NO. ____

# In the Supreme Court of the United States

KEVIN STITT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF OKLAHOMA, ET AL.,

*Petitioners,*

v.

ROWAN FOWLER, ET AL.,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the Equal Protection Clause requires a State to alter its official certificate documenting a person's sex at birth to represent that person's current gender identity.

## PARTIES TO THE PROCEEDINGS

**Petitioners and Defendants-Appellees below**

- Kevin Stitt, in his official capacity as Governor of the State of Oklahoma
- Keith Reed, in his official capacity as Commissioner of Health for the Oklahoma State Department of Health
- Kelly Baker, in her official capacity as State Registrar of Vital Records

**Respondents and Plaintiffs-Appellants below**

- Rowan Fowler
- Allister Hall
- Carter Ray

## LIST OF PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Rowan Fowler, et al., v. Kevin Stitt, et al.,* No. 23-5080 (10th Cir.), judgment entered on June 18, 2024; rehearing denied September 9, 2024.
- *Rowan Fowler, et al., v. Kevin Stitt, et al.,* No. 22-cv-115 (N.D. Okla.), judgment entered on June 8, 2023.

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## OPINIONS BELOW

The Tenth Circuit's opinion (App.1a) is reported at 104 F.4th 770. The district court's memorandum and order (App.66a) is reported at 676 F.Supp.3d 1094.

## JURISDICTION

The Tenth Circuit issued its opinion on June 18, 2024, App.1a, and denied a petition for rehearing on September 9, 2024, App.127a. Justice Gorsuch granted an initial application to extend the filing deadline on December 4, 2024, and an additional extension on December 13, 2024, thus extending the filing deadline to January 23, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Const. amend. XIV, § 1**

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> No State shall … deny to any person within its jurisdiction the equal protection of the laws.

**63 O.S. § 1-321**

The relevant portions of Section 1-321 of Title 63 of the Oklahoma Statues provide:

A. A certificate or record registered under this article may be amended only in accordance with this article and regulations thereunder adopted by the State Commissioner of Health to protect the integrity and accuracy of vital statistics records.

B. A certificate that is amended under this section shall be marked "amended", except as provided in subsection D of this section. The date of amendment and a summary description of the evidence submitted in support of the amendment shall be endorsed on or made a part of the record. The Commissioner shall prescribe by regulation the conditions under which additions or minor corrections shall be made to birth certificates within one (1) year after the date of birth without the certificate being considered as amended.

C. Upon receipt of a certified copy of a court order, from a court of competent jurisdiction, changing the name of a person born in this state and upon request of such person or his or her parent, guardian or legal representative, the State Commissioner of Health shall amend the certificate of birth to reflect the new name.

D. When a child is born out of wedlock, the Commissioner shall amend a certificate of birth to show paternity, if paternity is not currently shown on the birth certificate, in the following situations:

1. Upon request and receipt of a sworn acknowledgment of paternity of a child born out of wedlock signed by both parents;

2. Upon receipt of a certified copy of a court order adjudicating paternity; or

3. Upon receipt of an electronic record from the Department of Human Services indicating that an acknowledgement of paternity has been signed by both parents or a court order adjudicating paternity.

E. For a child born out of wedlock, the Commissioner shall also change the surname of the child on the certificate:

1. To the specified surname upon receipt of acknowledgment of paternity signed by both parents, upon receipt of a certified copy of a court order directing such name be changed or upon receipt of an electronic record from the Department of Human Services indicating that an acknowledgement of paternity has been signed by both parents or a court order directs such name change. Such certificate amended pursuant to this subsection shall not be marked "amended"; or

2. To the surname of the mother on the birth certificate in the event the acknowledgment of paternity is rescinded.

F. The Commissioner shall have the power and duty to promulgate rules for situations in which the State Registrar of Vital Statistics receives false information regarding the identity of a parent….

H. Beginning on the effective date of this act, the biological sex designation on a certificate of birth amended under this section shall be either male or female and shall not be nonbinary or any symbol representing a nonbinary designation including but not limited to the letter "X".

## INTRODUCTION

The State of Oklahoma records, permanently, the immutable sex of Oklahomans on birth certificates. A Tenth Circuit panel, partially divided, held that this biology-based system violates the Equal Protection Clause. In doing so, the panel wrongly applied a strict scrutiny analysis under the guise of rational basis review, it disturbingly found that an acknowledgment of God by Oklahoma's Governor constituted animus, and it stretched this Court's ruling in *Bostock v. Clayton County*, 590 U.S. 644 (2020), well past its breaking point. Moreover, the panel's decision now squarely conflicts with *Gore v. Lee*, 107 F.4th 548 (6th Cir. 2024). With Chief Judge Sutton writing, the Sixth Circuit criticized the Tenth Circuit and chose instead to affirm a district court's dismissal of a birth certificate challenge. *See id.* at 561. This Court should resolve this fissure.

Nothing in the Constitution prohibits States from permanently documenting sex on a birth certificate. A newborn's sex is an objective fact that has long been recorded and preserved in state records. And the Fourteenth Amendment does not require Oklahoma to catalogue gender identity—years after birth—on birth certificates. Even less so does an equal protection

promise enshrined in 1868 require Oklahoma to *replace* sex with gender identity on a birth certificate that is indisputably government speech. In sum, Oklahoma "does not guarantee anyone a birth certificate matching gender identity, only a certificate that accurately records a historical fact: the sex of each newborn." *Id.* at 556. This is permissible.

The Tenth Circuit's theories to the contrary have no merit. Numerous rational bases support Oklahoma's birth certificate policies, including the preservation of vital statistics, the right of a government to speak for itself, and the protection of sports and restrooms. Moreover, Oklahoma does not intentionally discriminate. The State's birth certificate approach is neutral on its face and in its application to both sexes alike. It does not involve any adverse government action, it does not take away, condition, or grant any benefit, and it does not compel anyone to act. No matter the motivation or identity of the applicant, no one can compel the State to replace sex on a birth certificate. Respondents' claim is a Trojan horse that outwardly professes to protect against discrimination but inwardly ushers in the destruction of sex classifications. The Tenth Circuit, that is, held that the permanent documentation of sex is irrational and insidious. Precedent and commonsense foreclose this. This Court should grant certiorari and reverse.

## STATEMENT OF THE CASE

### A. Vital Statistics

In Oklahoma, the practice of recording facts about birth traces back to Statehood. App.107a n.9. For instance, the *First Biennial Report of the Oklahoma State Public Health Department for the Years 1909 and 1910*, at 89, https://tinyurl.com/bd6z4xpb ("First Report"), explained that "[t]here is no more important subject that can come before a State Legislature for its consideration than that of vital statistics" and added that a "complete and modern system for reporting and registering births and deaths is fundamental to any system of vital statistics." Indeed, "registering of birth is no less important" than registering deaths, as failing to "hav[e] a complete record of the birth, properly recorded," may deprive the child "of its most valuable rights and privileges." *Id.* at 91.

