No. 24-801

IN THE

Supreme Court of the United States

KEVIN STITT, in his official capacity as GOVERNOR 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 IN OPPOSITION

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QUESTION PRESENTED

For at least 14 years, Oklahoma provided transgender people amended birth certificates listing sex designations consistent with their gender identity. As with other amended birth certificates, Oklahoma retained the original birth certificates. In 2021, Oklahoma's Governor abruptly reversed course and categorically banned transgender people from changing the sex designation on their birth certificates.

The question presented is:

Did the Tenth Circuit correctly hold that Respondents plausibly alleged that Oklahoma's decision to stop providing transgender people amended birth certificates stating their sex consistent with their gender identity violated their equal protection rights?

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INTRODUCTION

The Petition for a Writ of Certiorari in this case should be denied for the simple reason that it is premature. And even if the issue were ripe for this Court's review, review is unwarranted because the decision below faithfully applies this Court's precedents and takes proper account of the specific circumstances underlying the equal protection claim in this case.

To the extent there is a division of authority over the constitutionality of laws banning transgender people from amending their birth certificates, it is shallow and recent: Only two courts of appeals have weighed in, and both just in the last year. As the Tenth Circuit's decision below shows, the answer may depend on the circumstances on the ground. Additional courts, assessing different fact patterns, could illuminate important aspects of the constitutional question in a way that would aid this Court in any future review.

This Court's imminent decision in *United States v. Skrmetti*, No. 23-477, further weighs against review at this juncture. Although the level of scrutiny that applies to discrimination against transgender people was not decisive in this case, lower courts should have a chance to apply *Skrmetti* to other fact patterns before this Court decides the next case about the rights of transgender people.

Moreover, the case comes to the Court in an interlocutory posture, at the pleading stage. The Tenth Circuit reversed the grant of Petitioners' motion to dismiss, sending this case back to the district court for

further proceedings, including fact development. Any subsequent judgment can be challenged in this Court, on a full record, with proper fact development and application of the most recent relevant law. There is therefore no need to hold or grant this Petition, vacate the judgment below, and remand to the Tenth Circuit in light of *Skrmetti*. What is more, the Tenth Circuit's decision ultimately relied on a rational basis analysis; it did not rest on the heightened scrutiny this Court is considering in *Skrmetti*. Because the Tenth Circuit's decision stands on grounds independent of *Skrmetti*, there is no reason to remand in light of *Skrmetti*.

The Tenth Circuit's conclusion that Respondents plausibly alleged an equal protection claim under rational basis review was well founded. In arguing to the contrary, Petitioners attack an imaginary opinion. They rail against a decision that supposedly renders *any* government reference to sex irrational. The decision below does no such thing. Rather, it faithfully applies this Court's precedents to recognize the plausibility of a challenge to a policy that targets transgender people and strips them—and them alone—of their ability to rely upon a foundational identity document.

The Petition should be denied.

STATEMENT OF THE CASE

Gender identity is a person's core internal sense of their own gender.[1] For most people, their sex assigned at birth accords with their gender identity. Pet. App. 5a. For transgender people, however, their sex assigned at birth conflicts with their gender identity, and that conflict can cause gender dysphoria. *Id.* Treatment for gender dysphoria includes living in a manner consistent with gender identity, or "transition[ing]." *Id.* An essential part of transitioning is amending the name and sex designation on identity documents, like drivers' licenses, passports, and birth certificates. Pet. App. 6a.

Birth certificates are not just historical records. They are current identity documents, used for a variety of purposes, like enrolling in school, applying for jobs, obtaining professional licenses, and securing other documents, like voter identifications, tribal membership cards, and social security cards. Pet. App. 6a.

Depriving transgender individuals of identity documents that match their gender identity imperils their ability to participate fully, equally, and safely in public life. When the sex listed on an identity document does not align with a person's gender presentation, the mismatch reveals an individual's transgender status. That is information individuals

[1] Because this case comes up on a motion to dismiss, we rely on the allegations in the complaint and the Tenth Circuit's factual recitation, which likewise takes as true the complaint's well-pleaded allegations. Pet. App. 4a.

may wish to keep private, especially when applying for jobs or interacting with the government, or even just going about their daily lives.

