

No. 24-801

IN THE
Supreme Court of the United States

J. 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 Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit*

**BRIEF OF ALLIANCE DEFENDING FREEDOM
AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONERS**

CHLOE K. JONES
ALLIANCE DEFENDING
FREEDOM
1000 Hurricane Shoals
Rd. NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774

JAMES A. CAMPBELL
JOHN J. BURSCH
Counsel of Record
ALLIANCE DEFENDING
FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT..... 2

ARGUMENT 4

I. Oklahoma’s law does not discriminate based on any protected classification, so rational-basis review applies. 5

 A. The Equal Protection Clause protects sex rooted in biology, not gender identity..... 5

 B. Sex and gender identity differ conceptually and scientifically; the latter does not determine the former. 8

 C. Oklahoma’s Law treats similarly situated people the same regardless of sex or gender identity..... 11

II. The Tenth Circuit erred in accepting Respondent’s legal conclusions, couched as factual allegations, none of which state a plausible Equal-Protection claim. 15

III. The Amendment Law serves rational and important government interests. 18

 A. Medicine and safety 19

 B. Sports..... 22

C. Military	23
D. Education.....	24
CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases

<i>Adams v. School Board of St. Johns County</i> , 57 F.4th 791 (11th Cir. 2022).....	6, 8
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	17
<i>Ballard v. United States</i> , 329 U.S. 187 (1946).....	6–7
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	16
<i>Boe v. Marshall</i> , 2023 WL 3454575 (M.D. Ala. May 15, 2023).....	1
<i>Bostock v. Clayton County</i> , 590 U.S. 644 (2020).....	7, 14
<i>Brown v. Zavaras</i> , 63 F.3d 967 (10th Cir. 1995)	5
<i>Cape v. Tennessee Secondary School Athletic Association</i> , 563 F.2d 793 (6th Cir. 1977)	7
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985).....	5
<i>Dobbs v. Jackson Women’s Health Organization</i> , 597 U.S. 215 (2022).....	6
<i>Doe v. Boyertown Area School District</i> , 897 F.3d 518 (3d Cir. 2018)	9
<i>Eknes-Tucker v. Governor of Alabama</i> , 80 F.4th 1205 (11th Cir. 2023).....	2, 5, 12

<i>Fowler v. Stitt</i> , 104 F.4th 770 (10th Cir. 2024).....	3–4, 10, 13–18
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	7
<i>Gore v. Lee</i> , 107 F.4th 548 (6th Cir. 2024).....	2, 4–5, 7–8, 11–13, 18
<i>Grimm v. Gloucester County School Board</i> , 972 F.3d 586 (4th Cir. 2020)	9
<i>In re Doe</i> , 2017 WL 1375331 (Minn. Ct. App. Apr. 17, 2017).....	17
<i>Kelley v. Board of Trustees</i> , 35 F.3d 265 (7th Cir. 1994)	22
<i>L.W. v. Skrmetti</i> , 83 F.4th 460 (6th Cir. 2023).....	2, 14
<i>Lehnhausen v. Lake Short Auto Parts Co.</i> , 410 U.S. 356 (1973).....	4
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	5
<i>O’Connor v. Board of Education of School District 23</i> , 449 U.S. 1301 (1980).....	7
<i>Soule v. Connecticut Association of Schools, Inc.</i> , 90 F.4th 34 (2d Cir. 2023)	22
<i>Tennessee v. Cardona</i> , 737 F. Supp. 3d 510 (E.D. Ky. 2024).....	1
<i>Tuan Anh Nguyen v. I.N.S.</i> , 533 U.S. 53 (2001).....	6

<i>United States v. Skrmetti</i> , 144 S. Ct. 2679 (2024).....	14
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	2, 5–6, 10
<i>Wailes v. Jefferson County Public Schools</i> , 2024 WL 4433942 (D. Colo. Oct. 6, 2024)	1
<i>Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association</i> , 647 F.2d 651 (6th Cir. 1981)	6

Statutes

42 U.S.C. 300gg-13.....	12
50 U.S.C. 3802.....	23
50 U.S.C. 3803.....	23
Fla. Stat. Ann. § 1006.205	23
Okla. Admin. Code § 310:105-3-3	11
Okla. Stat. Ann. tit. 22, § 1601	20–21
Okla. Stat. Ann. tit. 63, § 1-242.2.....	21
Okla. Stat. Ann. tit. 63, § 1-311.....	11
Okla. Stat. Ann. tit. 63, § 1-321.....	11
Okla. Stat. Ann. tit. 63, § 1-323.1.....	21
Okla. Stat. Ann. tit. 70, § 1-125.....	25
Okla. Stat. Ann. tit. 70, § 27-106.....	23
Tenn. Code Ann. § 49-7-180.....	23

Other Authorities

Aditi Bhargava et al., <i>Considering Sex as a Biological Variable in Basic & Clinic Studies: An Endocrine Society Scientific Statement</i> , 42 <i>Endocrine Rev.</i> 219 (Mar. 11, 2021).....	8, 10
Alexander A. Boni-Saenz, <i>Legal Age</i> , 63 <i>B.C. L. Rev.</i> 521 (2022)	17
Am. Acad. of Pediatrics, <i>Promoting Healthy Development of Sexuality & Gender Identity, Bright Futures Implementation Tip Sheet</i> (July 2022)	8
<i>Bans on Transgender Youth Participation in Sports</i> , Movement Advancement Project.....	22
Chandra Prajapati et al., <i>Sex Differences in Heart: From Basics to Clinics</i> , <i>Eur. J. Med. Rsch.</i> (Nov. 9, 2022)	19
Claire Burgess et al., <i>Evolving Sex and Gender in Electronic Health Records</i> , <i>Fed. Practitioner</i> (June 2019).....	20
Corrinne Hess, <i>U.S. Department of Education is Opening an Investigation into Sun Prairie Locker Room Incident</i> , <i>Wis. Pub. Radio</i> (Nov. 30, 2023).....	25
<i>Gender & Health</i> , World Health Org.	9
<i>Glossary of Terms</i> , Hum. Rts. Campaign (May 31, 2023).....	10