The *Biennial Report of the State Health Department of Oklahoma for 1930–32*, at 33, https://tinyurl.com/5csa2mp9 ("1930 Report"), similarly explained "[t]he importance of Vital Statistics to the State and Civilization as a whole." Oklahoma needs such information "to keep, for ages to come a record of each of her children," and the federal government likewise needs "to complete his own records of population and public health." *Id.* Moreover, "the facts and figures recorded on these birth and death certificates" are "PERMANENT" and "form the VERY FOUNDATION of all intelligent public health work and research." *Id.*

As a result, Oklahoma has long imposed duties on itself, medical personnel, and parents to produce

accurate birth records—the child's sex included. For example, in 1910 the Health Department required physicians to report "all births and deaths, and the disease with which said person died and his age and sex, which said report shall be verified by affidavit." First Report at 91. Likewise, "[p]arents owe a duty to the State as well as to their off-spring to see that the record of their birth is properly reported" so "that it may become a permanent record with the Bureau of Vital Statistics." *Id.* at 93; *see also id.* at 92 ("The record of a birth shall state the date and place of birth, name of child—if it has any—sex," etc.); *Annual Rep. of the Okla. State Bd. of Health, 1917*, at 132, https://tinyurl.com/32c9j8d4 ("1917 Report") (similar). Those duties continue to this day. *See, e.g.*, App.67a–68a (individual preparing certificate "shall certify to the facts of birth" and the parent "attest[s] to the accuracy" (quoting 63 O.S. § 1-311(B), (E)).

Each detail reported on birth or death certificates, including sex, is important. *See* SJ Ventura, *The U.S. National Vital Statistics System: Transitioning Into the 21st Century, 1990-2017*, NCHS, VITAL & HEALTH STATS. 1(62), p. v (March 2018), https://www.cdc.gov/nchs/data/series/sr_01/sr01_062.pdf. By 1917, the items recorded on an Oklahoma birth certificate, including the "[s]ex of child[,]" were well established and the State Health Board again emphasized that "[e]very one of these items ... is essential to the keeping of proper records" and "necessary for the legal, social, and sanitary purposes subserved by registration records." 1917 Report at 116, 132–33. Not long after, the Health Department began regularly publishing compiled data about births, using sex—male and female—as a key heading in charts. *See* 1930 Report at 36.

In 1963, the Oklahoma Legislature codified existing practices relating to vital statistics and birth certificates. *See* S.B. 26, 1963 Okla. Sess. Laws. ch. 325, art. 3, § 321. Since then, Oklahoma law has allowed amendments of birth certificates in two primary circumstances: changes of name and changes related to paternity. *See* 63 O.S. § 1-321.[1] Oklahoma has also long recognized the importance of complying with amendment procedures "to protect the integrity and accuracy of vital statistics records." *Id.* § 1-321(A).

This is not unique to Oklahoma. By 1910, for example, 33 states already had birth records on file for their entire state. Alice M. Hetzel, HHS, CDC, & NCHS, *U.S. Vital Statistics System-Major Activities and Develops., 1950–95*, at 58 (1997), https://www.cdc.gov/nchs/data/misc/usvss.pdf. And for good reason: The importance of accurate statistics about birth is undeniable. *See, e.g.*, Hetzel, *supra* at 1–2, 43–47, 54–55. Because birth certificates report objective information, constitute permanent legal records, and provide valuable health data, "it is essential that the certificates and reports be prepared accurately." HHS & NCHS, *Hospitals' and Physicians' Handbook on Birth Registration and Fetal Death Reporting*, at 1–2, 7 (Oct. 1987), https://www.cdc.gov/nchs/data/misc/hb_birth.pdf; *see also* Off. of Inspector Gen., HHS, *Birth Certificate Fraud*, p.2 (Sept. 2000), http://oig.hhs.gov/oei/reports/oei-07-99-00570.pdf ("Legitimate birth certificates provide vital information.").

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[1] Oklahoma also allows "additions or minor corrections" within a year of birth "without the certificate being considered as amended." 63 O.S. § 1-321(B).

### B. Oklahoma Law

Around 2007, some individuals in Oklahoma began seeking to "amend the sex designation on their birth certificates to match their gender identity," App.68a–70a, despite nothing in Oklahoma law authorizing this. Improperly utilizing the non-adversarial court procedure for name changes, these individuals were able to obtain lower state court orders purporting to compel the Oklahoma State Department of Health ("OSDH") to amend sex designations on official records. *See* App.69a–70a; App.142a–43a; *see also* 12 O.S. § 1631 (authorizing name changes only). For the time being, the OSDH complied with the state court orders. App.69a–70a.

Controversy surrounding this little-known process exploded in 2021, after the OSDH entered a settlement allowing a federal plaintiff to obtain a birth certificate with a "non-binary" designation. App.70a. Oklahoma Governor Kevin Stitt condemned the settlement as being done without "proper approval or oversight." App.70a. He added that there "is no such thing as non-binary sex" and "I believe that people are created by God to be male or female. Period." App.70a. On November 8, 2021, he issued Executive Order 2021-24, which explained that altering sex on birth certificates was "not permitted under Oklahoma law." App.70a–72a. As such, he ordered the OSDH to "[c]ease amending birth certificates ... in any way inconsistent with 63 O.S. § 1-321." App.70a. Soon after, the State Legislature enacted Senate Bill 1100 ("S.B. 1100"). *See* App.72a–73a. S.B. 1100 amended Section 1-321 to reiterate that the sex on birth certificates is "the biological sex designation" and therefore "shall be either male or female

and shall not be nonbinary." App.72a–73a (quoting 63 O.S. § 1-321(H)).

Since the Governor's EO and SB 1100, and congruent with Oklahoma law, the OSDH has denied requests to amend sex on birth certificates. App.73a.

### C. District Court

On March 14, 2022, Respondents sued the Governor, Commissioner of Health, and Registrar of Vital Records. They alleged that declining to amend the sex designation on birth certificates to reflect their gender identity violates the Free Speech Clause of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. App.73a–75a, 161a–165a. Respondents later amended their complaint to include S.B. 1100. App.75a, 144a–145a.

The State moved to dismiss the case, and the district court granted the State's motion. App.67a. First, held the court, Respondents failed to state a First Amendment claim, in part because declining to amend the sex on birth certificates did not restrict speech or compel anyone to speak. App.77a–85a. Rather, "the content of a birth certificate constitutes government speech which does not implicate the First Amendment." App.82a.