Transgender people have good reason to be cautious: One national survey revealed that nearly one third of respondents who had shown an identity document with a name or gender that did not match their gender presentation were verbally harassed, denied benefits or services, or assaulted. Pet. App. 140a (complaint); Pet. App. 13a.

For 14 Years, Transgender Oklahomans Could Obtain Amended Birth Certificates Consistent With Their Gender Identity

Oklahoma has long permitted people to amend their birth certificates for a variety of reasons—including to change information that was correct at the time of birth. For instance, if a person changes their name, that person can amend their birth certificate to reflect their new name. Okla. Stat. tit. 63, § 1-321(C). Similarly, Oklahoma issues revised birth certificates to reflect the names of adoptive parents, even though the original birth certificates correctly listed the child's biological parents. *Id.* § 1-316.

By 2007 (if not earlier), the Oklahoma State Department of Health (OSDH) also allowed transgender people to amend the sex designation on their birth certificates. Pet. App. 6a-7a. As in the case of other amendments, OSDH retained copies of the original birth certificates. Pet. App. 45a.

For at least 14 years, transgender Oklahomans sought and received amended birth certificates without issue. Pet. App. 142a (complaint). Nationally during this period, 47 states, the District of Columbia, and Puerto Rico likewise allowed transgender people to amend the sex designation on their birth certificates, while the federal government permitted the same change on passports. Pet. App. 9a.

Oklahoma's Abruptly Changes Its Policy On Amending Birth Certificates

In 2021, Oklahoma's Governor Stitt abruptly changed course—but not because of any problems that had emerged from its longstanding practice, as there had been none. Rather, he did so after learning that OSDH had agreed, as part of a settlement, to issue an amended birth certificate to a plaintiff, whose gender identity did not match their sex assigned at birth, with a gender-neutral designation. Pet. App. 7a-8a. Governor Stitt released a statement explaining his reasoning. He said, "I believe that people are created by God to be male or female. Period." Pet. App. 7a. "There is no such thing as non-binary sex," he continued, "and I wholeheartedly condemn the OSDH court settlement that was entered into by rogue activists who acted without receiving proper approval or oversight." And he vowed: "I will be taking whatever action necessary to protect Oklahoma values." Pet. App. 70a.

The very next day, the commissioner of OSDH resigned. Pet. App. 70a. Soon after, Governor Stitt issued an executive order prohibiting OSDH from

amending birth certificates to "in any way alter a person's sex or gender on a birth certificate," such as changing a male designation to a female designation for a transgender woman. Pet. App. 8a.[2]

Oklahoma continues to permit other amendments to birth certificates that reflect post-birth changes, for instance, to legal name and related to adoption. Pet. App. 68a.

Respondents Challenge The Birth Certificate Policy

Respondents are transgender people born in Oklahoma who want the same thing every other Oklahoman is afforded: birth certificates they can use for identification. Pet. App. 6a. For Respondents, that requires amending the sex designation on their birth certificates so that it is consistent with their gender identity, and they can thus be accurately identified as

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[2] A law passed several months later provides that sex designations on birth certificates "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.'" Okla. Stat. tit. 63, § 1-321(H). Because designating a transgender man as "male" and a transgender woman as "female"—which is what Respondents want their certificates to say—does not involve any "nonbinary" designation, it is the Governor's directive, and not the law, that bars the amendment Respondents seek and is the subject of this suit. *See* Pet. App. 149a, 154a, 158a (OSDH denied Respondents' requests based on executive order); *contra* Pet. 27. Legislation that would have expanded that law's prohibition to include the male and female designations at issue here was proposed but failed to pass. H.B. 3219, 59th Leg., Reg. Sess. (Okla. 2024).

the holders of the certificates. Each Respondent received state court orders permitting the amendment, Pet. App. 9a-13a, but now cannot obtain the amendment.