Irving Zucker & Brian J. Pendergast, <i>Sex Differences in Pharmacokinetics Predict Adverse Drug Reactions in Women</i> , BioMed Central (June 5, 2020).....	19
Janine Austin Clayton & Cara Tannenbaum, <i>Reporting Sex, Gender, or Both in Clinical Research?</i> , JAMA Network (Nov. 8, 2016).....	19
Katie Barnes, <i>Amid protests, Penn swimmer Lia Thomas becomes first known transgender athlete to win Division I national championship</i> , ESPN (Mar. 17, 2022)	22
Mary Margaret Olohan, <i>School District Had Trans-Identifying Female Supervise Young Boys Showering, Lawsuit Alleges</i> , Daily Wire (Sept. 5, 2024)	25
Melissa Koenig, <i>Parents Claim Daughter, 11, Was Forced to Sleep in Bed with Transgender Student on School Trip</i> , N.Y. Post (Dec. 6, 2023).....	25
Peter C. Baldwin, <i>Public Privacy: Restrooms in American Cities, 1869–1932</i> , 48 J. of Soc. Hist. 264 (2014).....	25
<i>Request for Status Information Letter</i> , Selective Serv. Sys.....	24
Salvador Rizzo, <i>Victim of School Bathroom Sexual Assault Sues Virginia School District</i> , Wash. Post (Oct. 5, 2023)	25
Shaziya Allarakha, <i>What are the 72 Other Genders?</i> , Med. Net (Feb. 9, 2024)	10

<i>Understanding Transgender People, Gender Identity & Gender Expression</i> , Am. Psych. Ass'n (July 8, 2024).....	9
W. Burlette Carter, <i>Sexism in the “Bathroom Debates”</i> : <i>How Bathrooms Really Became Separated by Sex</i> , 37 <i>Yale L. & Pol’y Rev.</i> 227 (2018).....	24–25
<i>Women’s Preventive Services Guidelines</i> , Health Res. & Servs. Admin. (Jan. 2025)	12
<u>Regulations</u>	
29 C.F.R. 825.120	12

INTEREST OF *AMICUS CURIAE*¹

Alliance Defending Freedom is dedicated to protecting religious freedom, free speech, the sanctity of life, parental rights, and marriage and family. Because the law should respect that men and women are equal but unique, ADF advocates for laws recognizing relevant physiological and biological differences between the sexes.

ADF routinely defends laws that honor those differences—whether to protect fairness in women’s sports, see, *e.g.*, Pet. for Writ of Cert., *Little v. Hecox*, No. 24-38 (filed July 11, 2024), *Tennessee v. Cardona*, 737 F. Supp. 3d 510 (E.D. Ky. 2024), to ensure privacy in private spaces, see *Wailes v. Jefferson Cnty. Pub. Schs.*, No. 24-CV-02439-RMR, 2024 WL 4433942 (D. Colo. Oct. 6, 2024), or to protect children from potentially dangerous body-altering procedures, see *Boe v. Marshall*, No. 2:22-CV-184-LCB, 2023 WL 3454575 (M.D. Ala. May 15, 2023).

ADF submits this brief to support Oklahoma’s law requiring its state birth certificate records to record sex—a demonstrable fact ascertained at birth. This law helps promote public health and safety, protect privacy, and provide equal opportunities to women and girls.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were notified of this amicus brief less than 10 days before its filing, as Supreme Court Rule 37.2 requires. But in light of Respondents’ motion to extend time to file their brief, Petitioners and Respondents do not object to the filing of the instant brief.

SUMMARY OF THE ARGUMENT

Justice Ruth Bader Ginsburg famously recognized that the “inherent” and “enduring” “[p]hysical differences between men and women” are a “cause for celebration.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). These differences have prompted officials to document people’s sex—for countless years and in innumerable contexts—to advance medicine, protect privacy, and ensure equal opportunity. To be sure, our country is embroiled in a cultural debate about what it means to be male or female. But this petition asks a legal question: whether the Equal Protection Clause—as understood at the time of its 1868 ratification—*requires* states to alter birth certificates to reflect someone’s perceived gender identity rather than their sex.

To ask the question is to answer it. Neither the Constitution’s text nor pre-1868 legal history references gender identity. The concept of gender identity was not developed for another century. Respondents’ “position ultimately boils down to a demand that the Federal Constitution requires [Oklahoma] to use ‘sex’ to refer to gender identity on all state documents.” *Gore v. Lee*, 107 F.4th 548, 557 (6th Cir. 2024) (cleaned up). But sex and gender identity are not interchangeable. A “statute [that] does not establish an unequal regime for males and females,” but instead merely references sex, does not trigger heightened scrutiny under the Equal Protection Clause. *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1228 (11th Cir. 2023); *L.W. v. Skrmetti*, 83 F.4th 460, 480 (6th Cir. 2023).

