

No. 23-5080

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

ROWAN FOWLER, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On appeal from the United States District Court
for the Northern District of Oklahoma
The Hon. John W. Broomes
No. 4:22-cv-00115-JWB-MTS

Appellees' Appendix

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ORAL ARGUMENT IS REQUESTED

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APPEAL,CLOSED,DISCREP,STAY/D,VJASSIGN

**U.S. District Court
U.S. District Court for the Northern District of Oklahoma (Tulsa)
CIVIL DOCKET FOR CASE #: 4:22-cv-00115-JWB-MTS**

Fowler et al v. Stitt et al
Assigned to: Judge John W Broomes
Referred to: Magistrate Judge Mark T Steele
Case in other court: 10th Circuit, 23-05080 (#53)
Cause: 42:1983 Civil Rights Act

Date Filed: 03/11/2022
Date Terminated: 06/08/2023
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

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previously named as
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 Vital Records*

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Date Filed	#	Docket Text
03/14/2022	1	CIVIL COVER SHEET by C.R., Rowan Fowler, Allister Hall (Wilkins, Karen) (Entered: 03/14/2022)
03/14/2022	2	COMPLAINT against All Defendants (paid \$402 filing fee; receipt number AOKNDC-2576493) by Rowan Fowler, Allister Hall, C.R. (Wilkins, Karen) (Entered: 03/14/2022)
03/14/2022	3	ATTORNEY APPEARANCE by Karen Keith Wilkins on behalf of All Plaintiffs (Wilkins, Karen) (Entered: 03/14/2022)
03/14/2022	4	MOTION to Proceed Pseudonymously (Re: 2 Complaint) by C.R. (Wilkins, Karen) (Entered: 03/14/2022)
03/14/2022	5	MOTION for Attorney(s) Shelly L. Skeen to be Admitted Pro Hac Vice (paid \$50 PHV fee; receipt number AOKNDC-2576497) by C.R., Rowan Fowler, Allister Hall (With attachments) (Wilkins, Karen) (Entered: 03/14/2022)
03/14/2022	6	MOTION for Attorney(s) Nicholas Guillory to be Admitted Pro Hac Vice (paid \$50 PHV fee; receipt number AOKNDC-2576498) by C.R., Rowan Fowler, Allister Hall (With attachments) (Wilkins, Karen) (Entered: 03/14/2022)
03/14/2022	7	MOTION for Attorney(s) Peter C. Renn to be Admitted Pro Hac Vice (paid \$50 PHV fee; receipt number AOKNDC-2576499) by C.R., Rowan Fowler, Allister Hall (With attachments) (Wilkins, Karen) (Entered: 03/14/2022)
03/14/2022	8	SUMMONS Issued by Court Clerk as to Kelly Baker, Keith Reed, Kevin Stitt (bjb, Dpty Clk) (Entered: 03/14/2022)
03/14/2022	9	MINUTE ORDER by Judge Gregory K Frizzell <i>granting Motions for Admission Pro Hac Vice and ; adding attorney Shelly Lynn Skeen,Nicholas Arthur Guillory,Peter C Renn for C.R.,Shelly Lynn Skeen,Nicholas Arthur Guillory,Peter C Renn for Rowan Fowler,Shelly Lynn Skeen,Nicholas Arthur Guillory,Peter C Renn for Allister Hall ; granting 5 Motion for Admission Pro Hac Vice; granting 6 Motion for Admission Pro Hac Vice; granting 7 Motion for Admission Pro Hac Vice</i>

		(This entry is the Official Order of the Court. No document is attached.) (kjp, Dpty Clk) (Entered: 03/14/2022)
03/17/2022	10	ATTORNEY APPEARANCE by Peter C Renn on behalf of All Plaintiffs (Renn, Peter) (Entered: 03/17/2022)
03/17/2022	11	ATTORNEY APPEARANCE by Shelly Lynn Skeen on behalf of All Plaintiffs (Skeen, Shelly) (Entered: 03/17/2022)
03/17/2022	12	ATTORNEY APPEARANCE by Nicholas Arthur Guillory on behalf of All Plaintiffs (Guillory, Nicholas) (Entered: 03/17/2022)
04/22/2022	13	SUMMONS Returned Executed re: Kevin Stitt (Re: 2 Complaint) by Rowan Fowler, Allister Hall, CR (Wilkins, Karen) (Entered: 04/22/2022)
04/22/2022	14	SUMMONS Returned Executed re: Keith Reed (Re: 2 Complaint) by Rowan Fowler, Allister Hall, CR (Wilkins, Karen) (Entered: 04/22/2022)
04/22/2022	15	SUMMONS Returned Executed re: Kelly Baker (Re: 2 Complaint) by Rowan Fowler, Allister Hall, CR (Wilkins, Karen) (Entered: 04/22/2022)
05/04/2022	16	ATTORNEY APPEARANCE by Audrey A Weaver on behalf of Kelly Baker, Keith Reed, Kevin Stitt [Note: Attorney Audrey A Weaver added to party Kelly Baker(pty:dft), Attorney Audrey A Weaver added to party Keith Reed(pty:dft), Attorney Audrey A Weaver added to party Kevin Stitt(pty:dft).] (Weaver, Audrey) (Entered: 05/04/2022)
05/04/2022	17	ATTORNEY APPEARANCE by Bryan Cleveland on behalf of Kelly Baker, Keith Reed, Kevin Stitt [Note: Attorney Bryan Cleveland added to party Kelly Baker(pty:dft), Attorney Bryan Cleveland added to party Keith Reed(pty:dft), Attorney Bryan Cleveland added to party Kevin Stitt(pty:dft).] (Cleveland, Bryan) (Entered: 05/04/2022)
05/04/2022	18	ATTORNEY APPEARANCE by Zachary Paul West on behalf of Kelly Baker, Keith Reed, Kevin Stitt [Note: Attorney Zachary Paul West added to party Kelly Baker(pty:dft), Attorney Zachary Paul West added to party Keith Reed(pty:dft), Attorney Zachary Paul West added to party Kevin Stitt(pty:dft).] (West, Zachary) (Entered: 05/04/2022)
05/04/2022	19	Unopposed MOTION for Extension of Time to Answer (Re: 2 Complaint) by Kelly Baker, Keith Reed, Kevin Stitt (Weaver, Audrey) (Entered: 05/04/2022)
05/05/2022	20	ORDER by Judge Gregory K Frizzell ; granting 19 Motion for Extension of Time to Answer (Re: 2 Complaint, 4 MOTION to Proceed Pseudonymously) (lah, Chambers) (Entered: 05/05/2022)
07/29/2022	21	First AMENDED COMPLAINT against All Defendants (Re: 2 Complaint) by Rowan Fowler, Allister Hall, CR (Skeen, Shelly) (Entered: 07/29/2022)
08/17/2022	22	Unopposed MOTION for Extension of Time to Answer (Re: 21 Amended Complaint) by Kelly Baker, Keith Reed, Kevin Stitt (Weaver, Audrey) (Entered: 08/17/2022)
08/18/2022	23	ORDER by Judge Gregory K Frizzell ; setting/resetting deadline(s)/hearing(s): (Responses due by 8/26/2022, Replies due by 9/9/2022); granting 22 Motion for Extension of Time to Answer (Re: 4 MOTION to Proceed Pseudonymously) (lah, Chambers) (Entered: 08/18/2022)
08/26/2022	24	MOTION to Dismiss <i>and Brief in Support</i> by Kelly Baker, Keith Reed, Kevin Stitt (With attachments) (Weaver, Audrey) (Entered: 08/26/2022)
08/26/2022	25	RESPONSE in Opposition to Motion (Re: 4 MOTION to Proceed Pseudonymously) by Kelly Baker, Keith Reed, Kevin Stitt ; (Weaver, Audrey) (Entered: 08/26/2022)
08/31/2022	26	JOINT STATUS REPORT by CR, Rowan Fowler, Allister Hall (Skeen, Shelly) (Entered: 08/31/2022)
09/01/2022	27	MINUTE ORDER by Judge Gregory K Frizzell Pursuant to Fed.R.Civ.P. 16(b)(2), the Court finds good cause for delay in issuing a scheduling order in this case until resolution of pending motions. (This entry is the Official Order of the Court. No document is attached.) (lah, Chambers) (Entered: 09/01/2022)