Respondents have all personally experienced hassle, harassment, and humiliation when presenting identity documents discordant with their gender identity. *See* Pet. App. 9a-13a. When Ms. Fowler, for instance, presented identification in the past outing her as a transgender woman, she was openly denied service by a business on one occasion and attacked with a derogatory slur on another, causing her to fear for her safety whenever leaving her home for months afterward. Pet. App. 151a-152a. When Mr. Hall and Mr. Ray were unable to present identity documents consistent with their gender identity, they encountered problems in interacting with financial institutions and updating other forms of identification. Strangers also interrogated their identity. Pet. App. 155a-160a. Each of these experiences chipped away at Respondents' dignity, privacy, security, and, indeed, their basic sense of belonging in the community.

Respondents sued under 42 U.S.C § 1983. As relevant here, they claimed that Oklahoma's policy prohibiting transgender Oklahomans from amending their birth certificates violates the Equal Protection Clause. Respondents did *not* challenge Oklahoma's practice of recording sex assigned at birth on original birth certificates and retaining those original certificates after amendment. Pet. App. 28a, 45a.

At Petitioners' request, the district court stayed all discovery and granted Petitioners' motion to dismiss. Pet. App. 76a, 126a. At the threshold, the court held that government discrimination against transgender people triggers only rational basis review, reasoning that such discrimination is not sex-based and that classifications based on transgender status are not suspect or quasi-suspect. Pet. App. 116a-117a, 120a. And the court found Respondents could not state a plausible claim under rational basis review because the policy furthers the government's asserted interests in promoting the accuracy of its records and "protecting" cisgender women from, for instance, transgender women participating in sports. Pet. App. 122a-124a.

The Tenth Circuit Reverses The Dismissal Of Respondents' Equal Protection Claim

Like the district court, the Tenth Circuit ultimately applied rational basis review. But the Tenth Circuit disagreed with the district court's conclusion that Respondents failed to plausibly allege an equal protection violation and reversed the dismissal of Respondents' equal protection claim.

Over Petitioners' protestations of neutrality, the Tenth Circuit first held that the birth certificate policy purposefully discriminates against transgender people under the "totality of the relevant facts" test of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). Pet. App. 26a. Key to the court's conclusion were the "events leading up to the Policy's adoption," Pet. App.

28a, including the State's history of allowing amendments, Governor Stitt's public explanation of the change, and his directive to bar amendments. *See Arlington Heights*, 429 U.S. at 267 (holding that departures from normal processes can indicate "improper purposes are playing a role" including when a practice "suddenly was changed"). This, together with the policy's obvious impact on transgender people, satisfied the Tenth Circuit that the policy intentionally discriminates against transgender people. Pet. App. 29a.

The Tenth Circuit next concluded that the birth certificate policy triggers heightened scrutiny because discrimination against transgender people is sex discrimination per *Bostock v. Clayton County*, 590 U.S. 644 (2020). Pet. App. 32a-33a. The Tenth Circuit "decline[d] to decide" if the policy separately triggers heightened scrutiny because discrimination against transgender people constitutes a quasi-suspect classification. Pet. App. 43a.

Ultimately, however, the Tenth Circuit held that it is plausible that the birth certificate policy fails even rational basis review. Pet. App. 43a. The court assumed the legitimacy of the proffered and possible state interests—"protecting the integrity and accuracy of vital records," "protecting 'the interests of women'" in athletics, "preventing fraud," and "conserving resources," Pet. App. 44a, 47a. But the court found that Respondents had plausibly alleged that the policy does not rationally further those interests. The ill-fit was best illustrated by the fact that Oklahoma retains original birth certificates. Just as it had the ability to do for the 14 years preceding the policy (if not longer), Oklahoma can serve its interests by

referencing the original certificates. And providing Respondents with copies of amended certificates that they can use in no way impedes those interests.

Petitioners' petition for rehearing *en banc* was denied without a vote or noted dissent.

The case is now proceeding in the trial court, where Respondents are attempting to take discovery.

REASONS TO DENY CERTIORARI

This Court should deny certiorari for at least three reasons: (1) the shallow nature of the split over this issue, which *Skrmetti* could affect in other, future cases, calls for further percolation; (2) the preliminary posture renders this case a poor vehicle for either plenary review or a hold and GVR in light of *Skrmetti*; and (3) the decision below is correct.