Next, Respondents' substantive due process claim did not subject Oklahoma's law to heightened scrutiny. App.86a–109a. Declining to amend the sex on birth certificates does not involve "involuntary disclosure of highly-sensitive and confidential medical information[.]" App.104a. And the specific right Respondents alleged—"the right to amend the sex designation on [a] birth certificate to be consistent with ... gender identity"—was not "fundamental to our scheme of

ordered liberty[,]" based on history and tradition. App.106a–109a.

Moving on, the court held Oklahoma birth certificates do not discriminate against a suspect class. App.109a–120a. "As it currently stands, there is no indication that the Supreme Court is willing to extend heightened scrutiny to any other classifications." App.116a. "Moreover, the premature designation of suspect classifications would disrupt the necessary balance between the judicial branch and the democratic process" and "have implications that reach beyond the limited issue presented in this case[.]" App.119a.

Last, Oklahoma's approach survived rational basis by furthering at least two legitimate interests: (1) protecting the integrity and accuracy of vital records, and (2) using those records to protect the interests of women. App.121a–125a. As to the latter, a legislature "might readily conclude that birth certificates provide a ready, reliable, non-invasive means of verifying the biological sex of participants in women's athletics." App.124a.

The court also observed that "Plaintiffs do not directly challenge the applicable Oklahoma statute and regulations." App.74a n.4. Instead, they chose to "contend that Oklahoma law has affirmatively granted transgender people the right to amend their sex designation on a birth certificate since at least 2007." App.74a n.4. The court dismissed this because "the Oklahoma legislature only authorized the Commissioner of Health to amend birth certificates in the situations specifically set forth in the statute and the regulations." App.74a n.4. And, as a legal matter, "[n]either the statute nor the regulations authorize the Commissioner to amend the sex designation." App.74a–75a n.4. "As such, Defend-

ants' enforcement of Oklahoma law would only be unconstitutional if the underlying law is unconstitutional." App.75a n.4. Thus, although the court referred to the Governor's "Policy," the court ruled on the constitutionality of the underlying Oklahoma law.

**D. Tenth Circuit**

On appeal, Respondents discarded their First Amendment claim, effectively conceding that the "the content of a birth certificate constitutes government speech which does not implicate the First Amendment." App.82a. Once again, Respondents framed their case as a challenge against executive "policy," focusing on the Governor.

The Tenth Circuit affirmed the district court's dismissal of the substantive due process claim but reversed on equal protection grounds. To begin, contrary to the district court, the panel insisted that "[a]t this stage, we must accept ... that the Policy, not Oklahoma law, prevents Plaintiffs from obtaining amended birth certificates." App.6a n.3.

On substantive due process, the Tenth Circuit held that Respondents did not plausibly allege state action because they "have not alleged Defendants directly required them to disclose private information." App.54a. Although "[t]hey do allege third parties require birth certificates ... they do not allege those third-party requirements amount to state action." App.52a.

On equal protection, the panel first analyzed whether Oklahoma's birth certificate approach discriminates on transgender status. Because the policy is facially neutral, discriminatory intent was inferred on three grounds: (1) a purported "disparate impact on transgender people"; (2) "the events leading up to the

Policy's adoption"—mostly, the acknowledgement of God as Creator of the sexes by Governor Stitt; and (3) a supposed "inability to proffer a legitimate justification for the Policy." App.26a–31a.

Furthermore, the panel held that because Oklahoma "discriminates based on transgender status, it necessarily discriminates on the basis of sex as well." App.31a. Although *Bostock* arose under Title VII, which forbids discrimination "'because of ... sex'" in matters of employment, App.32a (quoting 42 U.S.C. § 2000e-2(a)(1)), the panel applied *Bostock* wholesale to the equal protection claim. App.31a–42a.

Judge Hartz dissented from this reliance on *Bostock* because "that opinion addressed an employment claim under Title VII, not a challenge to a generally applicable law under the Equal Protection Clause." App.57a. He cautioned that *Bostock* "does not translate to the circumstance we confront in this case." App.58a. He also acknowledged that Oklahoma's approach was facially neutral: "*No one* can obtain an amended birth certificate that changes gender." App.61a. As such, and given that "*Bostock* cannot help Plaintiffs here," he would have held that Respondents did not sufficiently plead a sex-discrimination case. App.64a.

Finally, the Tenth Circuit held that Oklahoma's decision not to replace biological sex with gender identity on a birth certificate lacks a rational basis. App.42a–49a. Among other things, the panel found Oklahoma's approach underinclusive since the State does not maintain the same policy for driver's licenses; it rejected Oklahoma's interest in protecting vital statistics because Oklahoma maintains a copy of the original certificate; and it rejected the interest of fraud

prevention offered by numerous amici States because it was supposedly too speculative. App.42a–49a.

Oklahoma thereafter moved for rehearing *en banc*, and the Tenth Circuit denied the petition.

## REASONS FOR GRANTING THE PETITION

A square circuit split now exists on whether states must alter birth certificates to include gender identity. And Oklahoma's declining to make such alterations easily passes rational basis review. As Chief Judge Sutton explained in *Gore*, it is implausible to allege otherwise. And Oklahoma's approach does not discriminate based on sex or on transgender status, nor does it contravene *Bostock* or any other case from this Court. This Court should thus grant certiorari to resolve this circuit split and reverse.

### I. The Tenth Circuit's Decision Squarely Conflicts with a Recent Decision from the Sixth Circuit.

Just weeks after the Tenth Circuit issued its decision below, the Sixth Circuit reached the opposite conclusion in *Gore*, affirming a district court's dismissal of a challenge to Tennessee's refusal to alter sex on birth certificates. 107 F.4th 548. With Chief Judge Sutton writing, the Sixth Circuit: (1) declined to apply *Bostock* in holding that Tennessee had not discriminated on the basis of sex; (2) held that transgender individuals are not a suspect class and therefore rational basis review applies; and (3) held that "[a]mple legitimate explanations support Tennessee's amendment policy," including "[t]racking the biological sex of

infants" to aid public health, "maintaining a consistent, historical, and biologically based definition of sex," and "protect[ing] the integrity and accuracy of [Tennessee's] vital records." *Id.* at 560–61 (citation omitted).

In short, the Sixth Circuit split from the Tenth Circuit in nearly every way possible. And in doing so, the Sixth Circuit expressly criticized the Tenth Circuit, explaining that the panel's approach in the opinion below "misunderstands rational basis review." *Id.* at 561. "That deferential standard," the Sixth Circuit responded, "does not require States to show that a classification is the only way, the best way, or even the most defensible way to achieve their interests." *Id.* With this split on the "same important matter," certiorari is warranted. *See* Sup. Ct. R. 10(a).