09/01/2022	28	Unopposed MOTION for Extension of Time to Reply to Motion Response , Unopposed MOTION for Extension of Time to Respond to Motion (Re: 4 MOTION to Proceed Pseudonymously , 24 MOTION to Dismiss <i>and Brief in Support</i>) by CR, Rowan Fowler, Allister Hall (Guillory, Nicholas) (Entered: 09/01/2022)
09/01/2022	29	MINUTE ORDER by Judge Gregory K Frizzell ; setting/resetting deadline(s)/hearing(s): (Responses due by 9/30/2022, Replies due by 10/14/2022); granting 28 Motion for Extension of Time to Reply to Motion Response; granting 28 Motion for Extension of Time to Respond to Motion (Re: 24 MOTION to Dismiss <i>and Brief in Support</i> , 4 MOTION to Proceed Pseudonymously) (This entry is the Official Order of the Court. No document is attached.) (lah, Chambers) (Entered: 09/01/2022)
09/14/2022	30	MOTION for Attorney(s) Christina Paek to be Admitted Pro Hac Vice (paid \$50 PHV fee; receipt number AOKNDC-2677003) by CR, Rowan Fowler, Allister Hall (With attachments) (Wilkins, Karen) (Entered: 09/14/2022)
09/14/2022	31	MINUTE ORDER by Judge Gregory K Frizzell <i>granting plaintiffs' motion for admission pro hac vice [Doc. 30]. Christina Paek is admitted pro hac vice and is directed to file separate entry of appearance forthwith</i> ; granting 30 Motion for Admission Pro Hac Vice (This entry is the Official Order of the Court. No document is attached.) (kjp, Dpty Clk) (Entered: 09/14/2022)
09/23/2022	32	ATTORNEY APPEARANCE by Christina S Paek on behalf of All Plaintiffs [Note: Attorney Christina S Paek added to party CR(pty:pla), Attorney Christina S Paek added to party Rowan Fowler(pty:pla), Attorney Christina S Paek added to party Allister Hall(pty:pla).] (Paek, Christina) (Entered: 09/23/2022)
09/30/2022	33	RESPONSE in Opposition to Motion (Re: 24 MOTION to Dismiss <i>and Brief in Support</i>) by CR, Rowan Fowler, Allister Hall ; (Skeen, Shelly) (Entered: 09/30/2022)
09/30/2022	34	REPLY to Response to Motion (Re: 4 MOTION to Proceed Pseudonymously) by CR ; (Skeen, Shelly) (Entered: 09/30/2022)
10/06/2022	35	Unopposed MOTION to Withdraw Attorney(s) <i>Nicholas Guillory</i> by CR, Rowan Fowler, Allister Hall (Guillory, Nicholas) (Entered: 10/06/2022)
10/06/2022	36	ORDER by Judge Gregory K Frizzell ; terminating attorney Nicholas Arthur Guillory ; granting 35 Motion to Withdraw Attorney(s) (kjp, Dpty Clk) (Entered: 10/06/2022)
10/11/2022	37	ORDER by Judge Gregory K Frizzell ; denying 4 Motion for Miscellaneous Relief (Re: 4 MOTION to Proceed Pseudonymously) (lah, Chambers) (Entered: 10/11/2022)
10/14/2022	38	RESPONSE in Support of Motion (Re: 24 MOTION to Dismiss <i>and Brief in Support</i>) by Kelly Baker, Keith Reed, Kevin Stitt ; (Weaver, Audrey) (Entered: 10/14/2022)
11/07/2022	39	Joint STIPULATION <i>to Apply Pending Motion to Dismiss to Plaintiffs' Second Amended Complaint</i> (Re: 33 Response in Opposition to Motion, 38 Response in Support of Motion, 24 MOTION to Dismiss <i>and Brief in Support</i>) by CR, Rowan Fowler, Allister Hall (With attachments) (Paek, Christina) (Entered: 11/07/2022)
11/07/2022	40	ORDER by Judge Gregory K Frizzell (Re: 33 Response in Opposition to Motion, 38 Response in Support of Motion, 24 MOTION to Dismiss <i>and Brief in Support</i> , 39 Stipulation,) (kjp, Dpty Clk) (Entered: 11/07/2022)
11/07/2022	41	Second AMENDED COMPLAINT against All Defendants (<i>Kevin Stitt, Keith Reed, and Kelly Baker</i>) (Re: 21 Amended Complaint) by Rowan Fowler, Allister Hall, CR (Skeen, Shelly) (Entered: 11/07/2022)
01/11/2023	42	MOTION to Stay <i>Discovery Pending Resolution of Defendants' Motion to Dismiss</i> by Kelly Baker, Keith Reed, Kevin Stitt (With attachments) (Weaver, Audrey) (Entered: 01/11/2023)
01/11/2023	43	MINUTE ORDER by Judge Gregory K Frizzell <i>Plaintiffs shall respond to Defendants' Motion to Stay Discovery Pending Resolution of Defendants' Motion to Dismiss [Doc. 42] by January 18, 2023. Defendants' reply, if any, shall be filed by January 23, 2023.</i> (This entry is the Official Order of the Court. No document is attached.) (GKFJ, Judge) (Entered: 01/11/2023)

01/12/2023	44	ATTORNEY APPEARANCE by Garry Michael Gaskins, II on behalf of Kelly Baker, Keith Reed, Kevin Stitt [Note: Attorney Garry Michael Gaskins, II added to party Kelly Baker(pty:dft), Attorney Garry Michael Gaskins, II added to party Keith Reed(pty:dft), Attorney Garry Michael Gaskins, II added to party Kevin Stitt(pty:dft).] (Gaskins, Garry) (Entered: 01/12/2023)
01/12/2023	45	MOTION to Withdraw Attorney(s) <i>Bryan Cleveland</i> by Kelly Baker, Keith Reed, Kevin Stitt (Weaver, Audrey) (Entered: 01/12/2023)
01/12/2023	46	ORDER by Judge Gregory K Frizzell ; terminating attorney Bryan Cleveland ; granting 45 Motion to Withdraw Attorney(s) (Re: 45 MOTION to Withdraw Attorney(s) <i>Bryan Cleveland</i>) (kjp, Dpty Clk) (Entered: 01/12/2023)
01/18/2023	47	RESPONSE in Opposition to Motion (Re: 42 MOTION to Stay <i>Discovery Pending Resolution of Defendants' Motion to Dismiss</i>) by Rowan Fowler, Allister Hall, Carter Ray ; (Renn, Peter) (Entered: 01/18/2023)
01/23/2023	48	REPLY to Response to Motion (Re: 42 MOTION to Stay <i>Discovery Pending Resolution of Defendants' Motion to Dismiss</i>) by Kelly Baker, Keith Reed, Kevin Stitt ; (Weaver, Audrey) (Entered: 01/23/2023)
01/25/2023	49	ORDER by Judge Gregory K Frizzell ; staying discovery; granting 42 Motion to Stay (Re: 42 MOTION to Stay <i>Discovery Pending Resolution of Defendants' Motion to Dismiss</i>) (kjp, Dpty Clk) (Entered: 01/25/2023)
02/15/2023	50	MINUTE ORDER by Court Clerk directly, reassigning case to <i>Visiting</i> Judge John W Broomes, Judge Gregory K Frizzell no longer assigned to case, changing case number to 22-cv-00115-JWB-SH (This entry is the Official Order of the Court. No document is attached.) (clb, Dpty Clk) (Entered: 02/15/2023)
05/04/2023	51	MINUTE ORDER by Court Clerk reassigning the magistrate judge in this case pursuant to General Order 23-6, reassigning case to Magistrate Judge Mark T Steele, Magistrate Judge Susan E Huntsman no longer assigned to case, changing case number to 22-cv-115-JWB-MTS (This entry is the Official Order of the Court. No document is attached.) (crp, Dpty Clk) (Entered: 05/04/2023)
06/08/2023	52	ORDER by Judge John W Broomes granting Defendant's Motion to Dismiss (doc. 24) ; dismissing/terminating case (terminates case) ; granting 24 Motion to Dismiss (Re: 24 MOTION to Dismiss and Brief in Support) (alg, Dpty Clk) (Entered: 06/08/2023)
06/08/2023		***Civil Case Terminated (see document number 52) (lmt, Dpty Clk) (Entered: 06/09/2023)
07/06/2023	53	NOTICE OF APPEAL to Circuit Court (paid \$505 appeal fee; receipt number AOKNDC-2837740) (Re: 52 Order,, Dismissing/Terminating Case,, Ruling on Motion to Dismiss,) by Rowan Fowler, Allister Hall, Carter Ray (Renn, Peter) (Entered: 07/06/2023)
07/07/2023	54	PRELIMINARY RECORD Sent to Circuit Court (Re: 53 Notice of Appeal to Circuit Court) (With attachments) (lmt, Dpty Clk) (Entered: 07/07/2023)
07/07/2023	55	APPEAL NUMBER INFORMATION from Circuit Court assigning Case Number 23-5080 (#53) (Re: 53 Notice of Appeal to Circuit Court) (lmt, Dpty Clk) (Entered: 07/07/2023)
07/19/2023	56	TRANSCRIPT ORDER FORM (Transcripts are not necessary or are already on file) (Re: 53 Notice of Appeal to Circuit Court) by Rowan Fowler, Allister Hall, Carter Ray (Renn, Peter) (Entered: 07/19/2023)
07/19/2023	57	ORDER from Circuit Court record is complete by 07/26/2023 for Mark C. McCartt, Clerk of Court (Re: 53 Notice of Appeal to Circuit Court) (dla, Dpty Clk) (Entered: 07/19/2023)
07/20/2023	58	CLERK'S RECORD on Appeal Sent to Circuit Court (Re: 53 Notice of Appeal to Circuit Court) (lmt, Dpty Clk) (Entered: 07/20/2023)

PACER Service Center
Transaction Receipt

11/09/2023 13:42:18			
PACER Login:	audreyaweaver	Client Code:	Fowler
Description:	Docket Report	Search Criteria:	4:22-cv-00115-JWB-MTS
Billable Pages:	8	Cost:	0.80

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROWAN FOWLER, *et al.*,

Plaintiffs,

v.