Respondents try to avoid this result by imposing an altogether different definition of sex on Oklahoma. They allege in their complaint that “gender identity is *the* critical determinant of a person’s sex.” App.134a–135a. The Tenth Circuit accepted that assertion, reasoning that (1) Respondents like Rowan Fowler—though born male—belong to the female sex by *self*-identification, (2) this allegation must be accepted as true at the pleading stage, and, as a result, (3) Oklahoma treats Fowler worse than women with female designations on their birth certificates. *Fowler v. Stitt*, 104 F.4th 770, 775–76, 789 (10th Cir. 2024). Such word games defy common sense. If an Ohio citizen alleged he was an Oklahoma citizen to challenge an Oklahoma law, a court is not compelled to accept that allegation as true when it is not.

No matter how Respondents define sex, Oklahoma’s birth-certificate law and Equal Protection jurisprudence define sex the same way: in biological terms. Those legal definitions govern—not Respondents’ conclusory allegations.

Under the proper standard—rational basis review—Oklahoma’s law easily survives scrutiny. The amendment process treats everyone the same regardless of their sex or gender identity. And Oklahoma has many rational reasons to record someone’s sex, not gender identity, on a birth certificate. In the context of medicine, military service, sports, and education, a person’s sex plays an important role in providing appropriate medical treatment, facilitating selective service, designating sex-specific sports teams, and enforcing sex-specific privacy spaces.

The court of appeals applied a heightened standard of review under the guise of rational basis. Abandoning the professed lenient standard, the Tenth Circuit simply parroted Respondents' arguments, ignoring Respondents' inability "to negative every conceivable basis which might support" the law. *Lehnhausen v. Lake Short Auto Parts Co.*, 410 U.S. 356, 364 (1973). As the Sixth Circuit has since recognized, the Tenth Circuit's holding was premised on a fundamental misunderstanding of what the rational-basis standard requires. *Gore*, 107 F.4th at 561. That holding upends rational-basis jurisprudence and creates a circuit split over whether individuals have a constitutional right to demand that the government alter its records to cater to gender ideology. This Court should grant the petition, restore proper rational-basis scrutiny in the Tenth Circuit, and resolve the circuit split in favor of governments controlling their own vital records.

ARGUMENT

The lower court held that Oklahoma's law fails rational-basis review. But it reached that conclusion only after holding that the law "purposefully discriminates on the basis of transgender status and sex," such that intermediate scrutiny applies. *Fowler*, 104 F.4th at 784. Both conclusions are wrong, create a circuit split, and warrant this Court's immediate correction.

I. Oklahoma’s law does not discriminate based on any protected classification, so rational-basis review applies.

“The Equal Protection Clause is ‘essentially a direction that all persons similarly situated should be treated alike.’” *Eknes-Tucker*, 80 F.4th at 1226 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). Courts adjudicate Equal Protection under rational-basis review if a law does not discriminate based on a protected classification. *Gore*, 107 F.4th at 560. And while sex is a protected classification, gender identity is not. See *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995). Of course, this conclusion presupposes that sex and gender identity are different—and they are, constitutionally, scientifically, and conceptually. Under that understanding, the references to biological anatomy in Oklahoma’s law are not unlawful discrimination.

A. The Equal Protection Clause protects sex rooted in biology, not gender identity.

In the Equal-Protection context, a court’s level of scrutiny depends on the type of classification at issue. That’s because some classifications are valid while others are suspect. For example, a law receives rational-basis review if it classifies based on the speed someone is driving because inherent differences between speeders and non-speeders warrant different treatment. Conversely, classifications based on race warrant strict scrutiny because “supposed inherent differences [between races] are no longer accepted as a ground for” discrimination. *Virginia*, 518 U.S. at 533 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

Unlike race, there are inherent and “enduring” biological differences between men and women; “the two sexes are not fungible.” *Ibid.* (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)). When a law accounts for biological differences between men and women, it recognizes a simple truth: the sexes “are not in fact similarly situated and when the law is blind to those differences, there may be as much a *denial* of equality as when a difference is created which does not exist.” *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass’n*, 647 F.2d 651, 657 (6th Cir. 1981) (emphasis added). Sometimes, refusing to recognize men and women’s “basic biological differences” “risks making the guarantee of equal protection superficial, and so disserving it.” *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001).

Accordingly, biology “is the driving force behind th[is] Court’s sex-discrimination jurisprudence.” *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 n.6 (11th Cir. 2022) (en banc). When adjudicating Equal Protection challenges, this Court has upheld laws reflecting real biological differences between men and women. For example, though only women give birth and can obtain abortions, governments can nevertheless protect unborn life. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022). And laws can impose “a different set of rules” to prove biological parenthood “with respect to fathers and mothers” because of “the unique relationship of the mother to the event of birth.” *Nguyen*, 533 U.S. at 63–64.

Laws can also separate sports teams by sex; otherwise, “boys would dominate the girls’ programs and deny them an equal opportunity to compete in interscholastic events.” *O’Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers); see also *Cape v. Tenn. Secondary Sch. Athletic Ass’n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam) (rejecting Equal Protection challenge to different rules for women’s basketball because of the “distinct differences in physical characteristics and capabilities between the sexes”).

