No. 24-801

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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF GOVERNOR RON DESANTIS AND THIRTEEN ADDITIONAL GOVERNORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Governor DeSantis is the Governor of Florida, charged with the constitutional duty as the supreme executive authority of the State to ensure the faithful execution of state law. Like the Governor of Oklahoma, his authority includes supervision of the state health department. And like Oklahoma's health department, Florida's health department previously granted requests from transgender people to change sex designations on their birth certificates. Much like Governor Stitt did, Governor DeSantis ended that practice upon learning of it because state law did not grant the health department authority to make such alterations. Accordingly, Governor DeSantis has an interest in the outcome of this constitutional challenge to Governor Stitt's directive.

The additional Governors joining this brief[2] have similar interests in the outcome of this case. Their state constitutions generally vest in them the supreme executive authority of their respective states and direct them to ensure the faithful execution of state law. Many have sole oversight authority over their state health departments, some of which have received requests to change sex designations on birth certificates. Finally, some of the *amici* have made public comments regarding the nature of biological

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[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

Counsel of record for all of the parties have received timely notice of the intent to file this brief.

[2] The *amici* joining this brief are identified in the appendix hereto, together with their respective counsel.

sex that are similar to those that the Tenth Circuit characterized as animus.

SUMMARY OF THE ARGUMENT

In the decision below, the Tenth Circuit reached the novel and unsupportable conclusion that the State of Oklahoma lacks a rational basis for refusing to alter sex designations on birth certificates to reflect "gender identity." Along its meandering path to that conclusion, the panel focused on a series of statements by Governor Stitt wherein he explained his reasons for directing the state health department to cease its practice of altering birth certificates in that manner. The Governor's explanation included a reference to God, a belief that biological sex is binary and immutable, and an explanation that state law did not authorize the health department's existing practice.

Avoiding any coherent explanation of its reasoning, the Tenth Circuit wrongly inferred discriminatory purpose from the Governor's comments. As explained below, none of the components of those comments gives rise even to a plausible inference of animus or discriminatory purpose. Public recognition of God by elected officials has been commonplace since the Founding and cannot by itself constitute animus toward anyone. Similarly, the immutable and binary nature of biological sex has been universally accepted throughout the Nation's (and world's) history—and even throughout this Court's history—notwithstanding that some now question it. It stands to reason that merely describing sex in that manner cannot support a plausible inference of animus.

A Governor's directive to a subordinate agency to faithfully execute a state law that has not been declared unconstitutional cannot support a plausible inference of animus, either. To the contrary, it is an essential function of what Governors do. A finding that such a directive is itself evidence of purposeful discrimination is not only baseless, but also unjustifiably intrudes on the "take care" duties of Governors and chills their ability to explain decisions to their fellow citizens.

Finally, in an apparent bout of eagerness to resolve this case in the plaintiffs' favor, the panel jumped the gun and seemingly decided the merits of the dispute against Oklahoma—the *defendant*—on a motion to dismiss. Notwithstanding its intermittent references to the sufficiency of the allegations, the court apparently *held* that Governor Stitt's directive was discriminatory and could not survive rational basis review. In doing so, it employed the motion-to-dismiss standard and rational-basis review in precisely the wrong way.

ARGUMENT

I. The Tenth Circuit erred by inferring purposeful discrimination.

Petitioners have thoroughly explained how the Tenth Circuit "blatantly contravened multiple bedrock rational basis principles" and erroneously rejected numerous (and obvious) rational bases for Governor Stitt's directive (which the Tenth Circuit referred to as the "Policy"). App. 20a–24a. The Sixth Circuit has recognized as much, rightly criticizing the Tenth Circuit's analysis as one that "misunderstands

rational basis review." *Gore v. Lee*, 107 F.4th 548, 561 (6th Cir. 2024). Needless to say, the *amici* agree with these criticisms of the Tenth Circuit's indefensible rational-basis analysis and will not belabor the point. *See also Trump v. Hawaii*, 585 U.S. 667, 705 (2018) (citation omitted) ("[T]he Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a 'bare ... desire to harm a politically unpopular group.'").