No. 22-CV-00115-GKF-SH

KEVIN STITT, *et al.*

Defendants.

DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT

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August 26, 2022

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INTRODUCTION

Biological sex, as the Oklahoma Legislature and U.S. Supreme Court have confirmed, is not a meaningless label. Like race and national origin, sex is a certifiable and immutable characteristic determined at birth. The physical differences between the two sexes—man and woman; male and female—are a legal and factual reality, not fiction. And because transgender status occurs when an individual’s “gender identity diverges from the sex they were assigned at birth[,]” *i.e.* biological sex, Doc. 21 at ¶ 23, it too is “inextricably bound up with sex.” *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1742 (2020); *see also* Doc. 21 at ¶ 21. An individual, by definition, cannot be transgender unless their birth sex is different than their current gender identity.

Plaintiffs’ suit challenges the constitutionality of Oklahoma law and a November 2021 Executive Order prohibiting the retroactive alteration of an individual’s birth sex marker on state-issued birth certificates (“Birth Certificate Law”). *See* 63 O.S. § 1-321; Exec. Order No. 2021-24 (Nov. 8, 2021).¹ Because State officials enforce the Birth Certificate Law and refuse to alter the sex reported on Plaintiffs’ birth certificates to conform to their current gender identities, Plaintiffs allege the Defendants violate 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. Each of Plaintiffs’ claims fails as a matter of law.

Plaintiffs’ requested relief seeks to compel the State to alter objective, factual information reported *about birth, at the time of birth, and in a record that functions to document birth*. The State’s inclusion of (and refusal to amend) birth sex on a birth certificate does not compel Plaintiffs to speak or even implicate Plaintiffs’ private speech. Plaintiffs’ claim, on the other hand, would compel the State to speak a certain way in its own government-issued and maintained records, including by erasing any records reflecting anything other than an individual’s preferred gender identity.

¹ available at <https://www.sos.ok.gov/documents/executive/2014.pdf> (last visited Aug. 24, 2022).

While Plaintiffs summarily claim the Birth Certificate Law discriminates on the basis of sex, they have no evidence of sex discrimination, and their legal theory regarding suspect classes actually supplants sex with subjective gender identity. There is no serious dispute that the Birth Certificate Law is facially neutral as to everyone and does not discriminate between the two sexes or otherwise. Plaintiffs' claim is a trojan horse that outwardly professes to protect transgender individuals from discrimination but inwardly ushers in the destruction of sex classifications altogether. It conflates gender identity with sex and undermines the established distinction between the two.

Plaintiffs' claim that the inclusion of (and refusal to amend) birth sex on a birth certificate somehow violates a right to privacy in their transgender status is even less availing. Disclosing birth sex does not directly disclose transgender status, which requires knowledge of both birth sex and current gender identity. But even assuming some constitutional right to informational privacy exists, which is questionable at best, birth sex is not the type of confidential, personal, or medical information that if disclosed would shock the conscience. And in any event, Plaintiffs fail to establish that the State's inclusion of birth sex on a birth certificate constitutes a third-party government disclosure.

Plaintiffs' far-sweeping constitutional theories have no basis in law. Accordingly, no set of facts could establish a plausible claim for relief, and dismissal under Fed. R. Civ. P. 12(b)(6) is proper.

BACKGROUND

Oklahoma has long maintained and operated a system of vital statistics, including vital records registering birth and recording certain personal information related thereto. *See, e.g.*, 63 O.S. §§ 1-301, 1-303, 1-311; *see also* OKLAHOMA HISTORICAL SOCIETY, *About the 1890 Oklahoma Territorial Census*.² Recording vital statistics on birth, including sex, is a well-established state and local government practice pre-dating the American Revolution and continuing today. *See* Alice M. Hetzel, U.S. DEP'T

² available at <https://www.okhistory.org/research/1890> (last visited May 5, 2022).

OF HEALTH AND HUMAN SERVS., CTRS. FOR DISEASE CONTROL AND PREVENTION, NAT'L CTR. FOR HEALTH STATS., *U.S. Vital Statistics System - Major Activities and Developments, 1950-95* (1997) at pp. 43-47.³ Vital statistics are “an indispensable component of the U.S. public health system[,]” and provide important data making “it possible to track indicators of health status for the population at the national, state, and local levels, including disparities by age, sex, race and ethnicity, and detailed geography.” Ventura SJ, *The U.S. National Vital Statistics System: Transitioning Into the 21st Century, 1990-2017 – Programs and Collection Procedures*, 1 *Vital and Health Statistics* 62, p. v (Mar. 2018).⁴

A birth certificate “is a statement of facts concerning an individual[]” and “is a permanent legal record.” U.S. DEP'T OF HEALTH AND HUM. SERVS., NAT'L CTR. FOR HEALTH STATS., *Hospitals' and Physicians' Handbook on Birth Registration and Fetal Death Reporting* p. 1 (Oct. 1987) (emphasis added) [“Hospitals' and Physicians' Handbook”];⁵ see also AM. BAR ASS'N, *Birth Certificates* (Nov. 20, 2018)⁶ (“A birth certificate is a document issued by a government that records the birth of a child for vital statistics, tax, military, and census purposes.”).⁷ Because vital records, including certificates of birth, report objective and factual information, are used to establish identity, and constitute permanent legal records, “it is essential that the certificates and reports be prepared accurately.” *Hospitals' and Physicians' Handbook* at p. 7; see also OFF. OF INSPECTOR GEN., DEP'T OF HEALTH AND HUM. SERVS., *Birth Certificate Fraud*, p. 2 (Sept. 2000)⁸ (“Legitimate birth certificates provide vital information about the person whose name appears on the certificate.”).

³ available at <https://www.cdc.gov/nchs/data/misc/usvss.pdf> (last visited Apr. 27, 2022).

⁴ available at https://www.cdc.gov/nchs/data/series/sr_01/sr01_062.pdf (last visited Apr. 27, 2022).

⁵ available at https://www.cdc.gov/nchs/data/misc/hb_birth.pdf (last visited Apr. 27, 2022).

⁶ available at https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/birth-certificates/ (last visited Apr. 27, 2022).

⁷ Although Congress has developed recommendations and guidance to state governments on matters of vital statistics, no federal law requires states to collect or report specific information on birth certificates. See generally Craig Konnoth, *Health Data Federalism*, 101 B.U.L. Rev. 2169, 2196 (2021); see also *Hospitals' and Physicians' Handbook* at p. 2. This discretion rests solely with each state.

⁸ available at <http://oig.hhs.gov/oei/reports/oei-07-99-00570.pdf> (last visited Apr. 27, 2022).

Under Oklahoma law, a certificate of birth must be filed with the Oklahoma State Registrar shortly after the birth. *See* 63 O.S. § 1-311(A). The individual preparing the certificate, typically the attending physician, “shall certify to the facts of birth and provide the medical information required by the certificate” *See* 63 O.S. § 1-311(B). By signing the certificate worksheet, the parent “attest[s] to the accuracy of the personal data entered thereon” *See* 63 O.S. § 1-311(E).

The Birth Certificate Law provides that “[a] certificate or record registered under this article may be amended only in accordance with this article and regulations thereunder adopted by the State Commissioner of Health to protect the integrity and accuracy of vital statistics records.” 63 O.S. § 1-321(A). Section 1-321 only permits changes to name change and to paternity in certain circumstances, with no other amendments allowed. *See id.* § 1-321; *see also* Okla. Admin. Code § 310:105-3-3 (“After its acceptance for filing, no birth certificate . . . shall be altered or changed in any respect on its face, except as provided in . . . this Section.”). The statute also preserves the information recorded at birth by requiring a record of any amendments. *See* 63 O.S. § 1-321(B).

In years prior, some Oklahoma state trial courts have disregarded this statute as not binding on them as a matter of state law. For example, certain courts in the past issued orders requiring the amendment of individual birth certificates notwithstanding the relevant statutes and often without any prior notice to the State. The Oklahoma State Department of Health (“OSDH”) complied with those court orders, believing Oklahoma law required said compliance notwithstanding the need to protect the integrity and accuracy of vital statistics records. *See id.* § 1-321(A).