I. Any Split Is Shallow At Best And Would Benefit From Further Percolation.

A. Petitioners and their amici urge the Court to grant review to resolve a division in authority. But the circuit conflict Petitioners assert is shallow and recent: By Petitioners' own count, only two courts of appeals have weighed in on the constitutionality of birth-certificate amendment bans, and both did so just in the past year. Pet. 14-15.

The Court should wait for more courts to weigh in. And they will: Multiple jurisdictions have recently banned amendments to sex designations on identity documents. *Compare* Pet. App. 9a (observing that only three States bar changes to sex designations on

birth certificates), *with Gore v. Lee*, 107 F.4th 548, 553 (6th Cir. 2024) (observing more recently that six States bar such amendments).[3] That includes the federal government, which has recently rescinded its policy permitting transgender people to change the sex listed on their passports.[4] That policy is currently being challenged, including on First Amendment and substantive due process grounds that are not raised in the Petition here. *See* Class Action Complaint, *Orr v. Trump*, No. 1:25-cv-10313 (D. Mass Feb. 7, 2025). That, and other challenges, will provide the Court with the "guidance" from "[o]ther circuits" and the "adversarial testing on which [it] usually depend[s]." *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part).

B. Further ventilation of the issue will surface the full range of considerations—both factual and legal—that bear on this constitutional question. It is generally "desirable to have different aspects of an issue further illumin[ated] by the lower courts," *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950), and that is particularly true here.

Just compare the Tenth and Sixth Circuit decisions. The Tenth Circuit relied in part on circumstances not present in the Sixth Circuit case,

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[3] For up-to-date information, see *Equality Maps: Identity Document Laws and Policies*, Movement Advancement Project, https://tinyurl.com/2ew2x3ub (last visited Apr. 9, 2025) (listing eight States with bans).

[4] Jaclyn Diaz, *Trump's Passport Policy Leaves Trans, Inter-Sex Americans in the Lurch*, NPR (Feb. 21, 2025), https://tinyurl.com/n8y4x2b7.

including Oklahoma's abrupt change to its longstanding amendment-permissive policy, statements by the Governor targeting transgender individuals, and the fact that transgender people could obtain drivers' licenses with sex designations consistent with their gender identity. *Compare* Pet. App. 28a-30a, 45a-46a, *with Gore*, 107 F.4th at 560; *id.* at 568 n.2 (White, J., dissenting). And unique features of Oklahoma law further attenuate the rational connection Oklahoma seeks to draw to its interests. *Infra* 21-24 (discussing, e.g., access to original records in Oklahoma; Oklahoma's treatment of drivers' licenses). Different fact patterns and additional analysis might illuminate important aspects of the constitutional question that would aid this Court in any future review.

What is more, the briefs in this Court show that States and their supporters are still working out their justifications for restrictive amendment policies. *Compare* Pet. 16-19 (offering five rationales), *with* Pet. App. 44a (observing that Petitioners offered only two rationales); *see* Alliance Defending Freedom (ADF) Br. 18-26 (raising rationales related to medicine, military, and education not raised below).[5]

C. It is especially imprudent to grant review at this time because the Court's forthcoming decision in *Skrmetti* may affect how other courts evaluate restrictions on amending identity documents, including birth certificates. *Skrmetti* is poised to address whether and when policies that discriminate against transgender people trigger heightened scrutiny. The

[5] This, and other citations to the views of amici, refer to the briefs filed in support of the Petition.

Tenth Circuit did not find that the level of scrutiny was decisive under the specific circumstances present here: It held that Respondents made out a claim even under rational basis review. *Skrmetti* is thus unlikely to have any effect on the Tenth Circuit's rational basis holding here. But in other jurisdictions evaluating similar questions on different sets of facts, the level of scrutiny might matter.

There is no good reason to preempt this percolation. Petitioners have not identified any injury they would suffer from denying review at this time. There is, for instance, no injunction in place requiring Petitioners to issue amended birth certificates. *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945 (2012) (Alito, J., concurring) (respecting the denial of certiorari where "no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take"). Nor do the two diverging decisions create any confusion for those subject to the law. The decisions apply to the policies of distinct jurisdictions, with one allowed to stand and the other still under review.

II. The Preliminary Posture Renders This Case A Poor Vehicle For Plenary Review Or A GVR.

The Petition should be denied for the additional reason that the judgment below is only preliminary. That makes it a poor candidate for both plenary review and a hold and GVR.