Instead, the *amici* submit this brief primarily to highlight the problems with the Tenth Circuit's treatment of Governor Stitt's explanation for his directive. In "holding[3] that the Policy discriminates on the basis of transgender status," App. 23a, the panel inferred purposeful discrimination from the "totality of the relevant facts." App. 26a (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Most prominently, it apparently derived animus from some or all of the following comments:

> "I believe that people are created by God to be male or female. Period."
>
> "There is no such thing as non-binary sex, and I wholeheartedly condemn the OSDH court settlement that was entered into by rogue activists who acted without receiving proper approval or oversight."
>
> Oklahoma law does not "provide OSDH or others any legal ability to in any way

[3] As explained in Part II, *infra*, the panel's "holdings" were entirely improper at the motion-to-dismiss stage.

> alter a person's sex or gender on a birth certificate."

App. 7a–8a. The panel neglected to explain how any of this demonstrates animus, seemingly content to stand on the force of its *ipse dixit*. Was it the mere reference to God? Was it the reference to the binary nature of biological sex? Or did the panel mean to suggest that a Governor's explanation of state law can constitute animus? For the following reasons, none of the Governor's comments raises a plausible inference of purposeful discrimination.

A. A reference to God cannot plausibly support an inference of animus.

"I believe that people are created by God to be male or female. Period." "When read in context," the Tenth Circuit explained, "Governor Stitt's statement about God creating people to be male or female demonstrates disfavor with people amending their birth certificates to change the sex designation." App. 29a. Obviously so. A directive to stop changing sex designations on birth certificates necessarily demonstrates some degree of "disfavor" with that practice, just as a directive to stop violating any other state law demonstrates "disfavor" with other practices that violate state law. Far less obvious is why this has any constitutional relevance—or, in the Tenth Circuit's terms, why a "statement about God creating people to be male or female" "show[s] the intent of the Policy is to target transgender people." *Id.*

Surely the answer cannot be that Governor Stitt mentioned God. After all, "[w]e are a religious people whose institutions presuppose a Supreme Being."

Zorach v. Clauson, 343 U.S. 306, 313 (1952). This Court has previously traced the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," explaining that "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch v. Donnelly*, 465 U.S. 668, 674–75 (1984). "Other examples of reference to our religious heritage are found in the statutorily prescribed national motto 'In God We Trust,' . . . which Congress and the President mandated for our currency, . . . and in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag." *Id.* at 676.

Similarly, the answer cannot lie in the Governor's expression of the common belief that God created mankind. As Petitioners rightly observe, even the Declaration of Independence acknowledges that people are "endowed by their Creator with certain unalienable Rights." In short, "our history is pervaded by expressions of religious beliefs[.]" *Id.* at 677. *See also McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 888–89 (2005) (Scalia, J., dissenting) ("Invocation of the Almighty by our public figures, at all levels of government, remains commonplace.").

In light of that pervasive history, it is implausible that a mere reference to God can constitute animus against transgender people or anyone else. Unsurprisingly, then, the *amici* have been unable to identify another decision in which a federal court has reached that dubious conclusion.

The Tenth Circuit was entirely dismissive of this concern, however, suggesting that Oklahoma had missed the point because "Plaintiffs are not challenging the Governor's right to express his beliefs." App. 29a. But it is the Tenth Circuit that missed the point—regardless of the Governor's right to express his beliefs, a Governor's mere reference to God cannot constitute animus sufficient to justify blocking a State from enforcing its laws.

Moreover, that a portion of the stated basis for the Governor's directive merely coincides with a religious tenet presents no constitutional problems.[4] The Court's recognition of the following principle in the context of the Establishment Clause is plainly true under the Equal Protection Clause as well: a law is not unconstitutional merely because it "happens to coincide or harmonize with the tenets of some or all religions." *Harris v. McRae*, 448 U.S. 297, 319 (1980) (citation omitted). In *Harris*, the Court correctly recognized "that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." *Id.* at 319–20. As the Court explained, "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Id.* at 319. This reasoning is equally applicable here: That the Judeo-Christian religions recognize that God created males and

[4] Although the Tenth Circuit did not squarely hold as much, its analysis of Governor Stitt's commentary is so opaque that it is necessary to consider and refute the various possible interpretations.

females[5] does not mean the States (or their elected officials) must disavow that belief lest they be charged with animus in violation of the Equal Protection Clause.