## II. The Tenth Circuit Contravened This Court's Precedents and the Sixth Circuit in Requiring a State to Replace Sex with Gender Identity on a Birth Certificate.

### A. Maintaining Sex on Birth Certificates Is Rationally Related to Many Legitimate Interests.

The crux of the Tenth Circuit's equal protection analysis was its finding that a state declining to change immutable sex to gender identity on a birth certificate fails rational basis review. Indeed, each of its other equal protection holdings depended on this finding, stacked like a deck of cards. Why is Oklahoma's policy sex discrimination? Because, according to the panel, it discriminates on transgender status. And how do we know the policy discriminates against transgender people? In part, per the panel, because it lacks a rational basis. Once a rational basis is demonstrated, the whole

deck comes crashing down. Thus, we begin with rational basis. For the following reasons, the Tenth Circuit plainly erred in its assessment.

1. "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Thus, under rational basis review, a plaintiff's equal protection claim will fail "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* This Court requires "a strong presumption of validity" under rational basis review, and plaintiffs "attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it." *Id.* at 314–15 (citation omitted).

Here, "there is a rational basis for a policy of categorically prohibiting the amendment of the sex designation on a birth certificate." App.122a. Indeed, per the Sixth Circuit, "[a]mple legitimate explanations support" an amendment approach like Oklahoma's. *Gore*, 107 F.4th at 560. These bases, which at times intertwine, include the following:

*First,* "[p]rotecting the integrity and accuracy of vital records is obviously a legitimate state interest." App.122a; *Gore*, 107 F.4th at 561 (same). "And this interest is logically furthered by a law prohibiting subsequent alterations to the 'facts of birth'" on a birth certificate. App.122a (quoting 63 O.S. § 1-311(B)). This hardly needs further explanation. *See* App.124a ("[T]he court can readily conceive of reasons that a state might want to preserve the accuracy of the facts of a birth related to biological sex."). As detailed above, recording vital statistics at birth, including sex, is a well-established practice undertaken by governments

throughout United States history, including Oklahoma. *See also Gore*, 107 F.4th at 565–66 ("[S]ince the birth of most States, American governments have been collecting, compiling, and preserving records about the biological sex of each child born in their jurisdiction."). And Oklahoma law confirms the system is designed "to protect the integrity and accuracy of vital statistics records." 63 O.S. § 1-321(A). This is more than enough for rational basis review.

*Second,* protection of bodily privacy from the opposite biological sex is an important interest. *See, e.g.*, *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) ("[T]he differences between the genders demand a facility for each gender that is different."); *Doe v. Luzerne Cnty.*, 660 F.3d 169, 176–77 (3d Cir. 2011) (collecting cases). And Government entities and private parties can—and do—further that interest through birth certificates that accurately document biological sex. "To ensure privacy and safety," for example, Oklahoma designates public school restrooms for the male or female sex, and it utilizes birth certificates to determine biological sex. 70 O.S. § 1-125. Similarly, legislative bodies "might readily conclude that birth certificates provide a ready, reliable, non-invasive means of verifying the biological sex of participants in women's athletics." App.124a.

*Third*, Oklahoma has a legitimate "interest in maintaining a consistent, historical, and biologically based definition of sex." *Gore*, 107 F.4th at 561. Indeed, a "key point" is that "States have considerable discretion in defining the terms used in their own laws and in deciding what records to keep." *Id.* at 560. Remember, the district court ruled against Respondents' First Amendment claim. In doing so, it held that "the content

of a birth certificate constitutes government speech," and that the certificate "does not communicate any ideological or political message" that "would be attributed to—or deemed to be endorsed by—the private citizen." App.82a, 84a. *And Respondents declined to appeal that decision*. Thus, it is undisputed here that birth certificates are government speech, and it is undeniable that the government has a strong interest in deciding what it says on a disputed topic. *See, e.g.*, *Shurtleff v. City of Boston*, 596 U.S. 243, 251 (2022) ("That must be true for government to work."). Deciding what information goes on a birth certificate, and whether to amend sex, "is a matter of public policy to be decided by" Oklahoma—not by Respondents or a court. *K. v. Health Div., Dep't of Hum. Res.*, 560 P.2d 1070, 1072 (Ore. 1977).

*Fourth*, states have an interest in relying on vital records such as birth certificates to determine things like eligibility for benefits, and thus they have an "interest in maintaining a complete, accurate, and uniform system to make those determinations and avoid fraud." Br. for *Amici Curiae* Kansas, et al., 2023 WL 8258523, at *13 (10th Cir. Nov. 20, 2023); *see also Hartin v. Dir. of Bureau of Recs. & Stat.*, 347 N.Y.S.2d 515, 518 (N.Y. Sup. Ct. 1973) (holding that the "public interest for protection against fraud" outweighs the "desire of concealment of a change of sex").

*Fifth*, "states have a legitimate interest in how they expend and preserve their own resources." Br. for *Amici Curiae* Kansas, et al., 2023 WL 8258523, at *13. And "[o]pening up the ability to alter birth certificates to change a sex marker plainly would require some expenditure of state resources." *Id.* States, not Res-

pondents, should determine "whether such expenditures are worth it." *Id.*

2. Given these grounded explanations, the Tenth Circuit's claim that Oklahoma has no rational basis for declining to amend sex on a birth certificate years after birth—when the original was accurate—exposes a broader view that *any* reference to biological sex is irrational. This is at odds with this Court's precedent. *See, e.g.*, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("To fail to acknowledge even our most basic biological differences ... risks making the guarantee of equal protection superficial."). At minimum, the panel failed to identify a single instance where recognizing biological sex would pass muster. To be sure, the panel acknowledged that "Plaintiffs are not challenging Oklahoma's practice of recording sex assigned at birth or of retaining such records." App.45a. This acknowledgment itself should torpedo Respondents' case, *see, e.g.*, *Gore*, 107 F.4th at 555–56, but the panel's phrasing left open the door for its finding *that* practice unconstitutional, as well.

Practically speaking, although the Tenth Circuit paid lip service to rational basis review, the stringent approach it took resembled strict scrutiny. For starters, the panel did not mention—much less apply—the "strong presumption of validity" owed to Oklahoma, *FCC,* 508 U.S. at 314, an egregious legal error. And the panel's claim that Respondents "met their burden of negating every conceivable basis" in favor of the law, App.48a, was untethered from reality. Respondents made no real effort to conceive of bases other than those cited by Oklahoma. And the only bases the panel evaluated were those put forward by Oklahoma and supporting amici. *See* App.45a–48a.

Moreover, in dismissing the various state interests, the Tenth Circuit blatantly contravened multiple bedrock rational basis principles.