On November 8, 2021, the Governor issued Executive Order 2021-24 (“Executive Order”), which ordered the OSDH to “[c]ease amending birth certificates that is in any way inconsistent with 63 O.S. § 1-321.” Exec. Order No. 2021-24 at p. 1 (Nov. 8, 2021). The Executive Order noted that neither Oklahoma law nor any administrative rules “provide OSDH or others any legal ability to in any way alter a person’s sex or gender on a birth certificate.” *Id.* After the issuance of this Executive

Order, the Oklahoma Legislature amended Section 1-321 to clarify that the sex designation on birth certificates is “the biological sex designation” 63 O.S. § 1-321(H); *see* Doc. 21 at ¶ 57. This statute, along with the Executive Order, confirmed that state law forbids OSDH from amending the sex designation on a birth certificate for any reason. No petitioner, including these Plaintiffs, has sought enforcement orders from state court or appealed to the Oklahoma Supreme Court for its view on this issue of state law interpretation. Instead, Plaintiffs filed this federal suit, challenging the Birth Certificate Law under the U.S. Constitution.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

To survive a motion to dismiss, a plaintiff must allege “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* Fed. R. Civ. P. 12(b)(6). While courts must view a complaint in a light most favorable to the nonmoving party, drawing all reasonable inferences therefrom, courts need not accept as true “labels and conclusions,” legal characterizations, unwarranted deductions of fact, or “naked assertions devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 678-679 (citation omitted). In other words, a court need not “swallow the plaintiff’s invective hook, line and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited.” *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996).

When a complaint presents a question of law and “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,” the complaint “must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one.” *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (citation omitted). Rule 12(b)(6) “authorizes a court to dismiss a claim on the basis of a dispositive issue of law” *Id.* at 326; *see also Wyoming v. United States*, 279 F.3d 1214, 1222 (10th Cir. 2002).

II. PLAINTIFFS FAIL TO STATE A PLAUSIBLE CLAIM FOR RELIEF UNDER THE EQUAL PROTECTION CLAUSE (COUNT I).

Plaintiffs' claim that the Birth Certificate Law violates the Equal Protection Clause cannot survive as a matter of law. *See* Doc. 21 at ¶¶ 123-130. Plaintiffs fail to plead any set of facts upon which this Court could conclude the Birth Certificate Law intentionally discriminates against any class, based on sex or otherwise. Moreover, courts have rightly rejected gender identity as a suspect class.

Although the Equal Protection Clause of the Fourteenth Amendment generally directs that “all persons similarly situated should be treated alike[.]” it “doesn’t guarantee equal results for all, or suggest that the law may never draw distinctions between persons in meaningful dissimilar situations.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684 (10th Cir. 2012). The Equal Protection Clause “does not forbid classifications,” nor does it create substantive rights. *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 54 (10th Cir. 2013) (citation omitted); *see also Teigen v. Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007). Consequently, “[u]nless a legislative classification or distinction burdens a fundamental right or targets a suspect class, courts will uphold it if it is rationally related to a legitimate end.” *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998).

To establish an Equal Protection Clause violation, a plaintiff must first establish “the challenged state action intentionally discriminates between groups of persons.” *SECSYS*, 666 F.3d at 685; *see also Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998) (a plaintiff “must first make a threshold showing that [she was] treated differently from others who were similarly situated to [her]”). When the distinction between groups of persons is apparent on the face of the challenged statute or state action, “an intent to discriminate is presumed and no further examination of legislative purpose is required.” *Id.* When the law is generally applicable to all persons, however, the plaintiff bears the burden of establishing “‘the existence of purposeful discrimination’ causing an adverse effect.” *Ashabed v. Currington*, 7 F.4th 1236, 1250 (10th Cir. 2021) (citing *McCleskey v. Kemp*, 481 U.S. 279, 292

(1987)). Disparate impact alone is insufficient to establish intentional or purposeful discrimination, “because many laws, perhaps most and often unavoidably, affect some groups of persons differently than others” *SECYS*, 666 F.3d at 685. At the dismissal stage, a plaintiff’s factual averments must be “at least susceptible of an inference of discriminatory intent.” *Ingram v. Cooper*, 163 F. Supp. 3d 1133, 1139 (N.D. Okla. 2016) (citation omitted).

Once a plaintiff overcomes this threshold burden, he or she must establish the state’s intentional discrimination is not “justified by reference to some upright government purpose.” *SECYS*, 666 F.3d at 686. Here, courts presume the relevant legislation is “valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *City of Cleburne, Tex.*, 473 U.S. at 440. Only when a plaintiff establishes the intentional discrimination targets a fundamental right or a suspect classification does a heightened standard of review apply. *Id.*

A. Plaintiffs fail to allege any set of facts to establish the Oklahoma Birth Certificate Law purposefully discriminates between groups of people.

The Birth Certificate Law governing amendments to birth certificates contains no facial classifications. Title 63, Section 1-321 provides a uniform process generally applicable to all individuals seeking to amend their birth certificates. It makes no distinction between the process based on sex or any other classification. The Executive Order likewise does not distinguish between the birth certificate amendment process based on sex or any other classification. *See* Exec. Order No. 2021-24 (Nov. 8, 2021). The prohibition against “alter[ing] a person’s sex or gender on a birth certificate[]” applies equally to men and women. *Id.* at 1.

Given the absence of any distinction between groups of people evident on the face of the relevant laws, “no presumption of intentional discrimination arises; proof is required.” *SECYS, LLC*, 666 F.3d at 685. Yet, Plaintiffs’ Complaint is devoid of any factual assertion that plausibly establishes a disparate impact on a class of persons—men, women, or even transgender individuals—let alone that the State intentionally discriminated against that class of persons as a facial matter. Plaintiffs’

conclusory declarations that the State “facially and intentionally discriminates against transgender people . . .” and “on the basis of transgender status . . .” are insufficient to establish any disparate impact on transgender individuals as a class. Doc 21. at ¶¶ 126-127; *see also Iqbal*, 556 U.S. at 678-679.⁹

Plaintiffs’ theory of equal protection proves too much because it recasts almost every neutral law as facially discriminatory. Facially neutral laws always have greater impact on people who want to violate or change those laws, but this impact does not make a law facially discriminatory. In Plaintiffs’ view, a law that prohibits birth certificate amendments discriminates against people who want amendments. By the same reasoning, as an example, the rules against swimming in Lake Hefner are facially discriminatory against people who can swim. Perhaps swimmers chafe under the swimming rules more than non-swimmers, just as transgender people chafe under the amendment rules more than people who do not seek amendments. Nevertheless, the existence of people experiencing greater impact from the law does not convert the neutral law into a discriminatory one. Nor does the fact an individual is transgender, any more than a swimmer, entitle them to special exemptions from neutral laws. To conclude otherwise would be to establish a rule that almost all statutes are discriminatory.

Plaintiffs plead nothing besides this novel impact theory to make their equal protection claim succeed. Plaintiffs don’t allege, for example, that men, women, or transgender individuals as a class are being treated differently than others in the amendment application process or in the denials issued under the law. Although Plaintiffs do allege they have been denied amendments, they fail to plead any facts to suggest Oklahoma is approving other applications under the current law and Executive Order. Doc. 21 at ¶¶ 76, 97, 112. Plaintiffs don’t allege, for example, the State is applying the law in discriminatory fashion, implementing two different sets of standards, or denying one group a benefit while allowing others access. *See, e.g., Cranford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 537-

⁹ For example, it is far from obvious transgender individuals as a class share Plaintiffs’ crusade to erase sex. After all, birth sex is fundamental to and inseparable from transgender status. *See infra* Part II(B).

538 (1982). Instead, Plaintiffs allege nothing more than a non-discriminate and equally applied policy that *they don't like*. This does not establish discrimination through disparate impact.

Even if the fact Plaintiffs want a contrary state law was sufficient to establish disparate impact under the Fourteenth Amendment, Plaintiffs' Complaint also fails to establish the State intentionally discriminated against transgender individuals. *See Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 42 (2012) ("Although disparate impact may be relevant evidence of ... discrimination ... such evidence alone is insufficient [to prove a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny." (citation omitted)). Plaintiffs fail to allege any set of facts to support some discriminatory intent behind 63 O.S. § 1-321 or its recent amendment through S.B. 1100, 2022 O.S.L. 87. Outside of Plaintiffs' conclusory allegations and incorrect statements of law, Plaintiffs cite only a single factual allegation potentially related to the intent behind the Executive Order: a statement from the Governor in the weeks before the issuance of the Executive Order. *Compare* Doc. 21 at ¶¶ 126-127 to ¶ 53. Specifically, the Governor declared that "people are created by God to be male or female. Period." *Id.* at ¶ 53. If any underlying intent could be garnered from this statement, it is an intent that Oklahoma birth certificates continue recording biological sex at birth. In other words, Plaintiffs identify an intent to accurately classify individuals based on sex. But, again, "[c]lassification is not discrimination." *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941); *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, to advance full development of the talent and capacities of our Nation's people." (citations omitted)); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) ("[T]he 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification

for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard.”¹⁰

In sum, even if the State’s refusal to alter state-issued certifications of a person’s birth sex has some sort of disparate impact on transgender individuals, Plaintiffs fail to plead any set of facts to establish discriminatory intent behind that refusal. *See SECSYS*, 666 F.3d at 685-86. Because Plaintiffs cannot establish purposeful discrimination, dismissal is proper.