B. A description of sex as binary and immutable cannot plausibly support an inference of animus.

The foregoing statement ("I believe that people are created by God to be male or female") can be further distilled to the following two propositions: "I believe that people are created by God. And I believe that people are created male or female." As explained *supra*, the first proposition cannot plausibly support an inference of animus. Neither can the second.

Notwithstanding the Tenth Circuit's emphasis on the religious overtones of Governor Stitt's commentary, the Book of Genesis is hardly the only source of the belief that sex is binary and immutable. Indeed, this Court has repeatedly recognized as much. *See*, *e.g.*, *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) ("Physical differences between men and women . . . are enduring"); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J.) (plurality opinion) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth"); *Ballard v. U.S.*, 329 U.S. 187, 193 (1946) ("the two sexes are not fungible"). Numerous Circuit Courts have done the same. *See*, *e.g.*, *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 807 (11th Cir. 2022) (en banc) (referencing "the Supreme Court's

[5] *See Genesis* 1:27 ("So God created man in His own image . . . male and female He created them.").

longstanding recognition" that sex is immutable). Surely the authors of such opinions, and the numerous Justices and judges who joined those opinions, were not expressing animus of any kind by recognizing these biological realities. Just as surely, it is misguided and improper to "tar" Governors "with the brush of bigotry" for doing the same. *U.S. v. Windsor*, 570 U.S. 744, 776 (2013) (Roberts, C.J., dissenting).

Notably, America's leading clinical guide in the field of psychiatry has *also* recognized sex as binary even in the treatment of gender identity disorders. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM"), the criteria for a diagnosis of gender dysphoria includes "a strong desire for the primary and/or secondary sex characteristics of *the other* gender."[6] It is simply fanciful to find animus in the expression of a biological reality that has been universally accepted within the medical profession.[7]

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[6] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452 (5th ed. 2013) (emphasis added). Although the current edition of the DSM (DSM-5) now also includes the phrase "or some alternative gender" for certain other criteria, *id.*, the criteria under DSM-IV all employed the phrase "the other sex." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 537–38 (4th ed. 1994). That the exceedingly small task force responsible for drafting the DSM-5 recently adopted the reference to "alternative genders" (perhaps for non-scientific reasons) does nothing to undermine the fact that the medical profession has long considered sex to be binary.

[7] *See also* Inst. of Med. Comm. on Understanding the Biology of Sex and Gender Differences, *Every Cell Has a Sex*, *in* EXPLORING THE BIOLOGICAL CONTRIBUTIONS TO HUMAN HEALTH: DOES SEX

C. A Governor's directive to a subordinate agency to follow state law that has not been declared unconstitutional cannot support an inference of animus.

The remaining comments at issue are Governor Stitt's assertions that "rogue activists" within an executive-branch agency agreed to a settlement without approval and oversight, and that Oklahoma law did not authorize the agency to alter sex designations on birth certificates. These comments likewise do not support even a plausible inference of unconstitutional animus.

Governors are the chief executive officers of their respective States, responsible for ensuring the faithful execution of state law. *See*, *e.g.*, Okla. Const., art. VI, § VI-2 (vesting the "supreme executive power" in the Governor); art. VI, § VI-8 (requiring the Governor to "cause the laws of the State to be faithfully executed"); Fla. Const., art. IV, § 1(a) (vesting the "supreme executive power" in the Governor, who "shall take care that the laws be faithfully executed").

Just as "Article II confers on the President 'the general administrative control of those executing the laws[,]'" *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting *Myers v. U.S.*, 272 U.S. 52, 164 (1926)), so too state constitutions generally confer such authority on Governors. Indeed, Governors as much as the President "cannot 'take

MATTER? 4 (T.M. Wizemann & M.L. Pardue eds., 2001) ("The biological differences between the sexes have long been recognized at the biochemical and cellular levels.").

Care that the Laws be faithfully executed' if [they] cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund*, 561 U.S. at 484. *See also CompSource Mut. Ins. Co. v. State ex rel. Okla. Tax Comm'n*, 435 P.3d 90, 105 (Okla. 2018) ("The Governor has the power to issue executive orders to executive officials directing them to faithfully execute the law.").