In their complaint, Respondents contend that gender identity is biological—that “[a] transgender man’s sex is male (even though he was assigned the sex of female at birth), and a transgender woman’s sex is female (even though she was assigned the sex of male at birth).” App.135a. But the law recognizes the commonsense understanding that sex and gender identity aren’t the same. The former is based on objective biology; the latter is based on subjective self-profession. So unlike sex, which is determined “by the accident of birth,” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), “[g]ender identity is not definitively ascertainable at the moment of birth.” *Gore*, 107 F.4th at 558 (cleaned up). Unlike sex, which is “an immutable characteristic,” *Frontiero*, 411 U.S. at 686, gender identity “can change over time.” *Gore*, 107 F.4th at 558. And unlike sex, which is binary, *Ballard*, 329 U.S. at 193, “[t]ransgender identity refers to a huge variety of gender identities and expressions.” *Gore*, 107 F.4th at 558 (cleaned up). In short, as this Court recognizes, “transgender status [is a] distinct concept[] from sex.” *Bostock v. Clayton Cnty.*, 590 U.S. 644, 669 (2020).

The court of appeals’ decision to collapse these concepts based on Respondents’ implausible allegations runs afoul of this Court’s precedent that roots Equal Protection Clause protections in biological sex. *Gore*, 107 F.4th at 558; *Adams*, 57 F.4th at 807. To reap the benefits of this Court’s sex-discrimination jurisprudence, Respondents created an alternate reality equating gender identity to sex.

B. Sex and gender identity differ conceptually and scientifically; the latter does not determine the former.

This Court’s precedent defines sex based on biology for Equal Protection purposes. That closes the legal question. Scientific literature and common sense fortify that conclusion.

Many medical and health organizations—including those that staunchly advocate for rights based on gender identity—define sex based on objective biology. The Endocrine Society explains that “[s]ex is a biological concept” and that “all mammals have 2 distinct sexes.”² The American Academy of Pediatrics describes sex as based on “external genital anatomy but sometimes [based on] internal gonads, chromosomes, or hormone levels.”³ Likewise, the American Psychological Association explains that sex “refers to one’s biological status as either male or

² Aditi Bhargava et al., *Considering Sex as a Biological Variable in Basic & Clinic Studies: An Endocrine Society Scientific Statement*, 42 *Endocrine Rev.* 219, 221 (Mar. 11, 2021), <https://bit.ly/48krsz0>.

³ Am. Acad. of Pediatrics, *Promoting Healthy Development of Sexuality & Gender Identity*, Bright Futures Implementation Tip Sheet at 2 (July 2022), <http://tinyurl.com/4rrje76x>.

female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy.”⁴

Compare those objective, biological-based definitions with that of gender identity: according to the World Health Organization, gender is “a social construct” that “interacts with but is different from sex.”⁵ While sex is “the different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones and reproductive organs,” gender identity is “a person’s deeply felt, internal and individual experience of gender, which may or may not correspond to the person’s physiology or designated sex at birth.”⁶

Other courts agree with these basic definitions. *E.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020) (defining “gender identity” as someone’s “deeply felt, inherent sense of their gender”) (cleaned up); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018) (contrasting sex as “anatomical and physiological processes” versus gender identity as someone’s “subjective, deep-core sense of self as being a particular gender”).

In contrast with science and precedent, the Tenth Circuit adopted Respondents’ unsupported allegation that “gender identity is innate” and “is *the* critical

⁴ *Understanding Transgender People, Gender Identity & Gender Expression*, Am. Psych. Ass’n (July 8, 2024), <https://bit.ly/3RyS5cC>.

⁵ *Gender & Health*, World Health Org., <https://bit.ly/3Ru7mf4> (last visited Feb. 4, 2025).

⁶ *Ibid.*

determinant of a person’s sex.” *Fowler*, 104 F.4th at 775–76. As just noted, even leading gender-activist groups reject that understanding. The Endocrine Society explains that “[s]ex is an essential part of vertebrate biology, but gender is a human phenomenon; sex often influences gender, *but gender cannot influence sex.*”⁷ (emphasis added).

Further demonstrating the gap between sex and gender identity, some people do not identify with either sex. According to some doctors, there are at least 72 recognized gender identities, including many “non-binary” ones.⁸ Advocacy groups contend that someone can identify as a “fluid or unfixed gender identity.”⁹ If someone’s gender identity were “*the* critical determinant of a person’s sex”—their physiological and biological traits—these distinct concepts would collapse in on themselves.

The Tenth Circuit flouted this Court’s Equal Protection sex-discrimination jurisprudence by adopting Respondents’ redefinition of “sex.” Doing so undermines the government’s ability to base its definitions of “sex” in biology, prohibiting laws from treating biological men and women differently based on their “inherent differences.” *Virginia*, 518 U.S. at 533.

⁷ Bhargava, *supra*, at 228.

⁸ Shaziya Allarakha, *What are the 72 Other Genders?*, Med. Net (Feb. 9, 2024), <https://bit.ly/3RLBrrH>.

⁹ *Glossary of Terms*, Hum. Rts. Campaign (May 31, 2023), <https://bit.ly/3GO8WmW>.

C. Oklahoma’s Law treats similarly situated people the same regardless of sex or gender identity.

Oklahoma treats all Oklahomans equally no matter their sex or gender identity. State law requires attending physicians to “certify to the facts of birth and provide the medical information required by the birth certificate,” including the child’s “biological sex designation,” which “shall be either male or female.” Okla. Stat. Ann. tit. 63, § 1-311(B), (G); § 1-321(H). The State will only amend birth certificates in limited circumstances. *Id.* § 1-321; Okla. Admin. Code § 310:105-3-3. Those few exceptions do not allow changes to the sex marker. App.74a–75a n.4.