As to plenary review, the interlocutory posture "alone furnishe[s] sufficient ground for the denial" of

a petition for a writ of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). The Tenth Circuit reversed the grant of Petitioners' motion to dismiss and remanded the case "for further proceedings consistent with [its] decision." Pet. App. 55a. Those further proceedings will include fact development. *Supra* 10. If this Court is inclined to weigh in, it should wait for a final decision with a complete record.

The case's preliminary posture also obviates the need to hold this case and ultimately grant, vacate, and remand in light of *Skrmetti*. As mentioned, the Tenth Circuit did not enter final judgment for Respondents or bar Petitioners from enforcing the policy, not even on a preliminary basis. Rather, the Tenth Circuit remanded for further proceedings, which are ongoing. The lower courts, then, will have the opportunity to determine what effect, if any, this Court's decision in *Skrmetti* has on Respondents' equal protection claim, this time on a complete record. And later, this Court will have the chance to consider reviewing that (or any other) determination, again, on a complete factual record.

It would be especially ill-advised to grant and vacate the Tenth Circuit's current judgment because it does not turn on the principal question in *Skrmetti*—what level of scrutiny applies to Tennessee's ban on

gender affirming care for minors. The *Skrmetti* parties are divided as to whether the ban in that case triggers heightened scrutiny, and on what basis—because it facially classifies on the basis of sex, because discrimination against transgender individuals is sex discrimination per *Bostock*, or because transgender status is a quasi-suspect classification. Although the Tenth Circuit agreed that the policy in this case warrants heightened scrutiny for the second of these reasons, the outcome did not turn on that conclusion. Rather, the court held that, on the record and arguments before it, the policy plausibly fails even rational basis review, and rightly so. *See infra* III.

What is more, on the antecedent question—whether the birth certificate policy discriminates against transgender individuals in the first place—the Tenth Circuit relied on a legal framework, *Arlington Heights*, that was not litigated in *Skrmetti*. *See* Transcript of Oral Argument at 138, *Skrmetti*, No. 23-477 (U.S. Dec. 4, 2024); *see infra* III.A (discussing the *Arlington Heights* holding).

In short, while it makes good sense to let the *issue* of the constitutionality of birth certificate amendment bans percolate in light of *Skrmetti*, there is no reason to hold and GVR this *case* in light of *Skrmetti*.

III. The Decision Below Follows This Court's Precedents And Is Correct.

Apart from all the above, the Court should deny the Petition because the Tenth Circuit's decision is correct. In arguing to the contrary, Petitioners attack

the integrity and competence of the Tenth Circuit, accusing the court of being "incapable of thinking rationally on this topic" and unwilling to "[]ever let stand a rational and non-discriminatory birth certificate policy like Oklahoma's." Pet. 24-25. In truth, the Tenth Circuit's decision faithfully follows this Court's precedents and is limited in its impact.

A. The Tenth Circuit was right that Oklahoma's policy discriminates against transgender people.

1. Petitioners' first misguided attack accuses the Tenth Circuit of finding discrimination where there is purportedly none. According to Petitioners, Oklahoma's policy affects "everyone"— "everyone has a sex" that is "recorded," after all—and so the policy does not discriminate against "anyone." Pet. 25-26; *see* ADF Br. 13 (similar).

The Tenth Circuit correctly applied well-settled precedent in rejecting Petitioners' protestation of neutrality. As the Tenth Circuit recognized, even if the policy could be viewed as "facially neutral," it can still constitute "purposeful discrimination." Pet. App. 22a (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)); *contra* Pet. 25 (arguing that "[t]he inquiry should have ended" with the Tenth Circuit's admission that the policy "appears facially neutral"). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. That "sensitive inquiry" is just what the Tenth Circuit performed when it assessed disparate impact,

the "historical background" of the policy, and the "sequence of events leading up to" it. Pet. App. 26a (quoting *Arlington Heights*, 429 U.S. at 267).

Petitioners have no grounds to attack the Tenth Circuit's fact-bound analysis on this front.