B. Plaintiffs fail to provide any set of facts to establish the Oklahoma Birth Certificate Law purposefully discriminates against a suspect class.

Even if Plaintiffs could overcome their first hurdle of establishing that the State purposefully discriminated against transgender individuals as a class, transgender status is not, as a matter of law, a suspect classification under the Equal Protection Clause.

To start, no binding authority has ever held that “transgender status” or “gender identity” is an independently suspect class under the Fourteenth Amendment. The Tenth Circuit confirmed this as recently as 2015:

To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227–28 (10th Cir.2007) (denying suspect-classification equal-protection employment rights for transgendered employees); *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir.1995) (affirming the dismissal of an equal protection claim alleging the denial of estrogen treatment to a transsexual prisoner).

Druley v. Patton, 601 F. App’x 632, 635 (10th Cir. 2015) (unpublished).

Indeed, the Supreme Court recently confirmed that transgender status is not sex in *Bostock v. Clayton Co*, 140 S. Ct. 1731 (2020). In analyzing whether the sex-based protections of Title VII prohibited employment discrimination against homosexual or transgender individuals, the Court built its opinion on the foundational fact that “sex” referred “only to biological distinctions between male

¹⁰ Moreover, Plaintiffs do *not* challenge the State’s decision to limit sex classifications to male and female.

and female.” *Id.* at 1739. The Court then concluded that an employer’s discrimination against an employee based on homosexual or transgender status violates Title VII because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Id.* at 1741. The Court held that discrimination against transgender persons is discrimination against individuals whose “sex identified at birth” does not match their identity today. *Id.* at 1746 (emphasis added). The Court further explained:

We agree that homosexuality and **transgender status are distinct concepts from sex.** But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.

Id. at 1746–47 (emphasis added). Put differently, the reason the *Bostock* Court found transgender status fell within the protections of Title VII is because a transgender individual’s subjective gender identity *differs* from his or her sex.¹¹

In sum, any conceivable equal protection theory based on transgender status rests upon a *sex-based* classification where gender identity is different from sex. *See, e.g., id.* at 1747 (“[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”); *Tudor v. Se. Oklahoma State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021) (“In the wake of *Bostock*, it is now clear that transgender discrimination, like that complained of by Dr. Tudor, is discrimination ‘because of sex’ prohibited under Title VII.”). The irony (and downfall) of Plaintiffs’ invocation of sex-based discrimination here, however, is that it requires

¹¹ Plaintiffs appear to agree with this by regularly relying on the concept of gender identity and referring to “gender identity” over one-hundred times in their Complaint. *See, e.g.,* Doc. 21 at ¶¶ 20-33. For example, Plaintiffs acknowledge that “[t]ransgender persons are people whose gender identity diverges from the sex they were assigned at birth[.]” *Id.* at ¶ 23, and that “transgender status” is “inextricably linked to a person’s sex[.]” *Id.* at ¶ 21. At the same time, Plaintiffs regularly conflate gender identity with sex, suggesting gender identity *is* sex and manufacturing a distinction between sex and *birth* sex. *See, e.g., id.* at ¶¶ 20-25.

objective sex to yield entirely to subjective gender identity—a position that would obliterate the very sex-based classifications upon which equal protection is predicated in the first place.

Even before *Bostock*, the Supreme Court long recognized that “sex, like race and national origin, is an immutable characteristic.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). After all, “[p]hysical differences between men and women . . . are enduring: ‘[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’” *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citing *Ballard v. United States*, 329 U.S. 187, 193 (1946)). As a result, the Supreme Court has explained: “[t]o fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—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). In other words, the distinction between men and women is a real one, and “the principle of equal protection does not forbid Congress to address” problems in a way specific to each sex. *Id.*

The invidious nature of some statutory classifications based on sex does not render sex classifications altogether disposable. The Equal Protection Clause does not aim to eliminate “dispositive realities” of sex, only assumptions, stereotypes, and over-broad generalizations about the tendencies or preferences of men or women. *Virginia*, 518 U.S. at 549-50; *see also Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 469 (1981) (“Underlying these decisions is the principle that a legislature may not ‘make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.’” (citation omitted)).

Today, “[i]nherent differences’ between men and women, we have come to appreciate, remain cause for celebration” *Virginia*, 518 U.S. at 533. Consistent with the same, the Supreme Court has declined to adopt strict scrutiny to evaluate sex classifications and has not hesitated to uphold sex

classifications “used to compensate women ‘for particular economic disabilities [they have] suffered,’ . . . to ‘promot[e] equal employment opportunity,’ . . . to advance full development of the talent and capacities of our Nation’s people.” *Id.* (internal citations omitted). *Bostock* reiterated that sex stereotyping in the workplace is impermissible by maintaining that birth sex is an identifiable concept separate from gender identity. 140 S. Ct. at 1746-47.

At the foundation of this wealth of equal protection precedent, then, is a deeply rooted understanding of the natural distinction between men and women as biological sexes and a prohibition against stereotyping based on the immutability of the two sexes. Time and time again, the Supreme Court has recognized the binary and biological nature of the *two* sexes: between male and female or man and woman. *See, e.g., Virginia*, 518 U.S. at 533 (identifying “[t]he two sexes . . .”); *Michael M.*, 450 U.S. at 471 (recognizing “[o]nly women may become pregnant . . .”). Only by recognizing the distinction between sexes could the Supreme Court strike down stereotypical and invidious sex discrimination and safeguard the rights of women. *See, e.g., Michael M.*, 450 U.S. at 469 (“[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.”).

Importantly, *Bostock* also stressed that its narrow holding only answered whether adverse employment actions based entirely on a person being homosexual or transgender violated Title VII, clarifying its opinion did “not purport to address bathrooms, locker rooms, or anything else of the kind.” *Bostock*, 140 S. Ct. at 1753. For good reason: such laws, like the birth certificate law at issue here, simply and permissibly classify individuals based on biological or birth sex. *Cf. Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (“The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.”). To invalidate a sex-based classification in any of these contexts because it “discriminates” against

transgender persons is to destroy sex-based classifications altogether—to conflate sex with subjective gender identity. That is not what the Supreme Court has ever authorized or ordered.

Numerous authorities have detected the havoc conflating sex with subjective gender identity would wreak in the context of laws separating the two sexes based on real and significant physical differences. As the Tenth Circuit emphasized in discussing sex-based classifications in restrooms, requiring “employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes” *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1225 (10th Cir. 2007), *overruled in part on other grounds in Tudor v. Se. Oklahoma State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021); *see also Carcaño v. McCrory*, 203 F. Supp. 3d 615, 645 (M.D.N.C. 2016).

In the context of sex-based classifications in athletic activities, the Sixth Circuit highlighted:

it must be apparent that its basis is the distinct differences in physical characteristics and capabilities between the sexes It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement.

Cape v. Tennessee Secondary Sch. Athletic Ass’n, 563 F.2d 793, 795 (6th Cir. 1977), *abrogated in part in Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 190 F.3d 705, 706 (6th Cir. 1999). Other courts have likewise noted the distinction between discrimination based on sex and sexual or gender identity. *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (“[A] prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born.”); *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015) (“Thus, while Plaintiff might identify his gender as male, his birth sex is female. It is this fact—that Plaintiff was born a biological female, as alleged in the complaint—that is fatal to Plaintiff’s sex discrimination claim.”).

Plaintiffs' Equal Protection claim discards all of this authority. Plaintiffs repeatedly conflate sex with subjective gender identity to assert the Birth Certificate Law discriminates "based on sex as well as discriminat[es] based on transgender status" Doc. 21 at ¶ 125. Plaintiffs contend Oklahoma's law interferes with the goal of transgender persons "to live in a manner consistent with their gender identity, rather than their sex assigned at birth" *Id.* at ¶ 30; *see also id.* at ¶¶ 23, 25-37. While conflating biological or birth sex with gender identity throughout their Complaint, Plaintiffs also repeatedly separate the concepts, using the phrase "gender identity" over 100 times and even conceding "[t]he various components associated with transition . . . do not change a person's sex" *Id.* at ¶ 35. Critically, Plaintiffs characterize Oklahoma's Birth Certificate Law as "depriving transgender people of birth certificates that match their gender identity" and of "being able to possess identity documents consistent with a person's gender identity" *Id.* at ¶¶ 37, 36; *see also* ¶¶ 38, 41, 42-43, 48, 66, 76-77, 80, 87, 97-98, 100, 102, 112-113, 115, 121, 126-127, 129(c)-(d). The inconsistencies in the Complaint only confirm the true issue here: there is no sex-based discrimination at issue, and Plaintiffs cannot prevail unless this Court substitutes sex for subjective gender identity.