No matter a person’s sex or gender identity, every person born in Oklahoma receives a birth certificate containing a “biological sex designation” certified by “[t]he physician in attendance.” Okla. Stat. Ann. tit. 63, § 1-311(B), (G). And regardless of sex or gender identity, no Oklahoman may alter that sex designation. “[Oklahoma], like all States, 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.” *Gore*, 107 F.4th at 561.

True, sex plays a role in issuing an original birth certificate: “doctors must answer the same question on each original birth certificate: Was the baby a ‘male’ or ‘female’ based on biological sex?” *Id.* at 555. But Respondents don’t challenge the practice of recording sex. They challenge only the State’s process for *amending* birth certificates. And when deciding

what exceptions to make to the no-amendment policy, the State attached zero “significance to the biological sex [or gender identity] of the applicant” requesting a change. *Ibid.* Everyone is bound by the same process and exclusions.

Laws that merely reference sex do not automatically trigger heightened scrutiny. Many laws and regulations mention sex, especially when it comes to medical care, because of the innate biological differences between men and women. For example, government programs provide specific benefits only to women for their sex-specific health needs. *E.g.*, 29 C.F.R. 825.120(a)(4) (providing prenatal-care benefits just for “mother[s]”); 42 U.S.C. 300gg-13 (requiring insurance coverage “with respect to women” for certain sex-specific preventative care); *Women’s Preventive Services Guidelines*, Health Res. & Servs. Admin. (Jan. 2025), <https://bit.ly/471zcFf> (identifying preventative care to cover medical needs like “screenings for cervical cancer” and gestational diabetes, as well as “breastfeeding equipment and supplies”). And many government hospitals and health insurance programs record a patient’s sex and treat men and women based on that information, as explained in Section III below. Although these laws and programs include “sex-related language . . . it is wrong to say that [they] *classify* based on sex.” *Eknes-Tucker*, 80 F.4th at 1233 (Brasher, J., concurring). And no court subjects such laws to heightened scrutiny merely because the laws reference sex. Otherwise, the government would have to justify why it only pays for hysterectomies for women or prostate treatments for men.

The Tenth Circuit’s holding subjects every law or policy that references sex to heightened scrutiny. Yet under this Court’s precedent, those laws trigger only rational-basis review because they “treat like cases alike” and don’t “impose one rule for males and another for females.” *Gore*, 107 F.4th at 555 (cleaned up). As the Sixth Circuit explained in *Gore*, under the Tenth Circuit’s logic, “a government may not allocate benefits and burdens based on ‘sex’ if the term does not cover gender identity as opposed to solely biological sex.” *Id.* at 556. If so, this Court “had no discretion in resolving *Bostock* with respect to the public employee in that case” because “[a]ny other interpretation of ‘sex’ in Title VII would have violated the Equal Protection Clause.” *Ibid.* That logical conclusion proves that the Tenth Circuit erred egregiously in equating sex with gender identity.

At most, Respondents complain about disparate impact, not disparate treatment. The Tenth Circuit agreed with Respondents’ assertion that, under the Amendment Law, “cisgender people still have access to Oklahoma birth certificates reflecting their gender identity,” whereas those identifying as transgender do not. *Fowler*, 104 F.4th at 786. And because only those who do not identify as their sex “need” sex-designation amendments, the court continued, the law “affects transgender people but not cisgender people.” *Ibid.* That misunderstands what birth certificate records do. That vital record does *not* record gender identity; *no one* has access to a birth certificate with a gender identity marker. Every Oklahoma birth certificate reflects the person’s sex. Amendments are prohibited because they introduce inaccuracies in the State’s vital records.

To reach its counterintuitive conclusion, the Tenth Circuit panel majority read its sex-blind interpretation of Title VII into Equal Protection. *Fowler*, 104 F.4th at 790 (discussing *Bostock*, 590 U.S. at 660–61). But *Bostock* accepted that sex and gender identity are different concepts, 590 U.S. at 655–56. And it addressed gender-identity discrimination only in the context of hiring and firing, when differences between the sexes are supposed to be ignored. The Court expressly reserved how Title VII might apply to sex-specific policies like private spaces and company dress codes. *Id.* at 681.

The question of how the Equal Protection Clause applies to laws affecting individuals who identify as transgender is pending before the Court in *L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir.), cert. granted sub nom. *United States v. Skrmetti*, 144 S. Ct. 2679 (2024). But the Tenth Circuit’s holding poses a separate legal issue warranting this Court’s review. The Tenth Circuit did not hold that those who identify as transgender are part of a quasi-suspect class. And it did not stop at importing *Bostock*’s but-for causation analysis to alleged transgender discrimination, as the private petitioner in *Skrmetti* advocates. Instead, the Tenth Circuit announced the startling holding that discrimination based on gender identity is sex discrimination because *sex determines gender identity*. *Fowler*, 104 F.4th at 775. Legally equating sex and gender identity defies this Court’s jurisprudence, science, and common sense. And because that concept presumptively invalidates countless laws that reference sex, this Court’s swift correction is required.

II. The Tenth Circuit erred in accepting Respondent’s legal conclusions, couched as factual allegations, none of which state a plausible Equal-Protection claim.