Petitioners insist, for example, that the policy does not "disparately impact" transgender individuals. Pet. 26. But not even the Sixth Circuit in *Gore* went that far. After all, who else does the policy injure? Indeed, the policy deprives *only* transgender people, not cisgender people, of a birth certificate consistent with their gender identity that they can use to navigate through life. Pet. App. 26a.

Petitioners and their amici also misunderstand the Tenth Circuit's review of the sequence of events leading to the anti-amendment policy. Petitioners accuse the court of "antipathy for religion," Pet. 28, because it cited Governor Stitt's public explanation for reversing course and refusing to allow transgender people to amend their birth certificates, which included his belief that "people are created by God to be male or female. Period," Pet. App. 28a-29a. But the Tenth Circuit did not need to find—and did not find—that Governor Stitt's statements themselves proved the existence of "bigotry" or "animus." *Contra* DeSantis Br. 8-9. The "intent to discriminate" required for an equal protection claim is merely the "intent to treat differently"—not "animus, hatred, or bigotry." Pet. App. 23a (internal quotations omitted). Nor did it matter that the statements had anything to do with religion—a point the Tenth Circuit emphasized. Pet.

App. 29a (stressing that Respondents "are not challenging the Governor's right to express his [religious] beliefs"); *contra* DeSantis Br. 5-8; Pet. 28. Rather, the statements were one factor, along with the other *Arlington Heights* factors, that illustrate "that the Policy was implemented 'at least in part because of' the effect it would have on transgender people." Pet. App. 29a (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). That is, the statements simply "show the intent of the Policy is to target transgender people." *Id.* The Tenth Circuit only needed to make that otherwise obvious point clear because Petitioners denied it.[6]

What is more, the Tenth Circuit's conclusion that the policy discriminates can stand on the alternative ground—briefed below, but not decided by the Tenth Circuit—that the policy *facially* discriminates on the basis of transgender status and sex. Pet. App. 23a-26a, 31a n.12.

2. After failing to refute the existence of discrimination against transgender people, Petitioners move on to arguing that such discrimination does not trigger heightened scrutiny. First, Petitioners challenge the Tenth Circuit's alternative holding that the policy

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[6] Petitioners oddly insist that the Governor's statements do not evince disfavor with transgender people changing their sex designations, only with non-binary people changing to a gender-neutral designation. Pet. 27-28. But even Petitioners' amici recognize that Governor Stitt expressed a view that sex is "immutable," which "[o]bviously" "'demonstrates disfavor with people amending their birth certificates to change the sex designation.'" DeSantis Br. 2, 5 (quoting Pet. App. 29a).

is subject to heightened scrutiny because discrimination against transgender individuals is discrimination on the basis of sex. Pet. 32-38. Petitioners also dispute the point—not passed on by the Tenth Circuit below—that transgender status is a quasi-suspect classification. Pet. 29-31. Petitioners are wrong about both, but there is no need to belabor the points, for they are not outcome determinative in this case and were ably briefed by the Petitioners in *Skrmetti*, which already presents a vehicle for resolving these questions. *See also* Respondents' Tenth Cir. Opening Br. 17-30.

B. The Tenth Circuit was right that Oklahoma's policy plausibly fails even rational basis review.

In finding that Respondents plausibly alleged in their complaint that Oklahoma's policy fails rational basis review, the Tenth Circuit correctly articulated and applied the law in accordance with this Court's precedents.

1. As to the legal standard, the Tenth Circuit adhered to the "bedrock rational basis principles" that Petitioners accuse the court of "blatantly contraven[ing]." Pet. 20.

For starters, the court recognized that, as the challengers to the policy, Respondents "have the burden to negative every conceivable basis which might support it." Pet. App. 43a (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); *contra* Pet. 19 (claiming the Tenth Circuit did not mention that laws are presumed valid under rational basis review).

And it reiterated that "conceived reason" need not be "the actual motivation" behind the state action. Pet. App. 44a (citing *Beach Commc'ns*, 508 U.S. at 315). The court likewise acknowledged its limited role: "the proposed justification [for the state action] 'is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" Pet. App. 43a (quoting *Beach Commc'ns*, 508 U.S. at 315).

