction broadly barring enforcement of the statute, and this Court affirmed. *Id.* at 339, 354. The Court noted that the plaintiff association could assert "the claims of the Washington apple growers and dealers who form its constituency." *Id.* at 344–45. At no point did the Court suggest that the injunction would apply only to specific apple growers who had been identified. Instead, the Court stated that "the request for declaratory and injunctive relief" did not require "individualized proof" and was "properly resolved in a group context." *Id.* at 344.

Against that weight of authority, the government offers next to nothing. It observes that "Article III confines courts to adjudicating the rights of 'the litigants brought before the Court.'" Appl. 22 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973)). But here, CASA and ASAP *are* litigants before the courts, and associational standing principles permit them to obtain relief

on behalf of their members. Beyond that, the government cites only one of its own prior briefs, a portion of Judge Niemeyer's dissenting opinion below quoting the government's brief, and Justice Thomas's lone concurrence in *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 399 (2024) (Thomas, J., concurring). As Justice Thomas's concurrence candidly acknowledges, however, "the Court consistently applies" associational standing principles to grant relief to an organization's members, and abandoning that doctrine would require overturning numerous precedents. *Id.* at 405. The government has not asked the Court to revisit those cases here.

Nor is this case in a suitable posture for the Court to reconsider the scope of associational standing doctrine. This Court has repeatedly declined to "abandon settled principles of associational standing" despite objections related to class-action procedures and preclusion principles. *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 288–90 (1986). And there is no circuit conflict on this question: the lower courts unanimously understand this Court's associational standing precedents as authorizing injunctions that reach unidentified members of plaintiff organizations. *See, e.g.*, *Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991) (Alito, J.) ("The Supreme Court has repeatedly held that requests by an association for declaratory and injunctive relief do not require participation by individual association members."); *Outdoor Amusement Bus. Ass'n v. DHS*, 983 F.3d 671, 683 (4th Cir. 2020) ("The Supreme Court has regularly found associational standing for trade associations when an injunction would benefit many of their members.").[2] Consistent with that

[2] *See also Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 55 (1st Cir. 2023); *All. for Open Soc'y Int'l, Inc. v. USAID*, 651 F.3d 218, 229 (2d Cir. 2011), *aff'd* 570 U.S. 205 (2013); *Self-Ins. Inst. of Am., Inc. v. Korioth*, 53 F.3d 694, 695–96 (5th Cir. 1995); *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1040 (6th Cir. 2022); *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011); *Pharm. Rsch. & Mfrs. of Am. v. Williams*, 64 F.4th 932, 948 (8th Cir. 2023); *Mi Familia Vota v. Fontes*, 129 F.4th 691, 709 (9th

precedent, the District of Massachusetts in a parallel challenge to the Executive Order granted a preliminary injunction covering all members of the associational plaintiffs in that case, App. 102a, and the government has not challenged that relief in this Court.

Adopting the government's novel proposal that each member of an association must establish individual standing before they can benefit from an injunction would not just narrow the relief in this case. It would put an end to associational standing as it has long been understood by this Court. As noted above, in an associational-standing case, "neither the claim asserted *nor the relief requested* requires the participation of individual members in the lawsuit." *SFFA*, 600 U.S. at 199 (emphasis added) (internal quotation marks omitted). Plaintiffs satisfied the requirements for associational standing in the district court, as the government does not contest. They can therefore obtain the relief requested without the participation of individual members in this lawsuit.

At a minimum, therefore, any party-specific injunction must apply to all members of CASA and ASAP. That is beside the point, however, because the district court properly granted universal relief, as explained above.

IV. Applicants Forfeited Their Argument that the District Court Improperly Enjoined "Implementation" of the Executive Order.

The district court enjoined "the implementation and enforcement" of the Executive Order. App. 56a. The government contends that the preliminary injunction improperly bars "implementation," rather than just "ultimate enforcement." Appl. 32–35. The government failed to preserve this argument below, so the Court should not consider it. *See* Sup. Ct. R. 23.3. In any event, the argument is incoherent and unpersuasive.

Cir. 2025); *NCAA v. Califano*, 622 F.2d 1382, 1392 (10th Cir. 1980); *S. River Watershed All., Inc. v. Dekalb County*, 69 F.4th 809, 820 (11th Cir. 2023); *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 594 (D.C. Cir. 2022).

When opposing the motion for a preliminary injunction in the district court, the government drew no distinction between implementation and enforcement of the Executive Order—and certainly never suggested that the district court should evaluate one of those concepts differently from the other. Supp. App. 31a–32a. Although the government did raise this issue in its motion to stay in the district court, the government did not renew the argument in the court of appeals. Supp. App. 35a–57a. There, the government argued that the injunction should not reach nonparties or unidentified members and thus sought a stay "except as to the sixteen identified individuals." Supp. App. 56a. But the government never asked the court of appeals to stay the injunction as to implementation. Accordingly, Plaintiffs did not address this issue in their opposition brief filed in the court of appeals. Supp. App. 175a–200a. And the Fourth Circuit did not address the argument in its decision denying the motion to stay. App. 65a–70a. The government is thus wrong when it says that the Fourth Circuit "declined to grant relief" as to "implementation." Appl. 34. The court did not consider the issue because the government failed to raise it.