Respondents attempt to skirt biology and this Court’s Equal Protection precedents through artful pleading, alleging that sex and gender identity are the same. And the court of appeals accepted these unsupported assertions as true: “Plaintiffs have plausibly alleged that” the sex designations on their “birth certificate [are] *incorrect*.” *Fowler*, 104 F.4th at 787. That’s akin to accepting an allegation that there is no gravity in Oklahoma. Simply because a complaint asserts something does not mean a court is compelled to accept that thing as true.

The Tenth Circuit’s holding depends on these unsupported assertions, so they are worth summarizing. The complaint alleges that “reproductive organs alone are not determinative of a person’s *sex*.” App.134a. So what is? Respondents answer that “gender identity” is “the primary” and most “critical determinant of a person’s *sex*.” App.134a–135a. Respondents say transitioning does not “change a person’s *sex*, but instead bring[s] a person’s physical appearance and lived experience into *better alignment with their sex, as determined by their gender identity*”—meaning the individual was really that *sex* all along. App.137a (emphasis added). As a result, “gender identity is innate” with “biological underpinnings,” and “[a] transgender man’s *sex* is male (even though he was assigned the *sex* of *female* at birth), and a transgender woman’s *sex* is female (even though she was assigned the *sex* of *male* at birth).” App.135a (emphases added).

In sum, Respondents assert that their “sex designation[s] originally placed on [their] birth certificate[s] [are] *inaccurate*” because those designations failed to consider “other relevant considerations that *determine a person’s sex*, including, most importantly, gender identity.” App.139a (emphases added). So, the central assertion in Respondents’ complaint is that their sex markers on their birth certificates are factually inaccurate because gender identity and sex are the same. App.140a.

The Tenth Circuit readily accepted these assertions. It explained that although it “t[ook] no position on the correct way to define sex,” the court was bound by “Plaintiffs’ well pleaded facts” “at this stage in the litigation.” *Fowler*, 104 F.4th at 775 n.2. But 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) (cleaned up). That means the Tenth Circuit was not bound to accept as true that gender identity determines someone’s sex.

The question here is not how Respondents perceive or define themselves, or even how they define sex. The only relevant question is how the Equal Protection Clause and Oklahoma law define sex. For the purpose of birth certificates, Oklahoma considers Respondents to be members of their sexes as revealed at birth. So does the Equal Protection Clause, as noted above in section I.B. Respondents cannot state a constitutional claim by artfully pleading their own definition of sex. It would be no different if the Tenth Circuit allowed a plaintiff to survive a motion to dismiss a Free Speech claim by alleging that unprotected “fighting words” are protected by the First Amendment.

The Tenth Circuit’s opinion is even at war with itself. Accepting Respondents’ allegations that gender identity determines sex would necessarily make gender identity a protected class. Yet the Tenth Circuit simultaneously recognized that “binding Tenth Circuit precedent holds transgender status is not a quasi-suspect class.” *Fowler*, 104 F.4th at 780, 794.

In so holding, the Tenth Circuit also ignored this Court’s admonition that, to evaluate whether a claim is plausible, courts must draw on their “judicial experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Common sense and science show that a woman who identifies as a man is female. Gender identity does not determine sex. Yet the Tenth Circuit rejected that proposition and accepted the unsupported allegation that a sex marker becomes factually incorrect whenever that person professes a different gender identity. *Fowler*, 104 F.4th at 787.

Respondents’ pleadings are “not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679. And the lower court’s erroneous acceptance of those assertions flouts this Court’s Equal Protection doctrine. Allowing that decision to go unchecked will lead to a flood of lawsuits based on perceptions, semantic redefinitions, and artful pleadings.¹⁰ This Court should grant review and reverse.

¹⁰ For example, some individuals have attempted to alter birth dates on birth certificates based on “a psychological disconnect” between biological age and age identity. *In re Doe*, No. A16-1392, 2017 WL 1375331, at *1 (Minn. Ct. App. Apr. 17, 2017). See Alexander A. Boni-Saenz, *Legal Age*, 63 B.C. L. Rev. 521, 524 (2022).

III. The Amendment Law serves rational and important government interests.

Because the Amendment Policy does not discriminate based on any protected classification, it need only satisfy rational-basis review. Incredibly, the Tenth Circuit determined that the Amendment Law “cannot withstand even rational basis review.” *Fowler*, 104 F.4th at 784. The court of appeals was only able to reach that conclusion by applying a far more exacting level of scrutiny than rational basis. The court declared that Oklahoma failed to provide *any* rational basis for designating sex on a person’s birth certificate despite centuries of government officials doing so for a broad variety of rational and legitimate purposes.

The Tenth Circuit’s new rational-basis test, standing alone, warrants review. The Sixth Circuit correctly castigated the Tenth Circuit as wholly “misunderstand[ing] rational basis review.” *Gore*, 107 F.4th at 561. And because the lower court applied rational-basis review, this Court’s decision in *Skrmetti* will not resolve the circuit split or otherwise prevent the drastic consequences of the Tenth Circuit’s decision. After all, the conclusion that there is *no* rational basis for declining to amend sex on a birth certificate “exposes a broader view that *any* reference to biological sex is irrational.” Pet.19.

The Amendment Law easily clears rational basis’s low bar. As Respondents concede, “[a] person’s birth certificate is a trusted and essential government-issued document that serves as proof of a person’s identity.” App.138a.

Indeed, there are multiple contexts in which government and private actors need to know someone's sex. So Oklahoma has legitimate reasons to place that information on state birth certificates and not alter it based on self-professed gender identity. Amicus will highlight four reasons Oklahoma's Law rationally relates to legitimate state interests.