Because subjective gender identity alone is not a suspect class, because Plaintiffs' claim does not rely on any sex-based discrimination, and because any such reliance would not be actionable, Plaintiffs fail to establish the Birth Certificate Law purposefully discriminates against anyone, let alone against any suspect class. This Court should dismiss Plaintiffs' Count I and uphold Oklahoma's law.

C. The Oklahoma Birth Certificate Law survives rational basis review.

The Court need not reach the question of state interests on a facially neutral law. *See supra* Part II(A). Nevertheless, if the Court adopts Plaintiffs' novel impact theory, any "classification" in denying amendments in the Oklahoma Birth Certificate Law "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). Under rational basis review, courts

do not sit “to judge the wisdom, fairness, or logic of legislative choices.” *Id.* (citation omitted). A state need only articulate some “conceivable basis” supporting the law, “whether or not the basis has a foundation in the record.” *Id.* at 320-321. “A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *Id.* at 320 (citation omitted).

Despite Plaintiffs’ glib assertion that the Birth Certificate Law “is not supported by any . . . legitimate government interest[,]” and lacks “even rational relationship to a valid government interest,” Doc. 23 at ¶¶ 63-64, the law furthers *at least* two state interests: (1) protecting the integrity and accuracy of vital records, including by documenting birth information and classifying individuals based on the two sexes,¹² and (2) using those classifications to protect the interests of women. The government practice of recording vital statistics on birth, including sex, is a well-established practice undertaken by state and local governments throughout history. *See supra* Background. Oklahoma’s Birth Certificate Law confirms the objective amendment process is designed “to protect the integrity and accuracy of vital statistics records.” 63 O.S. § 1-321(A). In addition, there can be no serious dispute that the protection of bodily privacy from the opposite sex is an important governmental interest. *See, e.g., Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993); *Doe v. Luzerne Cty.*, 660 F.3d 169, 176-77 (3d Cir. 2011); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *see also supra* Part II(B). Government entities, schools, and third parties commonly use birth certificates to apply laws and policies protecting privacy interest based on the physiological differences in men and women. This interest is furthered by

¹² Plaintiffs are wrong to suggest previous compliance with court orders on matters of state law surrendered any state interests, *see supra* Background, as no authority supports that proposition.

maintaining accurate classifications based on biological and physiological sex, including through birth certificates.¹³

Again, the Court need not reach these considerations because Plaintiffs’ equal protection claim cannot stand against a facially neutral law. *See supra* Part II(A). But even under Plaintiffs’ novel impact theory of discrimination, the “classification” is rational.

III. PLAINTIFFS FAIL TO STATE A PLAUSIBLE CLAIM FOR RELIEF UNDER SUBSTANTIVE DUE PROCESS (COUNT II).

Plaintiffs’ substantive due process claim cannot survive as a matter of law because Plaintiffs cannot identify a fundamental right that Defendants infringed. *See* Doc. 21 at ¶¶ 131-138.

The Fourteenth Amendment’s Due Process Clause protects two categories of substantive rights: those guaranteed by the first eight amendments, and “a select list of fundamental rights that are not mentioned anywhere in the Constitution.” *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022). In deciding whether a right falls into either of these categories, the Supreme Court “has long asked whether the right is ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty’” *Id.* (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019)). In *Dobbs*, the Court pointed to *Timbs* as an emblematic example of how to conduct such an examination. *Id.* There, the Court held that the protection against excessive fines was “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition” by tracing

¹³ The State’s interest in classifying based on biological and physiological sex, as well as the Supreme Court precedent recognizing physiological differences between the sexes, is not diminished by medical intervention attempting to “bring a person’s physical appearance and lived experience into better alignment with their . . . gender identity.” Doc. 21 at ¶ 35. As other courts have recognized:

A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to “produce ova and bear offspring” does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the *Littleton* court noted, the transsexual still “inhabits . . . a male body in all aspects other than what the physicians have supplied.”

In re Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002) (*citing Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999)); *see also Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971).

back to the Magna Carta, Blackstone’s Commentaries, and 35 of the 37 state constitutions in effect at the ratification of the Fourteenth Amendment. *Id.* at 2246–2247 (citing *Timbs*, 139 S. Ct. at 687–690).

A historical examination is necessary when a court is asked to recognize a new component of the “liberty” protected by the Due Process Clause because “the term ‘liberty’ alone provides little guidance.” *Id.* at 2247. And the Supreme Court has stated that “[w]e must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

The Tenth Circuit has previously held that substantive due process can be violated either by legislative acts infringing on a fundamental right without a compelling governmental purpose or executive action depriving “a person of life, liberty, or property in a manner so arbitrary as to shock the judicial conscience.” . . .” *Lindsey v. Hylar*, 918 F.3d 1109, 1115 (10th Cir. 2019). The arbitrary or conscience-shocking standard “is exacting.” *Id.* at 1116. “[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense . . .” and there must be “a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience-shocking.” *Id.* (citation omitted). To the extent any right to informational privacy exists at all,¹⁴ governmental disclosures of private or medical information “are prohibited only when they shock the conscience.” *Leiser v. Moore*, 903 F.3d 1137, 1144 (10th Cir. 2018).

¹⁴ The Supreme Court has never affirmatively recognized or explained the right, *see NASA v. Nelson*, 562 U.S. 134, 147 (2011); *see also id.* at 161 (Scalia, J., concurring), and has never found any undefined right to informational privacy was violated. *See, e.g., id.* at 147, 159; *Whalen v. Roe*, 429 U.S. 589, 591, 597-98, 603-04 (1977); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 455, 458-59, 464-65 (1977). Accordingly, the Tenth Circuit recently questioned whether a right to informational privacy exists at all, noting “it can no longer be said in the context of government disclosure of information that [t]here is no dispute that confidential medical information is entitled to constitutional privacy protection.” *Leiser v. Moore*, 903 F.3d 1137, 1144 (10th Cir. 2018).

Plaintiffs allege two different substantive due process claims: first, that the right to privacy includes the freedom from involuntary disclosure of transgender status, and second, that there is a right to define and express one's gender identity and to be treated in a manner consistent with a person's gender identity by the government. *See* Doc. 21 at ¶¶ 136-139. For the first claim, biological sex is not the type of confidential, personal, or medical information entitled to protection against governmental disclosure under the Fourteenth Amendment. *See, e.g., supra* Part II(C). Nor does governmental disclosure of an individual's biological or birth sex—or indirectly transgender status—implicate any fundamental right deeply rooted in the Nation's history. *Cf.* Background. Additionally, inclusion of biological sex on state records, such as birth certificates, does not shock the conscience. Finally, and in any event, Plaintiffs fail to establish any governmental disclosure of their biological sex, let alone transgender status. *See infra* Part IV.¹⁵

The only government action at issue here is the State's inclusion of (and refusal to amend) birth sex on a birth certificate. That, by itself, is not disclosure by the State to a third-party. Instead, any disclosure at issue comes from Plaintiffs, not the State. For example, in their Complaint Plaintiffs identify a number of examples of disclosures involving driver's licenses—none of which involve *the State* as the disclosing party, or even involve birth certificates. *See* Doc. 21 at pp. 26-27. Plaintiffs also concede that they could have their driver's license reflect gender identity, *id.* at ¶¶ 60, 96, without explaining how maintaining birth sex on a birth certificate causes a disclosure issue. These factual circumstances stand in stark contrast to those involving a government official directly informing third parties of a plaintiff's personal information, such as the plaintiff's HIV diagnosis in *Herring v. Keenan*, 218 F.3d 1171, 1173 (10th Cir. 2000) or cancer diagnosis in *Leiser*, 903 F.3d at 1138.

¹⁵ The absurdity and sweep of Plaintiffs' claim is illustrated by their insistence that even *keeping a record* of their sex assigned at birth, or a "revision history", somehow violates their constitutional rights. Doc 21 at ¶¶ 610-643, pp. 32-33 ¶ B-C.

In addition, the only disclosure at issue here is that of birth or biological sex. To the extent transgender status is disclosed because of the inclusion of (and refusal to amend) birth sex on government-issued records because transgender status is inextricably tied to sex, it is through *indirect* assumptions, inferences, and inclusions made based on extraneous circumstances such as the transgender individual's statements, mannerisms, or appearance. None of these intervening circumstances involve the State directly disclosing Plaintiffs' transgender status to third parties.