Herein lies one of the many problems with what the Tenth Circuit has done. It bears emphasis that (1) Oklahoma's birth certificate law did not provide any express authority to change sex designations, and (2) there was apparently no judicial declaration at the time of Governor Stitt's directive that the United States or Oklahoma Constitutions required Oklahoma to grant requests for such alterations. Accordingly, the proper characterization of Governor Stitt's "Policy" is that it was simply a directive to a subordinate agency to faithfully execute a state statute that had not been declared unconstitutional. To find animus in that directive is more than just judicial overreach—it works an intolerable intrusion into the proper function of state government.

If an executive-branch agency under a Governor's supervision is engaging in conduct that is not authorized by state law, the Governor must be able to direct the agency to refrain from doing so. After all, the "lesser executive officers" who wield a Governor's authority "must remain accountable to" the Governor. *Compare Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 213 (2020). This fundamental aspect of gubernatorial oversight cannot plausibly support an inference of animus—at least not where

(as here) the state law at issue has not previously been declared unconstitutional. And that is so regardless of the commentary that accompanies such a directive, because Governors (again, much like the President) "possess[] an extraordinary power to speak to [their] fellow citizens and on their behalf." *Compare Trump*, 585 U.S. at 701 (rejecting claim of religious animus notwithstanding President's comments regarding Muslim immigration).

In concluding otherwise, the Tenth Circuit essentially ratified—and thereby encourages—rogue agency action. Its decision signals to agency employees that they may unilaterally use a Governor's executive authority to engage in acts unauthorized by state law, and that a Governor's attempt to stop such activities will be construed as evidence of unconstitutional animus as long as the subject matter involves "a difference in treatment that [a federal court] *really* dislikes." *Obergefell v. Hodges*, 576 U.S. 644, 720 (2015) (Scalia, J., dissenting). It thereby threatens to sever the supervisory ties between Governors and the agencies that answer to them. Similarly, by purporting to invalidate only the Governor's "Policy" rather than the underlying Oklahoma statute, *see* App.6a n.3, the panel decision empowers inferior executive officers to administer the statute as they please without the Governor's oversight. But where a Governor acts to "preserve[] the intended effects of prior legislation against then-unforeseen changes in circumstance" by directing an inferior agency to refrain from unauthorized and novel expansions of its statutory authority, "[t]hat is not animus—just stabilizing prudence." *Windsor*, 570 U.S. at 796–97 (Scalia, J., dissenting).

In sum, unless and until a state law is declared unconstitutional, a Governor's directive to a subordinate agency to follow state law cannot *itself* give rise to any problem under the U.S. Constitution, and it surely cannot be characterized as "inexplicable by anything but animus." *Romer v. Evans*, 517 U.S. 620, 632 (1996). To the contrary, and quite separately from any legitimate policy justifications, it can be easily explained by a Governor's desire to fulfill the state constitutional obligation to ensure the faithful execution of state law.

II. The Tenth Circuit erred by deciding an implausible claim in the plaintiffs' favor on a motion to dismiss.

It is now elementary that "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The Tenth Circuit abandoned this gatekeeping function when it reversed the District Court's order of dismissal. It compounded that error by reaching the merits and effectively deciding the equal protection claim against Oklahoma at the motion-to-dismiss stage.

As explained, the allegations regarding Governor Stitt's comments were insufficient to establish even a plausible inference of purposeful discrimination. But the remaining substantive allegations fare no better.

The plaintiffs alleged that "gender identity—a person's core internal sense of their own gender—is the primary determinant of a person's sex" and "*the* critical determinant of a person's sex[.]" App. 134a,

¶ 20. They alleged further that "[t]he sex designation originally placed on a transgender person's birth certificate is inaccurate because it is based on visual assumptions about that person's sex made at the time of their birth, without taking into consideration any other relevant considerations that determine a person's sex, including, most importantly, gender identity." App. 139a, ¶ 42. And the Tenth Circuit stressed that it had to accept the truth of the allegation that "the sex designation[s] made at birth" were "no longer accurate." App. 28a.

Even if these "extravagantly fanciful" allegations were entitled to a presumption of truth, *Iqbal*, 556 U.S. at 681, that is not the end of the inquiry on a motion to dismiss. Instead, the next step in the *Iqbal* analysis is to determine whether those allegations "plausibly suggest an entitlement to relief." *Id.* Plainly, they do not.