This is "a court of review, not of first view." *Moody v. NetChoice*, 603 U.S. 707, 726 (2024) (internal quotation marks and citation omitted). "Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." Sup. Ct. R. 23.3. Because the government failed to present its argument about implementation either when opposing the motion for preliminary injunction in the district court or when seeking a stay in the court of appeals, the argument is forfeited. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016).

Regardless, there is no discernible difference between "enforcement" and "implementation" in this context. In common parlance, the verb "enforce" means "to give force to" or "to carry out effectively." *Enforce*, Merriam-Webster's Online Dictionary, perma.cc/8GJA-

DXXX. Likewise, the verb "implement" means to "carry out" or to "accomplish." *Implement*, Merriam-Webster's Online Dictionary, perma.cc/Q9HQ-KZYC. Given those overlapping meanings, the terms are often used together to convey the idea of putting a law into practice, whether through an implementing regulation or an enforcement proceeding. *See, e.g.*, *Missouri v. United States*, 144 S. Ct. 7 (2023) (mem.) (statement of Gorsuch, J., respecting the denial of the application for stay) ("agree[ing]" not to stay an injunction barring "implementation and enforcement" of a state law).

Whatever distinction might be drawn between implementation and enforcement in other contexts, the Executive Order uses those words interchangeably. Section 3, which the government identifies as concerning implementation, Appl. 32, is titled "Enforcement." Within that enforcement provision, Section 3(b) directs agencies to "issue public guidance . . . regarding this order's implementation with respect to their operations and activities." In light of that structure, it is unclear how a court could distinguish between implementation and enforcement of the Order—or how it could enjoin one but not the other.

The government suggests that the difference between enforcement and implementation is that enforcement is public-facing whereas implementation is internal. Appl. 33. But the government then abandons that distinction by classifying the public "issuance of guidance" as somehow on the internal side of the line. Merely attaching the label "guidance" to a policy does not preclude it from imposing legal consequences. *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 18–19 (2020); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000). And here, public issuance of guidance announcing a policy of refusing to recognize the citizenship of babies born to Plaintiffs would impose immediate irreparable harm. At best, such guidance would

cause confusion and fear among expecting parents about the legal status of their unborn children. At worst, the guidance itself could be used as a basis to deny the legal status of those children.[3]

The district court properly enjoined both implementation and enforcement. If the government is uncertain about what qualifies as implementation, it should seek clarification in the district court.

V. Any Relief Granted to the Government Should Incorporate a 30-Day Delay.

For all of the foregoing reasons, this Court should deny the government's stay application. If, however, the Court narrows the district court's injunction, the Court should enter an administrative stay delaying the effective date in Section 2(b) of the Executive Order for 30 days from the date of this Court's order. Entry of such an administrative stay would at least partially mitigate the chaos that would ensue if the Order went into immediate effect before guidance on its implementation and enforcement can be issued. Such an administrative stay is also necessary to ensure the government does not apply the Order to the plaintiffs, given that no system for identifying and exempting members of the plaintiff organizations has yet been proposed.

The Executive Order initially contemplated a 30-day ramp-up period. Order § 2(b). During those 30 days, agencies would develop guidance on how the Order should be administered. *Id.* § 3(b). But they would not begin to deny citizenship to newborns until after those 30 days expired and the guidance had been issued. Because the Executive Order was immediately enjoined, that ramp-up period never occurred. If this Court decides to lift the injunction in part, the ramp-up period will be essential so that the government can clarify exactly to whom the Order applies and how its provisions will be implemented; so that the plaintiffs and the government can attempt to

[3] The government's suggestion that this injunction violates the Opinions Clause is wholly without merit. *See* Appl. 33. The Executive Order directs agencies to "issue public guidance," not to advise the President. Order § 3(b).

devise some feasible system for administering party-specific relief to protect the citizenship of children born to CASA and ASAP members; and so that the plaintiffs can consider other avenues for relief.

The government seems to agree that if this Court stays the district court's injunction, that should not lead to immediate denial of citizenship to newborns. According to the government, a stay in this case "would simply allow the agencies to resume their work developing and issuing guidance regarding the implementation of the Order—work that never got off the ground because the Washington court immediately issued a nationwide TRO." Appl. 37–38. That statement implies the government does not intend to immediately begin denying citizenship to children born after any stay granted by this Court. The government also represents that "relief here would not mean that affected individuals would need to file thousands of separate suits across the country challenging the Order" but "could instead seek class certification and, if appropriate, seek class-wide preliminary relief." Appl. 38. If the plaintiffs decide to pursue that course, they should be given time to do so before babies' constitutionally guaranteed right to be born as citizens of the United States is denied.

CONCLUSION

The government's application for a stay should be denied.

Respectfully submitted.

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