Most prominently, the Tenth Circuit found that Oklahoma's legitimate interest in the accuracy of vital statistics was not furthered here because Oklahoma retains a copy of the original birth certificate even after amendment. App.45a–46a. This argument fails for multiple reasons. To begin, it violates the fundamental principle that "it is entirely irrelevant" for rational basis review whether the "conceived reason for the challenged" action was the state's actual motivation. *FCC*, 508 U.S. at 315. One can easily conceive that maintaining an accurate sex designation on birth certificates promotes accuracy in statistics, even if a state may not have been motivated by that interest.

Regardless, Oklahoma *was* motivated by the interest. In finding that Oklahoma retains the original birth certificate, the Tenth Circuit relied on Oklahoma law (citing, *e.g.*, 63 O.S. § 1-316(B)(2)), while ignoring that Oklahoma law also has stated since 1963 that Oklahoma birth certificates may only be amended in certain limited circumstances "*to protect the integrity and accuracy of vital statistics records*." 63 O.S. § 1-321(A) (emphasis added). To make its point, that is, the panel simultaneously relied on Oklahoma's Legislature and called it irrational (or a liar). It made no attempt to read these laws in harmony but rather pitted them against each other, which is the opposite of a presumption of validity. Moreover, the panel ignored—in the very subsection it cited—that after amendment the original certificate shall *not* "be subject to inspection except upon order of a court of com-

petent jurisdiction or as otherwise specifically provided by law." *Id.* § 1-316(B)(2).

The Tenth Circuit also took an overly narrow view of Oklahoma's interest in accuracy. An amended birth certificate for an individual's "own use" is *still government speech*, regardless of whether the State retains the original copy, and thus Oklahoma retains a compelling interest in the accuracy of that speech. This interest alone should easily sustain Oklahoma's approach. *See Gore*, 107 F.4th at 559 ("Tennessee's policy is simply a nondiscriminatory form of government speech embraced by some States about an undeniable historical fact."). Although not stated as such, the panel effectively held that the amended birth certificate is solely Respondents' speech, despite Respondents' failure to appeal their First Amendment claim.

The Tenth Circuit's argument proves too much, as well, since it would mean that Oklahoma has no rational basis to keep individuals from changing *anything* on their birth certificates. By the panel's logic, because the State maintains an original copy it could not rationally decline to change the date of birth, for instance. Plaintiffs could claim that a certificate with their true birthdate impedes the goal of verifying their identity (because they look younger or older), exposes intimate information, and causes (age) discrimination. What ground would Oklahoma have for opposing such a change, under the panel's view? The panel ignored this argument.

The Tenth Circuit similarly ignored Oklahoma's point that Respondents allege that a birth certificate "reflect[ing] a sex contrary to their gender identity ... causes harm" and "discriminat[es]," App.161a, broad language which would encompass even the original

document. And Respondents have alleged that *any* "revision history that can disclose a person's transgender status" is constitutionally suspect. *See* App.141a–142a. Why then would the State's use of an original—which invariably will involve disclosure to *someone*, if the Tenth Circuit is correct that it could be used for vital statistics—not offend the Constitution under Respondents' theory? With this argument, the panel let Respondents have their cake and eat it, too.

Unsurprisingly, it was in direct response to the "original copy" argument that the Sixth Circuit accused the Tenth Circuit of "misunderstand[ing] rational basis review." *Gore,* 107 F.4th at 561. "That deferential standard," Chief Judge Sutton explained, "does not require States to show that a classification is the only way, the best way, or even the most defensible way to achieve their interests." *Id.* That a court finds a policy "imprudent," "ineffective," or "imperfect" does not mean it is utterly irrational. *Id.* Oklahoma, like Tennessee, "records a fact of birth: the biological sex of the child. A policy requiring an error before changing that record rationally correlates with the State's interest in consistency and historical accuracy." *Id.*

The Tenth Circuit's other arguments for irrationality fare no better. For instance, the panel rejected Oklahoma's contention "that all Oklahoma birth certificates [should] uniformly reflect sex assigned at birth" because this "is at odds with the fact that Oklahoma law allows amendments to the sex designation on driver's licenses." App.45a–46a. But driver's licenses are not birth certificates, so why would uniformity between the two be logically required? Regardless, the panel violated yet another axiom of rational basis review here, which is that a "legislature must be allowed

leeway to approach a perceived problem *incrementally*." *FCC*, 508 U.S. at 316 (emphasis added). For rational basis, that is, a state policy should stand even if it "is significantly over-inclusive or under-inclusive." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001).

That same axiom undermines the assertion that Oklahoma's interest in accuracy of immutable characteristics on birth certificates is irrational because Oklahoma allows changes to paternity for adoption purposes. App.46a (citing 63 O.S. § 1-316(A)(1)). States are entitled to draw lines and carve out exceptions to otherwise general rules and interests, and they may be under-inclusive in doing so. *See Gore*, 107 F.4th at 561 ("[T]he Constitution does not require Tennessee to allow all changes or none."). Furthermore, the Tenth Circuit did *not* claim—as such a claim would be absurd—that persons seeking adoption-related changes are "similarly situated" in all "relevant respects" to Respondents for equal protection purposes. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001).

Next, the Tenth Circuit argued that a legitimate interest in protecting women's sports was "not rationally related to the Policy" because Oklahoma does not currently use birth certificates to protect women's sports. App.46a. Yet again, it is "entirely irrelevant" that Oklahoma does not use birth certificates in its law protecting women's sports, given that it would be rational for Oklahoma or any other state to do so if it wanted. *FCC*, 508 U.S. at 315.

In addressing the amici states' rational basis of resource conservation, the Tenth Circuit merely claimed that the states had not offered up a "discussion of what resource sex-designation amendments require" or explained "how the Policy would rationally conserve

those resources." App.48a. But surely such depth is not necessary for rational basis review, since it is easily conceivable that it will take at least *some* time, effort, and resources to accommodate a change of sex on a birth certificate.

Finally, in rejecting the amici states' rational basis of fraud prevention, the panel criticized the states for failing to "offer more information." App.47a. It then offered its own speculation *in favor of Respondents* that Oklahoma's approach "may facilitate, rather than prevent, fraud." App.47a. But rational basis review does not permit a court to speculate in favor of the challengers; rather, the Tenth Circuit was "*obligated* to seek out other conceivable reasons for validating" Oklahoma law. *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004). Importantly, in making this point, the panel cited *Ray v. Himes*, No. 2:18-cv-272, 2019 WL 11791719 (S.D. Ohio Sept. 12, 2019), which applied strict scrutiny to a birth certificate policy. App.47a–48a. This citation—along with the contraventions of rational basis principles discussed above—shows that the panel effectively applied strict scrutiny, not rational basis.