Notwithstanding the Tenth Circuit's "conclusion" of purposeful discrimination, App. 22a, Oklahoma outlined "obvious alternative explanations" for the directive. *Iqbal*, 556 U.S. at 682 (citation omitted); App. 121a (identifying an interest in "protecting the integrity and accuracy of vital records, including documenting birth information and classifying individuals based on the two sexes"). "It should come as no surprise that a legitimate policy" of recording sex at the time of birth—the legitimacy of which the plaintiffs *have not challenged*—could "produce a disparate, incidental impact on" transgender people "even though the purpose of the policy" was not to target them. *Iqbal*, 556 U.S. at 682. "As between the 'obvious alternative explanation[s]' for the [directive]

. . . and the purposeful, invidious discrimination" the plaintiffs "ask[ed the court] to infer, discrimination is not a plausible conclusion." *Id.* (citing *Twombly*, 550 U.S. at 567).

The Tenth Circuit abandoned "judicial experience and common sense" when it construed the complaint to state a "plausible claim for relief." *Id.* at 679. Consider, for example, the allegation that an "accurate[] recording [of] the sex designation made at birth" could later be "no longer accurate"—an allegation that the Tenth Circuit explicitly credited. App. 28a. As explained earlier, this Court has repeatedly recognized that sex is binary and immutable. That is part of the "judicial experience" that a court must employ to determine the plausibility of a claim. Given that sex is immutable, it is not plausible that an admittedly accurate sex designation can later become inaccurate. Thus, even if this "extravagantly fanciful" allegation is afforded the presumption of truth, it cannot form the basis of a plausible entitlement to relief under the Equal Protection Clause.

The remaining substantive allegations similarly fail to establish a plausible entitlement to relief. For example, the panel insisted that "Plaintiffs have plausibly alleged that because of the Policy, their birth certificates do not accurately reflect their gender identities." App. 28a. Again, that is not the end of the inquiry under *Iqbal*. Even if the allegation is true, it is irrelevant under the Equal Protection Clause and therefore cannot plausibly suggest entitlement to relief. That is because sex and gender identity are

different,[8] because Oklahoma records only the former, and because there is no plausible construction of the Equal Protection Clause that would require Oklahoma to record the latter. As the Sixth Circuit recently put it when affirming the dismissal of a remarkably similar equal protection claim, "Plaintiffs' position 'ultimately boil[s] down to' a demand that the Federal Constitution requires" States "to use 'sex' to refer to gender identity on all state documents. . . . The Constitution does not contain any such requirement." *Gore*, 107 F.4th at 557 (citation omitted).

To be sure, the plaintiffs' farcical allegation that subjective gender identity is "*the* critical determinant of a person's sex," App. 134a, ¶ 20, betrays what their position "ultimately boils down to." It is simply a demand that the federal judiciary "resolve a debate between two competing views of" biological sex under an "equal protection framework . . . [that] is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of [biological sex], which fundamentally turn on what [biological sex] is." *Windsor*, 570 U.S. at 811, 813 (Alito, J., dissenting). To find a plausible entitlement to relief here would require the judiciary to redefine sex,[9]

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[8] The plaintiffs themselves alleged that "[t]ransgender persons are people whose gender identity diverges from the sex they were assigned at birth." App.135a, ¶ 23. Of course, sex is not "assigned" at birth based on individual preferences or subjective factors—it is *determined* at (and even before) birth by chromosomal makeup.

[9] Although the panel purported to "take no position on the correct way to define sex," App. 4a n.2, its analysis and conclusion that the plaintiffs plausibly stated a claim belie that disclaimer. This problem is not unique to the Tenth Circuit, either. Just last

because the traditional definition of sex is entirely independent of "gender identity" and therefore cannot support a claim that the Equal Protection Clause requires the States to account for the latter when recording sex on birth certificates. The federal judiciary's acquiescence in redefining sex for the States would be "an act of will, not legal judgment[,]" because it is not up to the federal judiciary to redefine "sex." *Obergefell*, 576 U.S. at 687–88 (Roberts, C.J., dissenting). The plaintiffs' claim "implicitly ask[s] [the court] to endorse" their view of biological sex "and to reject the traditional view," *Windsor*, 570 U.S. at 815 (Alito, J., dissenting)—a task that neither the law nor biological reality permits the judiciary to perform.