A. Medicine and safety

Knowing a person's sex is critical to the practice and study of medicine. Consider just a handful of examples.

Sex matters enormously to drug dosage because females often metabolize drugs more slowly than men, even when holding body weight constant, thereby exposing women to worse side effects.¹¹ In cardiovascular medicine, the two sexes present heart disease symptoms differently because of the different structure and function of men's and women's hearts.¹² And in the clinical realm, reporting sex ensures accurate conclusions, facilitates meta-analysis, and avoids wasteful and unethical research.¹³

¹¹ Irving Zucker & Brian J. Pendergast, *Sex Differences in Pharmacokinetics Predict Adverse Drug Reactions in Women*, BioMed Central (June 5, 2020), <http://tinyurl.com/25b47t8s>.

¹² Chandra Prajapati et al., *Sex Differences in Heart: From Basics to Clinics*, Eur. J. Med. Rsch. (Nov. 9, 2022), <https://tinyurl.com/2zbysr6a>.

¹³ Janine Austin Clayton & Cara Tannenbaum, *Reporting Sex, Gender, or Both in Clinical Research?*, JAMA Network (Nov. 8, 2016), <https://tinyurl.com/4crhmjv8>.

If healthcare professionals lack “accurate information about patient birth sex,” serious issues will arise when determining appropriate screenings, prescribing the proper drug dosage, and pairing lab results with assumed hormonal history.¹⁴ As more and more Americans begin identifying as a gender different than their sex, these problems increase. For example, when individuals in the Veterans Health Administration replaced sex with gender identity in their documents, the change threatened to “misalign natal sex-based clinic reminders, medication dosages, and laboratory test values, which created potential patient safety risks. Thus, birth sex created potential hazards to quality and safety.”¹⁵ To avoid confusion, doctors need an easy, non-invasive way to verify someone’s sex. Oklahoma’s birth certificates can provide that official document when other documents, like medical records, driver’s licenses, or (until recently) passports, do not.

Sex is also critical to government health and safety initiatives. Oklahoma has established “review boards” to address public health and safety concerns. For example, the State created the Domestic Violence Fatality Review Board to coordinate state and local efforts to address domestic violence. Okla. Stat. Ann. tit. 22, § 1601(A)(1). Part of the Board’s responsibilities include “[c]ollect[ing], analyz[ing], and interpret[ing] state and local data” and “[d]evelop[ing] a state and local database.” *Id.* § 1601(A)(2)–(3). The Board must “maintain statistical information,”

¹⁴ Claire Burgess et al., *Evolving Sex and Gender in Electronic Health Records*, Fed. Practitioner (June 2019), <https://bit.ly/476WbhZ>.

¹⁵ *Ibid.*

“including birth certificate records” of the “victim, perpetrator or any other person cohabitating in the domicile.” *Id.* § 1601(B)(3), (7). To accurately analyze domestic violence incidents and develop proper policies, the Board requires accurate birth certificate information.¹⁶ Otherwise, government officials and the public could be confused about the causes of and solutions for a sudden increase in female domestic-abuse fatalities caused by women when the perpetrators are actually men who identify as female.

The same is true for public safety measures. When an Oklahoman minor is reported missing, the State Bureau of Investigation must notify the Commissioner of Health, who then identifies the minor’s sex from a birth certificate. The Commissioner will “immediately notify[]” the Bureau “whenever a request for a copy of the birth certificate of such person is made.” Okla. Stat. Ann. tit. 63, § 1-323.1(A). This safety measure, aimed at tracking potential kidnappers, depends on “immedia[cy].” *Ibid.* If a minor’s sex is not accurately recorded on his or her birth certificate, that could disrupt and delay the cross-agency communications, endangering the minor’s safety. These laws convey Oklahoma’s compelling interest in the accuracy of its vital records in such time-sensitive and dangerous circumstances.

¹⁶ Oklahoma also established a Maternal Morality Review Committee that functions much the same and also must collect birth certificates when analyzing incident reports. See Okla. Stat. Ann. tit. 63, § 1-242.2(B)(6).

B. Sports

Across the country, women and girls have lost equal athletic opportunities because men who identify as female are competing in—and dominating—women’s sports. A male swimmer won the 500-yard freestyle at the 2022 NCAA Swimming and Diving Championship, knocking 15 women, including two Olympians, down the scoreboard.¹⁷ In Connecticut, two male track athletes won a combined 15 state championships and set 17 individual records in women’s track, repeatedly displacing female athletes.¹⁸ And in West Virginia, a male athlete beat over 100 different middle-school girls in shot put and discus, denying two girls the chance to compete in conference championships.¹⁹

States have an important interest in ensuring equal opportunity for women in sports. *Kelley v. Bd. of Trustees*, 35 F.3d 265, 272 (7th Cir. 1994) (complying with Title IX serves important interests under the Equal Protection Clause by ensuring equal athletic opportunity to women). That’s why 27 states have enacted laws or regulations that designate women’s sports teams only for females.²⁰ Many of

¹⁷ Katie Barnes, *Amid protests, Penn swimmer Lia Thomas becomes first known transgender athlete to win Division I national championship*, ESPN (Mar. 17, 2022), <https://es.pn/3Ty1HY6>.

¹⁸ *Soule v. Connecticut Ass’n of Schs., Inc.*, 90 F.4th 34 (2d Cir. 2023) (en banc).