3. In conclusion, it is worth reiterating that Respondents are admittedly "not challenging Oklahoma's practice of recording sex assigned at birth or of retaining such records." App.45a. And if that practice is concededly rational, then there is no universe in which declining to change an accurate sex designation on a birth certificate years after birth is somehow irrational. The Tenth Circuit holding otherwise is irreconcilable with this Court's precedent in cases like *FCC*, and with the Sixth Circuit decision in *Gore*. Indeed, the ruling amounts to a declaration not just that the Sixth Circuit is wrong, but that it is incapable

of thinking rationally on this topic. This is obviously incorrect. The Tenth Circuit should be reversed.

### B. The Tenth Circuit Wrongly Found Transgender Discrimination Through Disparate Impact and an Acknowledgment of God.

In a maneuver that would be inexplicable if the Tenth Circuit truly believed Oklahoma's amendment policy failed rational basis review, the panel spent the bulk of its equal protection analysis explaining that Oklahoma is plausibly discriminating based on transgender status and sex. Labels aside, the Tenth Circuit's signal was definitive: One way or another, it will never let stand a rational and non-discriminatory birth certificate policy like Oklahoma's. This Court's intervention is therefore necessary.

1. Oklahoma birth certificates do not discriminate based on transgender status. Neither Oklahoma birth certificates nor Oklahoma's amendment policy takes transgender status or gender identity into account. Rather, to the extent there is one, the "class" affected by Oklahoma's policy is much broader—everyone is implicated since everyone has a sex. Conversely, the class also encompasses everyone with a characteristic *not* recorded on birth certificates, whether it be a medical condition, hair color, parents' favorite sports team, socioeconomic status, or anything else imaginable.

The Tenth Circuit admitted that Oklahoma's "Policy appears facially neutral because it prevents all Oklahomans—regardless of their sex or gender identity—from amending the sex designation on their birth certificates." App.24a. The inquiry should have ended there, especially since Respondents do not argue that recording sex on birth certificates at birth discrimi-

nates against transgender persons. App.45a. Nevertheless, the panel claimed it could "infer purposeful discrimination on the basis of transgender status" in Oklahoma's declining to later change the accurate sex designation. App.23a–24a. Going further, the panel opined that Oklahoma's "Policy 'seems inexplicable by anything but animus' toward transgender people.'" App.31a (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)). The panel offered three bases for this, none of which holds water.

*First*, the Tenth Circuit found that the policy's "disparate impact on transgender people indicates discriminatory intent." App.26a. To reach that conclusion, though, the panel improperly conflated sex with gender identity. Per the panel, Respondents experience a disparate impact because their gender identity is not represented on a birth certificate while the gender identity of "cisgender" individuals is represented. App.26a. But birth certificates record immutable sex at birth, which is not the same as gender identity. Even Respondents describe gender identity as a "core internal sense," App.130a, whereas sex denotes "a biological and historical fact of birth," *Gore*, 107 F.4th at 559; *see also id.* at 558 (gender identity "is not definitively ascertainable at the moment of birth, and it can change over time" (cleaned up)). Thus, Oklahoma's choice to record sex, and to decline amendments to that recording, does not disparately impact anyone. Everyone has their sex recorded and then maintained. All are treated the same.

The Tenth Circuit also found a disparate impact from the Governor's actions allegedly removing the ability for transgender people to obtain birth certificates matching their gender identity. App.28a. But the panel's

focus on the Governor, and not Oklahoma law, cannot be defended. Oklahoma law has *never* allowed gender identity on birth certificates. And the Governor's "policy" was simply to reiterate and enforce that law in the face of a recently discovered pattern of unlawful actions. App.70a–72a. To get around this, the panel insisted that "[a]t this stage, we must accept ... that the [Governor's] Policy, not Oklahoma law, prevents Plaintiffs from obtaining amended birth certificates." App.7a n.3. This is preposterous. It is Pleading 101 that for "a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). The panel blatantly erred by accepting as true that it is "not Oklahoma law" that "prevents Plaintiffs from obtaining amended birth certificates." App.7a n.3. The district court, on the other hand, got this right. App.74a–75a n.4.[2]

*Second*, the Tenth Circuit found surrounding events supported a finding of discriminatory intent against transgender people. App.28a. But the panel focused almost entirely on Governor Stitt's statement that "I believe that people are created by God to be male or female." App.2a, 7a–8a, 28a–30a. The panel opined that "[w]hen read in context," this quote "demonstrates disfavor with people amending their birth certificates to change the sex designation." App.29a. The specific "people amending their birth certificates to change the sex designation" in question, however, were *not* "transgender people." App.29a. Rather, the Governor

[2] In any event, the panel also admitted that this "Court has stated that disparate impact alone does not show purposeful discrimination." App.25a (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

was referencing a situation where a person sought a "non-binary" designation, not where someone sought to change from "male" to "female" or vice versa. App.70a–72a. The panel got the context wrong.

This misstep aside, the panel never explained how the expression of a basic and well-known religious belief about how the world works can be equated to animus or an intent "to target transgender people." App.70a–72a. After all, similar statements can be found in everything from the Declaration of Independence to the Gospels. *See Matthew* 19:4 (ESV) (Jesus: "Have you not read that he who created them from the beginning made them male and female ...."); Decl. of Independence pmbl. (U.S. 1776) ("We hold these truths to be *self-evident*, that *all men are created* equal, that they are endowed *by their Creator* with certain unalienable Rights ...." (emphases added)). Put differently, which part of the quote is problematic? The answer must be the reference to God, as it is hard to imagine a similar objection if he had said "I believe the best science proves people are male or female" or "I believe the Supreme Court has held that people are male or female."

In the end, the panel's holding is deeply troubling in its negative treatment of religious sentiment by the governor of a sovereign state, especially given that "[r]espect for religious expressions is indispensable to life in a free and diverse Republic." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022). If a state commission cannot "base laws or regulations on hostility to a religion or religious viewpoint," *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 584 U.S. 617 (2018), then surely a court cannot base judicial decisions on apparent antipathy for religion, either.

Moreover, again, the Governor's comments aren't even relevant here. The Tenth Circuit claimed the comments "show the intent of the Policy is to target transgender people," App.29a, but the Governor emphasized that his "Policy" was just to ensure that longstanding Oklahoma law is followed, App.70a–72a. The personal religious opinions of the Governor cannot be assigned to a law duly enacted by a separate branch of government, and neither Respondents nor the panel has pointed to anything that could support some nefarious legislative motive here.

