
IN THE
Supreme Court of the United States

J. KEVIN STITT, in his official capacity
as Governor of the State of Oklahoma, et al.,

Applicants,

v.

ROWAN FOWLER, et al.,

Respondents.

**Application to the Hon. Neil M. Gorsuch for an Extension of
Time Within Which to File a Petition for a Writ of Certiorari to
the United States Court of Appeals for the Tenth Circuit**

GENTNER DRUMMOND
Attorney General of Oklahoma

GARRY M. GASKINS, II
Solicitor General

CULLEN D. SWEENEY
Assistant Solicitor General

ZACH WEST
*Director of Special Litigation
Counsel of Record*

OKLAHOMA OFFICE OF THE
ATTORNEY GENERAL
313 NE Twenty-First St.
Oklahoma City, OK 73105
zach.west@oag.ok.gov

Pursuant to Supreme Court Rule 13.5, Oklahoma Governor Kevin Stitt, Oklahoma Health Commissioner Keith Reed, and Oklahoma Registrar of Vital Records Kelly Baker (“Applicants”) respectfully request that the time to file their petition for a writ of certiorari in this matter be extended for 11 days, up to and including December 20, 2024. Absent an extension of time, the petition for a writ of certiorari would be due on December 9, 2024.

In support of this request, Applicants state as follows:

1. The U.S. Court of Appeals for the Tenth Circuit rendered its decision on June 18, 2024 (Exhibit 1). The Tenth Circuit declined to rehear the case *en banc* on September 9, 2024 (Exhibit 2). This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

2. This case concerns a state’s authority to document a person’s sex, permanently, on its own official, government-issued birth certificate. Below, three individuals (“Respondents”) sued, alleging that Oklahoma’s declining to amend the biological sex designation on official Oklahoma birth certificates to reflect Respondents’ current gender identity violates the Free Speech Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment.

3. The district court dismissed the case for failure to state a claim. *See Fowler v. Stitt*, 676 F. Supp. 3d 1094 (N.D. Okla. 2023). Respondents failed to state a First Amendment claim, the court concluded, in part because declining to amend the sex

designation on birth certificates does not restrict Respondents’ speech or compel them to speak in any way. *Id.* at 1105–08. Respondents failed to state a due process claim, it found, in part because “the right to amend the sex designation on [a] birth certificate to be consistent with ... gender identity” is not “fundamental to our scheme of ordered liberty[,]” as determined by history and tradition. *Id.* at 1116. The court further held that Oklahoma law does not discriminate against a suspect class for equal protection purposes, and holding that transgender status constitutes a suspect class would “disrupt the necessary balance between the judicial branch and the democratic process.” *Id.* at 1124. To conclude, the court found Oklahoma law survived rational basis by furthering at least two legitimate state interests: protecting the integrity and accuracy of vital records and using those records to protect the interests of women. *Id.* at 1125–27.

4. Respondents appealed to the Tenth Circuit (abandoning their First Amendment claim in the process). The Tenth Circuit affirmed the district court’s dismissal of Respondents’ due process claim but reversed on equal protection grounds. *See Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024). First, the panel inferred the plausible existence of discriminatory intent against transgender persons on three grounds: (1) a purported “disparate impact on transgender people”; (2) “the events leading up to the Policy’s adoption”—mostly, a single acknowledgement of God as Creator made by Governor Stitt; and (3) Oklahoma’s supposed “inability to proffer a legitimate justification for the Policy,” which “suggests it was motivated by animus towards transgender people.” *Id.* at 786–88.

5. Next, the Tenth Circuit held that because Oklahoma’s policy “discriminates based on transgender status, it necessarily discriminates on the basis of sex as well.” *Id.* at 788. For this, the panel relied on this Court’s decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020). Despite *Bostock*’s express caution that it was not prejudging any other law or “address[ing] bathrooms, locker rooms, or anything else of the kind,” *id.* at 681, the panel applied *Bostock* wholesale to the equal protection claim. *Fowler*, 104 F.4th at 788–94. Dissenting on this point, Judge Hartz criticized the panel for relying 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.” *Id.* at 801 (Hartz, J., dissenting). He cautioned that *Bostock* “does not translate to the circumstance we confront in this case.” *Id.* He would have held that Respondents did not sufficiently plead a sex discrimination case.

6. Finally, the Tenth Circuit held that Oklahoma’s decision not to replace a biological sex designation with a gender identity designation on a birth certificate lacks a rational basis. *Id.* at 794–97. 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 historical accuracy because Oklahoma maintains a copy of the original certificate, and it rejected the interest of fraud prevention offered by numerous amici States in support of Oklahoma because it was supposedly too speculative. *Id.* In so holding, the panel relied on a Southern District of

Ohio case that expressly applied strict scrutiny. *Id.* at 796 (citing *Ray v. Himes*, No. 2:18-cv-272, 2019 WL 11791719 (S.D. Ohio Sept. 12, 2019)).

7. Less than a month later, the Sixth Circuit upheld the dismissal of an identical equal protection challenge to Tennessee’s birth certificate law. *See Gore v. Lee*, 107 F.4th 548 (6th Cir. 2024). The Sixth Circuit held that “Tennessee’s policy is simply a nondiscriminatory form of government speech embraced by some States about an undeniable historical fact.” *Id.* at 559. With Chief Judge Sutton writing, the Sixth Circuit expressly criticized the Tenth Circuit’s reasoning in this very case. *See id.* at 561. Specifically, the Sixth Circuit found that the Tenth Circuit’s “approach misunderstands rational basis review,” which is supposed to be a “deferential standard” that “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.* In the end, “Tennessee, like all States, records a fact of birth: the biological sex of the child,” the Sixth Circuit held. “A policy requiring an error before changing that record rationally correlates with the State’s interest in consistency and historical accuracy.” *Id.*

8. The Tenth Circuit’s equal protection ruling cannot be reconciled with this Court’s precedent or with the Sixth Circuit’s opinion to the contrary, making this case worthy of this Court’s review.

9. The time to file a petition for a writ of certiorari on this issue should be extended for 11 days because of conflicts with the schedules of several of Applicants’ counsel. Most significant at present, the Oklahoma Attorney General’s Office has

No. _____

responses to two petitions for certiorari due on the same day, December 9, 2024, as the present petition is due. *See Oklahoma Statewide Charter Sch. Bd. v. Drummond*, No. 24-394; *St. Isidore v. Drummond*, No. 24-396.

10. For the foregoing reasons, Applicants request that an extension of time, up to and including December 20, 2024, be granted within which they may file a petition for a writ of certiorari.

Respectfully submitted,



Zach West, OBA No. 30768
Director of Special Litigation
OFFICE OF THE ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
P: (405) 521-3921
E: zach.west@oag.ok.gov

Counsel for Applicants