On the other hand, many authorities recognize a right to bodily privacy in places such as bathrooms and changing facilities. *See supra* Part II(C). Any unidentifiable informational privacy interest Plaintiffs may claim is eclipsed by this countervailing privacy interest, which can only be preserved by maintaining accurate sex classifications. Recognizing some right to privacy of birth sex would ironically eviscerate privacy rights based on biological sex, as women cannot have bodily privacy without a disclosed classification based on sex.

With regards to the second claim, Plaintiffs fail to establish that the right to express one's own gender identity and to be treated in a manner consistent with a person's gender identity by the government is "deeply rooted in [our] history and tradition" and "essential to our Nation's scheme of ordered liberty." *Dobbs*, 142 S. Ct. at 2246 (citation omitted). The Complaint alleges that OSDH allowed transgender people to change the gender markers on their birth certificates for "several years" and that the practice is currently followed in many but not all states, Doc. 21 at ¶¶ 50, 58, but crucially, nothing in the complaint even suggests that there is a deeply rooted historical basis for this right. That is because there is not one. *See* Background. Recent practices do not establish a deeply rooted liberty interest. Because Plaintiffs cannot identify any governmental interference with a fundamental right, nor any application of the law that shocks the conscience, dismissal is proper as a matter of law.

IV. PLAINTIFFS FAIL TO STATE A PLAUSIBLE CLAIM FOR RELIEF UNDER THE FIRST AMENDMENT (COUNT III).

Plaintiffs claim that the Birth Certificate Law violates the Free Speech Clause of the First Amendment under the novel theory that the State’s recording of (and refusal to amend) birth sex on a birth certificate forces Plaintiffs “to endorse the government’s position as to their own gender,” and “disclose their transgender status” when they show the same to third persons. *See* Doc. 21 at ¶¶ 142-143. Plaintiffs’ claims cannot survive as a matter of law. The Birth Certificate Law does not implicate, let alone violate, any free speech rights of Plaintiffs and a birth certificate constitutes purely governmental speech.

The Free Speech Clause of the Constitution protects “both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). But when the government speaks, it “has the right to ‘speak for itself[,]’” and “is entitled to say what it wishes” *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (citations omitted). The Free Speech Clause therefore does not restrain the government’s freedom to determine the content of what it says or chooses not to say. *Id.* at 467-68; *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Otherwise, “government would not work.” *Walker*, 576 U.S. at 207; *see also Shurtleff v. City of Boston, Massachusetts*, 142 S. Ct. 1583, 1589 (2022).

In evaluating whether the relevant expressive conduct is a form of government speech or provides a forum for private speech, courts must consider factors including: (1) whether the medium has historically been used for government speech, (2) whether the public observer would interpret the speech as being conveyed by the government, and (3) whether the government has maintained control over the speech. *See Walker*, 576 U.S. at 209-210; *Shurtleff*, 142 S. Ct. at 1589-1590. Pursuant to this analysis, the Supreme Court of the United States has concluded, for example, that license plates convey government speech. *See Walker*, 576 U.S. at 209-214.

In *Walker*, the Supreme Court reasoned that license plate designs have a robust history of use to communicate various governmental messages, are closely identified in the public mind with the state, and are controlled directly and solely by the state. *Id.* at 212-213. The Supreme Court emphasized that “[t]he governmental nature of the plates is clear from their faces”—from the governmental purpose they serve (vehicle registration and ID) to the placement of the state name in large letters to the state’s comprehensive control over their designs, issuance, and disposal. *Id.* at 212. Going further, the Supreme Court analogized license plates to *government IDs*, explaining:

issuers of ID “typically do not permit” the placement on their IDs of “message[s] with which they do not wish to be associated.” *Sumnum*, 555 U.S., at 471, 129 S.Ct. 1125. Consequently, “persons who observe” designs on IDs “routinely—and reasonably—interpret them as conveying some message on the [issuer’s] behalf.” *Ibid.*

*Id.*¹⁶ The fact private parties took part in the design of those messages on the license plate did “not extinguish the government nature of the message” *Id.* at 217.

Here, as with the license plate in *Walker*, the state-issued birth certificate is government speech—not a public forum of any sort. A certificate of birth is a vital record registering a birth and recording certain personal information related thereto, a statement of facts concerning an individual, and a permanent legal record. *See supra* pp. 2-3. The governmental nature of a birth certificate is evident in its purpose, function, and official custodian. *See, e.g., id.* The governmental nature of a birth certificate is also evident on its face: from the uniform format and information contained thereon to the identification of “OKLAHOMA” across the top. *See* Example Oklahoma Birth Certificate, attached as Exhibit 1. As a government-issued record, a public observer would associate any message conveyed on a birth certificate with the State.

¹⁶ The Court further clarified that in contrast to the public parks at issue in *Sumnum*, “license plates are not traditional public forums for private speech[.]” and therefore “forum analysis is misplaced here.” *Id.* at 214, 215.

Moreover, unlike the specialty license plates at issue in *Walker*, private parties do not select the design or the categories of information reported on the birth certificate. The State alone decides the style, form, and information required to be reported on the birth certificate. The private parties merely supply some of the personal information required to the State. But the information provided is objective, and the certifying parties attest to the accuracy of the same. *See* 63 O. S. § 1-311(E). More importantly, the individual identified in the birth certificate plays **no role whatsoever** in the submission of personal information. *See* 63 O. S. § 1-311(B). He or she is not speaking at all, in any manner, having just been born.

Because an Oklahoma birth certificate and its contents are purely government speech, the Birth Certificate Law does not compel private individuals to speak in violation of the First Amendment. And just as the State cannot compel Plaintiffs to convey the State’s ideological message in Plaintiffs’ private speech, Plaintiffs cannot compel the State to convey their ideological message in the State’s own records. *See Walker*, 576 U.S. at 219.

In addition, a birth certificate does not express any ideological message, nor compel a private party to express a view with which they disagree. *Cf. Walker*, 576 U.S. at 219 (collecting cases); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (“Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . .”). It is a governmental record registering and certifying simple factual information associated with an individual at the time of his or her birth, including an individual’s biological sex. *See supra* Part II(C)(i); Background. The sex reported on a state-issued birth certificate is a certifiable fact. *See* 63 O.S. §§ 1-311, 1-321; 28 U.S.C. § 1739; Fed. R. Civ. P. 44; Fed. R. Evid. 201. Indeed, “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Physical differences between men and women . . .

are enduring: “[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.” (citation omitted)). Plaintiffs concede that the State birth certificates record biological sex assessed at birth, Doc. 21 at ¶ 18, and admit they are asserting feelings about gender identity, not disputing the accuracy of their biological sex recorded at birth, *id.* ¶ 23, 69, 91, 106.

Biological or birth sex is not an ideological message, nor is it the type of “personal information of the utmost intimacy[.]” *Coe v. U.S. Dist. Court for Dist. of Colorado*, 676 F.2d 411, 416 (10th Cir. 1982) (collecting example cases involving birth control, abortion, homosexuality, sodomy, illegitimate children, abandoned families, etc.) (quoting *Southern Methodist University Ass’n v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979)). As evidenced in the very government document in dispute here, an individual’s sex is disclosed and recorded almost immediately after birth. Biological or birth sex is not the type of confidential information that remains private, subject to disclosure controlled by the individual. By extension, neither is the fact someone presents themselves as a different gender from their birth sex.

That the categories of information contained on a birth certificate, including sex, may carry subjective personal importance to an individual later in life does not alter the administrative and governmental nature of any message contained thereon. Although sex may feel inherently personal to the individual, so could a person’s name, birth date, address, height, weight, eye-color, and other like information routinely disclosed to the government or contained on government records. The personal importance of the information does not, without more, convert it into private speech.

The inclusion of sex on state-issued identification is so well-established, in fact, that it is often required by *federal* law. For example, the federal REAL ID ACT of 2005 *requires* a state-issued driver’s license to include a sex/gender marker, “as determined by the State.” 6 C.F.R. § 37.17(b); *see also* 8 C.F.R. § 274a.2(b)(v)(B)(1) (requiring employment verification through identification cards or driver’s licenses including “identifying information” such as “name, date of birth, sex, height, color of eyes,

and address”). Individuals also regularly reveal their sex with the public and government officials, whether through social media, licensing or registration, financial applications, etc. *See, e.g.*, Doc. 21 at ¶ 121. Because identifying information, such as sex, is so readily and regularly disclosed, the inclusion of the same on a government record does not compel a private party to express a view with which they disagree, nor invade their private speech.¹⁷ This Court should dismiss Plaintiffs’ Count III.

CONCLUSION

For the many reasons stated herein, Plaintiffs constitutional claims fail as a matter of law. In the absence of any plausible claim that Oklahoma’s Birth Certificate Law violates the U.S. Constitution, it “is a matter of public policy to be decided by the [state] legislature” that must be upheld. *K. v. Health Div., Dep’t of Human Res.*, 560 P.2d 1070, 1072 (Or. 1977); *see also Hartin v. Dir. of Bureau of Records & Statistics, Dep’t of Health of City of New York*, 347 N.Y.S.2d 515, 518 (N.Y. Sup. Ct. 1973). For these reasons, Defendants respectfully this Court dismiss the Complaint in its entirety and grant Defendants all other and further relief as the Court deems appropriate.