*Third*, the Tenth Circuit found plausible discriminatory intent (and animus) because the policy was "not rationally related to a legitimate state interest." App.30a. This is just a rehash of the panel's wayward rational basis discussion. If rational bases exist for Oklahoma—and they certainly do—then the panel's three-pronged transgender discrimination holding collapses, as well.

In the end, Oklahoma law does not discriminate against transgender individuals, facially or implicitly.

2. Even if discrimination based on transgender status was shown, only rational basis review would apply. This is because transgender individuals are not a quasi-suspect class. *See L.W. v. Skrmetti*, 83 F.4th 460, 486 (6th Cir.), *appeal pending*, 144 S. Ct. 2679 (2024). Respondents argued otherwise below, but the district court disagreed: "Plaintiffs do not constitute a quasi-suspect class for equal protection purposes." App.120a. The Tenth Circuit dodged this question "because the Policy discriminates based on sex, so intermediate scrutiny applies regardless." App.43a. Nevertheless, the district court was correct.

This "Court has been reluctant to expand the scope of quasi-suspect classifications[,]" "declin[ing] every opportunity to recognize a new quasi-suspect class" since 1977. App.116a. The bar to recognize a new suspect class is high, to say the least. *See Skrmetti*, 83 F.4th at 486. Especially in this arena, "the premature designation of suspect classifications would disrupt the necessary balance between the judicial branch and the democratic process" on many difficult issues. App.119a. The admonition in *Dobbs v. Jackson Women's Health Organization* applies here: Courts should not "usurp[] the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." 597 U.S. 215, 269 (2022).

Elevating transgender status, in terms of scrutiny, would wreak havoc on existing sex-based protections. If adopted, Respondents' view would mean that any state action acknowledging biological differences between men and women would constitute discrimination against transgender individuals. Respondents have failed to provide any limiting principles for courts to resolve the inevitable, direct conflicts that would arise when laws rely on biological sex. As this challenge to Oklahoma's benign birth certificate policy well illustrates, gender identity would prevail over sex every time. Consequently, hard-won victories in women's equality would be undermined overnight. "[F]raught line-drawing dilemmas" would ensue in the "[r]egulation of treatments for gender dysphoria[,]" "[b]athrooms and locker rooms[,] [s]ports teams and sports competitions[,]" and others "sure to follow." *Skrmetti*, 83 F.4th at 486. Separating prisons based on sex, a practice plainly protecting inmates' privacy and safety, *see,*

*e.g.*, *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982), would be automatically suspect. And so on.

Transgender status does not bear the normal indicia of a suspect classification. *See, e.g., Skrmetti*, 83 F.4th at 486–88; *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1230 (11th Cir. 2023). Among other things, gender identity is not immutable. Although Respondents summarily allege that gender identity is innate, App.135a, they cannot dispute that "[u]nlike existing suspect classes, transgender identity is not 'definitively ascertainable at the moment of birth.'" *Skrmetti*, 83 F.4th at 487 (citation omitted). Again, Respondents admit gender identity is "a person's core internal sense of their own gender," App.130a, which makes it a subjective and fluid classification rather than an objectively ascertainable fact. *See Adams*, 57 F.4th at 803 n.6.

Nor are transgender persons politically powerless. As the district court found, "[i]t is unreasonable to assume that transgender people as a whole are simply incapable of effectuating change via the normal democratic process." App.119a n.14. Transgender individuals are robustly supported by numerous governments, major medical associations, the media and entertainment industries, and basically every major law firm; courts do not need to permanently place a finger on the scrutiny scale because they lack power. *See, e.g.*, *Skrmetti*, 83 F.4th at 487. As a result, several appellate courts have recently declined to find transgender status is a suspect class. *See, e.g.*, *id.* at 486–87; *Eknes-Tucker*, 80 F.4th at 1230 ("we have grave 'doubt' that transgender persons constitute a quasi-suspect class" (quoting *Adams*, 57 F.4th at 803 n.5)). This Court should follow suit, if it touches the issue at all.

### C. Birth Certificates Are Not Sex Discrimination.

Per the Tenth Circuit, "*Bostock*'s reasoning leads to the conclusion that the Policy intentionally discriminates against Plaintiffs based in part on sex." App.33a. In so holding, the panel deepened a circuit split on the application of *Bostock*, divided (again) from the Sixth Circuit on birth certificates, and lost one of its own panel members. Judge Hartz, dissenting on this point, found "no evidence of the requisite intent in promulgating the Policy to disadvantage either males or females." App.64a. Judge Hartz, the Sixth Circuit, and the district court below are correct: Accurately recording and declining to alter sex on a birth certificate cannot amount to sex discrimination.

1. This Court long ago made clear: "[c]lassification is not discrimination." *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941). Ergo, the Equal Protection Clause "does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Certainly, some cases casually refer to unlawful "classification." *See, e.g., Virginia*, 518 U.S. at 546 (excluding women from military school is "gender-defined classification"). Each time, however, the challenged policy did more than merely acknowledge sex (or race). Instead, it tied benefits or exclusions to that recognition.

There is nothing discriminatory, that is, in the mere "[a]rrangement into groups or categories on the basis of established criteria." *Classification*, BLACK'S LAW DICTIONARY (6th ed. 1990). Governments *routinely* classify by race, sex, and other categories in their records. *See, e.g.*, 42 U.S.C. § 300kk(a)(1)(A) (requiring collection

of "data on race, ethnicity, sex"); 29 C.F.R. § 1614.601 (similar); 23 C.F.R. § 200.9(b)(4) (similar). Should heightened scrutiny apply to these run-of-the-mill sex classifications? Of course not. But under the Tenth Circuit's view, all government records that document sex would be constitutionally suspect.

Also significant, states retain the discretion to determine who falls within various classifications. For example, in *Jana-Rock Construction v. New York Department of Economic Development*, 438 F.3d 195, 200 (2d Cir. 2006), a plaintiff challenged the State's definition of "Hispanic." The Second Circuit concluded that "the contours of the specific racial classification that the government chooses" were subject only to rational basis scrutiny. *Id.* at 210–12. So too here: Oklahoma's decision to define sex in its own records the way sex has historically been understood is subject to nothing more than (real) rational basis review.

2. Respondents have not plausibly alleged sex discrimination. It is indisputable that Oklahoma birth certificates equally apply to both sexes. *See, e.g.*, 63 O.S. §§ 1-310, 1-311. The process for amending a birth certificate is also neutral. *See, e.g.*, 63 O.S. § 1-321. Regardless of the identity of the applicant, Oklahoma does not permit amendments to sex. *See id.* § 1-321(C)–(E). Under the law, no one in Oklahoma can amend a birth certificate to reflect gender identity. *See id.* § 1-321(H). Including an objective category on a government record does not treat anyone differently, and thus it does not merit heightened review. *See Skrmetti*, 83 F.4th at 480 ("[i]f any reference to sex in a statute dictated heightened review, virtually all abortion laws would require heightened review").