¹⁹ Pet. for Writ of Cert., *W. Va. State Bd. of Educ. v. B.P.J.*, No. 24-43 (filed July 11, 2024).

²⁰ *Bans on Transgender Youth Participation in Sports*, Movement Advancement Project, <https://tinyurl.com/yc6rh4ae> (last visited Feb. 9, 2025).

these laws use birth certificates to identify a person's sex and determine eligibility to participate in women's sports. See, e.g., Tenn. Code Ann. § 49-7-180(b); Fla. Stat. Ann. § 1006.205(3)(d).

Science supports such efforts. The American Committee on Sports Medicine noted in an extensive expert statement that “[b]iological sex is a primary determinant of athletic performance because of fundamental sex differences in anatomy and physiology dictated by sex chromosomes and sex hormones.”²¹

Oklahoma's sports law does not currently use birth certificates but instead requires parents to “sign an affidavit acknowledging the biological sex of the student at birth.” Okla. Stat. Ann. tit. 70, § 27-106(D). Nevertheless, if that method proves insufficient, Oklahoma could follow other states and use its own vital records because accurate birth certificates facilitate equal opportunity and fairness for women in sports. And other states may rely on Oklahoma's vital records to determine who can compete in those states' women's sports. By ensuring the accuracy of its birth certificates, the State protects and provides equal opportunities for women and girls.

C. Military

Under the Military Selective Service Act, “every male citizen” must be registered in case they are conscripted into the armed forces. 50 U.S.C. 3802-03.

²¹ Sandra Hunter et al., *The Biological Basis of Sex Differences in Athletic Performance: Consensus Statement for the American College of Sports Medicine*, 8 *Translational J. Am. Coll. Sports Med.* (Fall 2023), <https://tinyurl.com/4y2z4c3x>.

And “every male” means “individuals who were designated male at birth.”²² So what about women who identify as men? To avoid the registration requirement, a woman who identifies as male can submit “a copy of [a] female birth certificate” to establish natal sex.²³

In these circumstances (or perhaps the situation of a male trying to duck registration by identifying as female), the Selective Service Department depends on the accuracy of the birth certificate to administer the draft and facilitate program eligibility determinations. If the federal government can legally use state birth certificates in this way, then certainly Oklahoma can ensure the accuracy of its birth certificates to assist the federal government in facilitating the draft, protecting national security, and determining eligibility in its own state programs where sex is relevant.

D. Education

Designating intimate spaces by sex goes back “as far as written history will take us.” W. Burlette Carter, *Sexism in the “Bathroom Debates”: How Bathrooms Really Became Separated by Sex*, 37 *Yale L. & Pol’y Rev.* 227, 287–88 (2018). By the time of the Fourteenth Amendment’s ratification in 1868, sex-assigned bathrooms were the norm in places like schools, department stores, railway stations, and hotels. Peter C. Baldwin, *Public Privacy: Restrooms in American Cities, 1869–1932*, 48 *J. of Soc. Hist.* 264,

²² *Request for Status Information Letter*, Selective Serv. Sys., <https://tinyurl.com/3mpbrrr2> (last visited Feb. 7, 2025).

²³ *Ibid.*

270–72 (2014); Carter, *supra*, at 277–78 (citing state regulations).

Recent events confirm the need to protect privacy and safety by creating sex-specific private spaces. Men and boys identifying as female have assaulted girls in school bathrooms and shower rooms.²⁴ On an overnight school trip, a school district assigned an 11-year-old girl to share a bed with a male classmate without giving advance notice to the girl or her parents.²⁵ And a school district assigned a “nonbinary” adult female to supervise a cabin of 11 and 12-year-old boys, including supervising their changing and showering.²⁶

Given these and similar events, state and local governments—including Oklahoma—have clarified that private spaces in K-12 public schools must be designated by sex, not gender identity. Okla. Stat. Ann. tit. 70, § 1-125. And many of these statutes define “sex” how Oklahoma does—by looking to a student’s sex “as identified on the individual’s original birth certificate.” *Ibid.* The federal courts should not use Equal-Protection principles to prohibit Oklahoma from advancing these important privacy interests by

²⁴ Salvador Rizzo, *Victim of School Bathroom Sexual Assault Sues Virginia School District*, Wash. Post (Oct. 5, 2023), <https://bit.ly/4181FrB>; Corrinne Hess, *U.S. Department of Education is Opening an Investigation into Sun Prairie Locker Room Incident*, Wis. Pub. Radio (Nov. 30, 2023), <https://bit.ly/3t5ao0W>.

²⁵ Melissa Koenig, *Parents Claim Daughter, 11, Was Forced to Sleep in Bed with Transgender Student on School Trip*, N.Y. Post (Dec. 6, 2023), <https://bit.ly/46LskLZ>.

²⁶ Mary Margaret Olohan, *School District Had Trans-Identifying Female Supervise Young Boys Showering, Lawsuit Alleges*, Daily Wire (Sept. 5, 2024), <https://tinyurl.com/2p9kaadj>.

ensuring the accuracy of sex designations in its state birth certificates. The proper administration of Oklahoma's law depends on this accuracy.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

CHLOE K. JONES
ALLIANCE DEFENDING
FREEDOM
1000 Hurricane Shoals
Rd. NE, Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774

JAMES A. CAMPBELL
JOHN J. BURSCH
Counsel of Record
ALLIANCE DEFENDING
FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

FEBRUARY 2025