If anyone "misunderstands rational basis review," it is Petitioners. Pet. 15 (quoting *Gore*, 107 F.4th at 561). Relying on *Gore*, they fault the Tenth Circuit here for supposedly failing to recognize that rational basis review "requires only that 'some plausible reason' supports the classification, no matter how imprudent or ineffective." *Gore*, 107 F.4th at 561 (citation omitted); *see* Pet. 22 (quoting this language). But the Sixth Circuit forgets that the government must not only have a "plausible policy reason for the classification"; the classification must also "rationally further[]" that interest. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). When a policy is utterly ineffective, "the relationship [between] the classification [and] its goal is … so attenuated as to render the distinction arbitrary or irrational." *Id.*

2. As to the application of that law to the facts here, the Tenth Circuit again made no error. The Tenth Circuit did *not* hold that the asserted state interests are irrational or illegitimate. *Contra* States' Br. 1, 9. To the contrary, the Tenth Circuit expressly assumed all the state interests are "legitimate" ones. Pet. App. 45a-46a. The problem is that Oklahoma's policy does not rationally further its interests. *See*

Pet. App. 45a-48a; *see also* Pet. App. 30a ("[T]he Policy is wholly disconnected from Defendants' proffered justifications."). Here, too, the Tenth Circuit was correct.

Start with Petitioners' interest in accurately recording facts reported at birth. That is not "rationally related to the Policy" for at least one simple reason: Oklahoma "retains and has access to the original birth certificate[] … regardless of whether the Policy exists." Pet. App. 45a. Contrary to Petitioners' and amici's contention, government officials and others *can* access the originals for a variety of purposes; indeed, even the public can verify a person's sex assigned at birth. *See* Okla. Stat. tit. 63, § 1-323(A)-(C).[7] And Petitioners' insistence that Oklahoma's policy furthers accuracy flies in the face of its own acknowledgment that Oklahoma allows amendments to other facts accurately recorded at birth, like name and biological parents. Pet. 23.

Tellingly, Oklahoma's Petition does not claim that its policy rationally furthers an interest in accurate *identification*. Nor could it: Requiring a transgender woman like Ms. Fowler to present an identity document marked "male" does not rationally further her

[7] Petitioners incorrectly assert that amended birth certificates cannot be "'subject to inspection except upon order of a court of competent jurisdiction or as otherwise specifically provided by law.'" Pet. 20-21. That language comes from a provision that concerns "new" birth certificates issued, for instance, in connection with adoptions. Okla. Stat. tit. 63, § 1-316. A separate provision addresses "[a]mend[ed]" birth certificates, which are at issue here. *Id.* § 1-321.

ability to be accurately identified as the individual reflected on that document.

Petitioners respond by saying it does not matter if Oklahoma was actually motivated by an interest in accuracy, yet also insisting that it was. Pet. 20. That is a non-sequitur—the question is the fit, not the origin of the interest. And the existence of the originals shows the fit fails.

Petitioners' contention (at Pet. 21) that even amended certificates are government speech is likewise no defense. Government cannot shield its conduct—whether denying the amendment here or denying a benefit somewhere else—simply on the ground that the government claims to be advancing a message by engaging in that conduct. Were it otherwise, government could discriminate with impunity.

As to fraud prevention (Pet. 18), the Tenth Circuit rightly observed (Pet. App. 47a) that Petitioners failed to provide any explanation of *how* the policy even conceivably addresses fraud—a defect they make no effort to cure even now. Nor can they, for retention of, and access to, original certificates proves that the policy does not rationally further the State's interest in preventing fraud or errors in eligibility for benefits. *See* Pet. App. 47a; Okla. Stat. tit. 63, § 1-323(C)(4) (permitting electronic verification of birth certificates "for fraud protection"); *id.* § 1-323(C)(1) (same, for "[a] government agency in [the] conduct of its official business").