The Tenth Circuit did far more than just allow an implausible claim to proceed, though. Notwithstanding its references in various parts of the decision to "sufficient" or "adequate" allegations, *see, e.g.*, App. 31a, the Tenth Circuit apparently proceeded to decide the equal protection claim against Oklahoma *at the motion-to-dismiss stage*. For example, it "conclude[d]" that Governor Stitt's directive "purposefully discriminates on the basis of transgender status and sex." App. 22a. Later, the panel "h[e]ld that the Policy discriminates on the

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week, for example, a federal judge reportedly chastised the Department of Justice for its defense of President Trump's executive order regarding transgender military service members, declaring from the bench that the recognition of sex as binary is "not biologically correct" and characterizing the order as "unadulterated animus." Peter Charalambous and Tesfaye Negussie, *'Unadulterated Animus': Judge Blasts DOJ about Transgender Military Restrictions*, ABC NEWS (Feb. 18, 2025), https://abcnews.go.com/Politics/judge-poised-block-limitations-transgender-service-members/story?id=118927094.

basis of transgender status." App. 23a. As its coup de grâce, the Tenth Circuit held that "the Policy cannot pass rational basis review." App. 43a. And this is not just the *amici*'s interpretation of what the Tenth Circuit did—Judge Sutton, writing for the Sixth Circuit, has construed the Tenth Circuit's decision the same way. *See Gore*, 107 F.4th at 561 (describing the Tenth Circuit's "*holding* that a similar amendment policy did not rationally relate to the State's interest in accurate records") (emphasis added).

The decision below not only "misunderstands rational basis review," *id.*, it misunderstands the role of the court on a motion to dismiss. A motion to dismiss for failure to state a claim merely tests the legal sufficiency of the allegations—it does not expose a defendant to an adverse ruling on the merits of the plaintiff's claim. And it surely does not expose a State to a holding that its laws—or its Governor's directives—lack a rational basis and are therefore unconstitutional.

Although the Tenth Circuit purported only to reverse and "remand for proceedings consistent with this decision," App. 55a, it appears that the only proceedings consistent with the foregoing "holdings" would be the prompt entry of judgment for the plaintiffs.[10] Accordingly, the Court should grant certiorari review notwithstanding the putatively interlocutory nature of the panel decision. *Cf. F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 160 (2004) (granting certiorari to resolve circuit

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[10] Of course, the *amici* do not purport to speak for Petitioners on this point.

split notwithstanding that panel decision reversed an order of dismissal).

CONCLUSION

The Tenth Circuit imagined purposeful discrimination and animus in a straightforward policy to record biological sex rather than gender identity on birth certificates. On that dubious premise, it wrongly decided that the policy lacks even a rational basis. Ultimately, however, "a State's decision to maintain the meaning of [biological sex] that has persisted in every culture throughout human history can hardly be called irrational." *Obergefell*, 576 U.S. at 686 (Roberts, C.J., dissenting). Because the Tenth Circuit's unsupportable conclusion to the contrary conflicts with the Sixth Circuit's decision in *Gore*, the Court should grant the petition for certiorari.

Respectfully submitted,

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February 26, 2025

APPENDIX

The following Governors join Governor DeSantis in this brief:

Governor Kay Ivey of Alabama
William G. Parker, Jr., General Counsel

Governor Sarah Huckabee Sanders of Arkansas
Cortney Kennedy, Chief Legal Counsel

Governor Brian P. Kemp of Georgia
Samuel Hatcher, Executive Counsel

Governor Brad Little of Idaho
Andy Snook, General Counsel

Governor Mike Braun of Indiana
Patrick Price, General Counsel

Governor Kim Reynolds of Iowa
Eric Wessan, Solicitor General

Governor Jeff Landry of Louisiana
Angelique Freel, Executive Counsel

Governor Tate Reeves of Mississippi
Joseph Anthony Sclafani, Counsel to the Governor

Governor Mike Kehoe of Missouri
Jordan Roling, Deputy General Counsel

Governor Greg Gianforte of Montana
Anita Y. Milanovich, General Counsel

Governor Henry McMaster of South Carolina
Thomas A. Limehouse, Jr., Chief Legal Counsel

Governor Larry Rhoden of South Dakota
Katie J. Hruska, General Counsel

Governor Greg Abbott of Texas
Trevor W. Ezell, General Counsel