Nor could Respondents allege any facts to establish that Oklahoma law discriminates in its effects. Again, Oklahoma law does not allow *any* individual to supplant the sex recorded on a birth certificate. *See* App.64a (Hartz, J., dissenting in part) ("I see no evidence of the requisite intent in promulgating the Policy to disadvantage either males or females."). And it never has. The fact that some individuals were able to lawlessly manipulate Oklahoma's system in the past does not change this, and to hold otherwise would undermine democracy and Oklahoma's sovereignty by stripping the elected State Legislature of the right to say what Oklahoma law is and is not.

Presumably for these reasons, Respondents made no effort below to argue that Oklahoma's birth certificate policy is straightforward sex discrimination. Instead, relying on *Bostock*, "Plaintiffs contend that because the Policy discriminates based on transgender status, it necessarily discriminates on the basis of sex as well." App.31a. Thus, if Oklahoma's policy does *not* discriminate based on transgender status—and it does not, for reasons given above—then Respondents' claim of sex discrimination crumbles, as well.

The decision in *Bostock* does not support a sex discrimination theory here, regardless. Foremost, *Bostock* limited its holding to Title VII and employment discrimination and did "not purport to address bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681. Rather than provide the controlling precedent here, that is, *Bostock* itself confirms it does not control outside Title VII. *See also Skrmetti*, 83 F.4th at 484 (*Bostock*'s "reasoning applies only to Title VII, as *Bostock* itself and many subsequent cases make clear"); *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th

Cir. 2022) (en banc) (similar). The district court appropriately took this Court at its word; the Tenth Circuit did not. *See* App.59a (Hartz, J., dissenting in part) ("We ignore that language at our peril.").

Moreover, although *Bostock* may stand for the proposition that discrimination against transgender individuals in the Title VII employment context necessarily entails sex discrimination, it cannot stand for the reverse proposition in the equal protection context: that a neutral sex classification necessarily entails sex discrimination against transgender individuals. *See, e.g.*, *Adams*, 57 F.4th at 808–09 ("*Bostock* does not resolve the issue before us" because "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating").

3. The Tenth Circuit's arguments otherwise are meritless. To reiterate, the panel held that *Bostock* stands for the "reasoning" that "an employer who intends to discriminate based on transgender status necessarily intends to discriminate based in part on sex." App.33a. But the panel was wrong about Oklahoma discriminating on transgender status, and it based that mistaken holding partially on its meritless rational basis finding. *Bostock*'s "reasoning" is thus irrelevant here from the get-go, since this Court's reasoning was reliant on a situation where the employer fired an employee because of transgender status. *See* 590 U.S. at 653. And various cases relied upon by the Tenth Circuit involved similarly blatant actions *against* individuals, whether it be a move to "strike individual jurors because of their sex" or to "punish[] Black and White citizens" for intermarriage. App.38a–39a (citing *J.E.B. v. Alabama*, 511 U.S. 127 (1994), and *Loving v. Virginia*, 388 U.S. 1 (1967)); *see also* App.56a (Hartz,

J., dissenting in part) ("That doctrine has been invoked to invalidate a generally applicable law only when the law has intentionally treated males and females differently, to the detriment of one of the sexes."). Nothing like that exists here.

Nevertheless, attempting to mimic *Bostock*, the Tenth Circuit posited that if Fowler's "sex were different ... then the Policy would not deny her a birth certificate that accurately reflects her identity.... Thus, the Policy intentionally treats Plaintiffs differently because of their sex assigned at birth." App.33a. "But this contention, premised on Title VII cases, does not apply to equal protection claims, as [the Sixth Circuit] and others have explained." *Gore*, 107 F.4th at 556. To be sure, the panel collected cases in its favor, as well. App.41a–42a. But it also admitted that the circuits are split on whether *Bostock* applies to equal protection claims in this manner. *Id*. Indeed, the panel disavowed the Sixth Circuit's decision in *Skrmetti* on this point, embracing the dissent from that case. App.35a–36a.

This split aside, the Tenth Circuit's *Bostock*-ish formulation is difficult to even understand. Again, per the panel, if Fowler's "sex were different ... then the Policy would not deny her a birth certificate that accurately reflects her identity." App.33a. But saying that if Fowler's sex were different Fowler would have a different birth certificate is practically a tautology. Of *course* it would: that's the point of documenting male or female sex. That still would not change the fact that the "Policy is [a] facially neutral" classification and "applies generally to all persons." App.61a (Hartz, J., dissenting in part). In response, the majority retorted that "in *Bostock*, the Supreme Court explained that an employer discriminates based on sex even if it is 'equally

happy to fire male *and* female employees who are homosexual and transgender.'" App.36a (quoting *Bostock*, 590 U.S. at 662). But that just circles back to the fallacy observed above: No one here is firing anyone with discriminatory intent or doing anything even remotely similar.

Furthermore, by relying on this formulation, the Tenth Circuit makes two things clear: (1) every recognition of biological sex will eventually fall; and (2) that includes the original birth certificate. With this Court's guardrails removed, that is, this type of logic is a universal solvent; it will eat through any remaining reliance on or citation of biological sex in the law. If a policy can be viewed as "intentionally treat[ing] Plaintiffs differently because of their sex assigned at birth" in a way that violates equal protection solely because it documents their sex and declines to replace it with gender identity, then everything is suspect. App.33a. The panel admitted as much. It "agree[d]" that biological differences between men and women exist but held that these differences "'cannot render' a classification 'sex- or gender-neutral.'" App.41a (quoting *Skrmetti*, 83 F.4th at 505 (White, J., dissenting)). This, combined with a hypercritical approach to rational basis scrutiny, spells doom for anything remotely referencing sex. *See Gore*, 107 F.4th at 557 ("Plaintiffs' position ultimately boils down to a demand that the Federal Constitution requires Tennessee to use 'sex' to refer to gender identity on all state documents." (cleaned up and citation omitted)).

The better course would find that Oklahoma's policy is subject to rational basis review because it "treats the sexes equally" and "does not attach any significance to the biological sex of the applicant." *Id.* at 555; *see*

*also id.* ("Tennessee's birth-certificate policy treats like alike."). And it would reject an absurdist application of *Bostock*. *See* App.58a (Hartz, J., dissenting in part) ("But when [*Bostock*'s] reasoning is not a good fit in the context before us, we need not blindly apply the Court's conclusions to that different context.").

## CONCLUSION

This Court should grant Oklahoma's petition for a writ of certiorari. At minimum, this Court should hold the petition pending the decision in *Skrmetti*, No. 23-477.

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