Likewise, the Tenth Circuit correctly recognized that Petitioners' interest in protecting women has no

connection to the policy. As to sex-separate athletics in public schools, "[b]irth certificates … are irrelevant to ensuring only students assigned female at birth compete on athletic teams designated for women or girls." Pet. App. 47a. After all, Petitioners concede that, by statute, Oklahoma relies on affidavits—not birth certificates—for this purpose. Pet. 23; Pet. App. 46a-47a; Okla. Stat. tit. 70, § 27-106(D). And even if Oklahoma wanted to use birth certificates, it could—regardless of the policy—because, again, it maintains the original birth certificates. Pet. App. 47a; Pet. 23. This, too, dooms Petitioners' "bodily privacy" and school restrooms argument. Pet. 17. Oklahoma law specifically looks to the sex "identified on the individual's *original* birth certificate"—not an amended certificate—for access to sex-separated facilities in public schools. Okla. Stat. tit. 70, § 1-125(A)(1) (emphasis added).

Next, Petitioners try and fail to defend their policy on the ground that it furthers the State's interest in "maintaining a consistent, historical, and biologically based definition of sex." Pet. 17. For one thing, Oklahoma has not consistently maintained a historical or "biologically based definition of sex"—it has previously allowed transgender people to amend the sex on their birth certificates and has allowed Respondents to amend their drivers' licenses. For another, mere adherence to a historical practice cannot justify a discriminatory law like this one. *See Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack"). In other words,

the practice has to be rational in its own right—it cannot stand just because it is old, broadly used, or simply preferred.

And Petitioners are still unable to offer any explanation—not even "rational speculation," Pet. App. 48a (quoting *Beach Commc'ns*, 508 U.S. at 315)—as to how its policy conserves resources. They do not even try, *see* Pet. 18-19, likely because that explanation would flounder on the fact that Petitioners permit a whole host of *other* amendments. *Supra* 4, 6. "[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1982). That is particularly true here where Respondents paid the requisite fee to amend their birth certificates just like other Oklahomans seeking to amend their birth certificates. Pet. App. 10a-12a.

Finally, and tellingly, Petitioners and their amici fail to grapple with the factual allegation that, for over a decade, Oklahoma—like nearly every other State—permitted transgender people to amend their birth certificates without giving rise to any of the problems the policy supposedly solves.

C. Petitioners and their amici greatly exaggerate the implications of the decision below.

Petitioners and their amici grossly overstate the implications of the Tenth Circuit's limited fact-bound rational basis ruling. According to them, "the Tenth Circuit makes … clear [that] every recognition of biological sex will eventually fall." Pet. 37; *see also* Pet.

19 ("The Tenth Circuit's [decision] … exposes a broader view that *any* reference to biological sex is irrational."); ADF Br. 13 (similar).

The Tenth Circuit, of course, did no such thing. In fact, the court expressly reaffirmed that "such [biological] differences exist and that they may be relevant to whether state action passes judicial scrutiny" in an appropriate case. Pet. App. 41a. And the court cited a case, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60, 64 (2001), in which this Court upheld a sex classification that was justified in part by biological differences related to sex. Pet. App. 41a; *contra* Pet. 19 (accusing the Tenth Circuit of being "at odds" with *Nguyen*).

The Tenth Circuit's reasoning confirms the limited nature of its ruling. The only question before the court was whether Respondents plausibly alleged that it is irrational for Oklahoma to bar transgender individuals from *amending* the sex designation on their birth certificates. No one—not Respondents and certainly not the Tenth Circuit—argued that it is irrational to record on an *original* certificate the sex assigned at birth. *See, e.g.*, Pet. App. 28a ("[Respondents] acknowledge Oklahoma's right to maintain the original birth certificate accurately recording the sex designation made at birth"); Pet. App. 45a (similar); *contra* ADF Br. 18 (wrongly asserting that "[t]he court declared that Oklahoma failed to provide *any* rational basis for designating sex on a person's birth certificate"); Pet. 19 (claiming the panel "left open the door" to invalidating "that practice" (emphasis omitted)). Quite the opposite. The Tenth Circuit reasoned that it is precisely because Oklahoma does (and may) make and retain such a record

that the government's various interests are not served by a policy barring amendment: If the government needs to confirm a person's sex assigned at birth, it can consult the original. *See* Pet. App. 45a-47a.

The Tenth Circuit's restraint in declining to hold that the amendment policy facially discriminates on the basis of sex, Pet. App. 31a n.12, is further proof that its opinion lacks the grand ambition Petitioners attribute to it.

CONCLUSION

The Court should deny the Petition for a Writ of Certiorari.

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