¹⁷ Plaintiffs’ First Amendment claim is so vaguely stated, that is unclear whether Plaintiffs argue that their own requested relief—ordering the State to issue *changed* or issue “*corrected* birth certificates . . . accurately reflecting . . . gender identity”—involves compelled disclosure of transgender status to the State. *Id.* at p. 33. Such a claim would be particularly indefensible, because in order to *change* the personal information on state records, an individual *must* disclose that change.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2022, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants with entries of appearance filed of record.

s/ Audrey A. Weaver

Audrey A. Weaver

Case 4:22-cv-00115-GKF-SH Document 24-1 Filed in USDC ND/OK on 08/26/22 Page 1 of 2

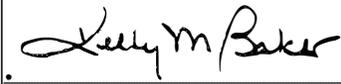
EXHIBIT 1

Case 4:22-cv-00115-GKF-SH Document 24-1 Filed in USDC ND/OK on 08/26/22 Page 2 of 2

CERTIFICATE OF LIVE BIRTH

STATE OF OKLAHOMA-DEPARTMENT OF HEALTH

STATE FILE NO 135- **2022-123456**

1. CHILDS NAME (First, Middle, Last, Suffix)		2. DATE OF BIRTH (Month, Day, Year)	3. TIME OF BIRTH	4. SEX
5a. FACILITY NAME (If not institution, give street and number)		6. CITY, TOWN OR LOCATION OF BIRTH		7. COUNTY OF BIRTH
5b. PLACE WHERE BIRTH OCCURRED (Check one) <input checked="" type="checkbox"/> Hospital <input type="checkbox"/> Freestanding birthing center <input type="checkbox"/> Clinic/Dr's Office <input type="checkbox"/> Home Birth => Planned to deliver at home? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (Specify) _____				
8a. ATTENDANT'S NAME AND TITLE NAME: TITLE: <input checked="" type="checkbox"/> MD <input type="checkbox"/> DO <input type="checkbox"/> CNM/CM <input type="checkbox"/> OTHER MIDWIFE <input type="checkbox"/> OTHER (Specify) _____	8b. ATTENDANT'S MAILING ADDRESS Street & Number or Rural Route: _____ City or Town: _____ State: _____ Zip: _____		9. STATE REGISTRAR'S SIGNATURE  10. DATE FILED WITH STATE REGISTRAR (Month, Day, Year)	
11a. CERTIFIER'S NAME AND TITLE NAME: _____ TITLE: <input type="checkbox"/> MD <input type="checkbox"/> DO <input type="checkbox"/> HOSPITAL ADMIN. <input type="checkbox"/> CNM/CM <input type="checkbox"/> OTHER MIDWIFE <input checked="" type="checkbox"/> OTHER (Specify) UNIT CLERK			11b. DATE CERTIFIED (Month, Day, Year)	
12a. MOTHER'S CURRENT LEGAL NAME (First, Middle, Last, Suffix)	12b. MOTHER'S LAST NAME PRIOR TO FIRST MARRIAGE	12c. MOTHER'S DATE OF BIRTH (Month, Day, Year)	12d. MOTHER'S BIRTHPLACE (State, Territory, or Foreign Country)	
13. MOTHER'S RESIDENCE ADDRESS Inside City Limits? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown County: Street & Number: Apartment Number: City: State: OK Zip Code				
14. MOTHER'S MAILING ADDRESS <input checked="" type="checkbox"/> Same as Residence County: Street & Number: Apartment Number: City: State: Zip Code				
15a. FATHER'S CURRENT LEGAL NAME (First, Middle, Last, Suffix)	15b. FATHER'S LAST NAME PRIOR TO FIRST MARRIAGE	15c. FATHER'S DATE OF BIRTH (Month, Day, Year)	15d. FATHER'S BIRTHPLACE (State, Territory, or Foreign Country)	
16a. Permission given to provide Social Security Administration with necessary birth information to issue a Social Security Number?				
16b. Permission given to provide Oklahoma State Department of Health registries (such as Newborn Screening and Immunization) with information necessary to protect and promote the health of Oklahoma citizens?				

VS 152 Revised 2009 C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROWAN FOWLER; ALLISTER HALL; and
C.R.,

Plaintiffs,

v.

KEVIN STITT, in his official capacity as
Governor of the State of Oklahoma; KEITH
REED, in his official capacity as Commissioner
of Health for the Oklahoma State Department of
Health; and KELLY BAKER, in her official
capacity as State Registrar of Vital Records,

Defendants.

Case No.: 22-CV-00115-GKF-SH

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendants have stripped transgender people of legal recognition of their identity, in spite of the extraordinary danger inflicted by their actions, the absence of any harms in the many years preceding this policy reversal, and even the court orders forbidding their conduct. They fervently believe that “sex” must have their preferred meaning—one rooted in “Oklahoma values,” as the Governor put it—and they have used the power of government to impose that view on the nonconforming minority whose identity and very existence threatens it.

The constitutional guarantees against abuse of government power that protect all of us do not permit Defendants to hold Plaintiffs’ identity documents hostage to make a political point. Successful navigation of modern life requires accurate identification. From employment to housing, and health care to financial affairs, there are few facets of life where we are not called upon to prove our identities. But when Plaintiffs are called upon to do so, they cannot use their birth certificates—one of the most foundational documents to verify identity—as others are able to do. Instead, their certificates involuntarily disclose their transgender status, exposing them to an all-too-real risk of harassment, discrimination, and even catastrophic violence.

As virtually every federal and state court to confront the issue has held, the government may not bar transgender people from correcting their identity documents to match their gender identity. First, doing so violates equal protection: while others have access to birth certificates matching their gender identity, transgender people are deprived of access to such documents. That discriminates based on sex, regardless of how sex is defined, as well as transgender status. Second, the government violates due process through infringements upon the right to privacy, which protects against the involuntary disclosure of information revealing one’s transgender status, and liberty, which safeguards the basic right to live in accordance with one’s gender identity without

government intrusion. Third, the policy violates free speech by compelling transgender people like Plaintiffs to disclose information revealing their transgender status and, adding insult to injury, to carry the government’s message of their gender rather than their own.

Ultimately, while the policy triggers heightened scrutiny on each of these bases, it fails even rational basis review. It is a quintessential solution in search of a problem. Tellingly, Defendants’ imagined parade of horrors—including the incendiary and irrational assertion that women will suffer if transgender people’s birth certificates are corrected—never came to pass in Oklahoma in the many years preceding its policy reversal, nor in the 47 states where transgender people can correct their birth certificates to match their gender identity. For all these reasons, Plaintiffs have satisfied and surpassed their burden at the pleading stage to state valid claims.

FACTUAL BACKGROUND

Plaintiffs Rowan Fowler, Allister Hall, and C.R. are transgender Oklahomans who seek to correct their birth certificates to accurately reflect their sex, consistent with their gender identity. ECF No. 21, First Amd. Compl. (“FAC”), ¶ 11-13. Like other transgender people, the sex they were assigned at birth does not match their gender identity, which is a person’s core internal sense of their own gender. *Id.* ¶ 20. Contrary to the government’s derisive characterization, gender identity is not some new-fangled invention: it is an established concept in science, medicine, and law, and it is the key determinant of a person’s sex, including most notably where one’s gender identity differs from their birth-assigned sex. *Id.*

Like almost every other state in the country, Oklahoma previously allowed transgender people to correct their birth certificates to match their gender identity—but Defendants abruptly reversed that longstanding practice and replaced it with a categorical ban (hereafter, “Birth Certificate Policy” or “Policy”). *Id.* ¶ 50. On November 8, 2021, Governor Stitt issued an

Executive Order unilaterally decreeing that Oklahoma law does not provide the Oklahoma State Department of Health (OSDH) or others with the ability to “alter a person’s sex or gender on a birth certificate.”¹ *Id.* ¶ 55. Shortly before its issuance, he explained that, “I believe that people are created by God to be male or female. Period.” *Id.* ¶ 53. He also promised that he would “tak[e] whatever action necessary to protect Oklahoma values.” *Id.*

Notwithstanding Defendants’ portrayal of the Policy as supposedly imposing a “neutral” rule on all people born in Oklahoma, the only change it accomplished was with respect to transgender people. Both before and after the Policy, non-transgender people have always had access to birth certificates matching their gender identity. But after the Policy, transgender people like Plaintiffs have been categorically deprived of such access.

ARGUMENT

I. Defendants’ Birth Certificate Policy Violates the Equal Protection Clause.

A. The Policy Triggers Heightened Scrutiny Because It Discriminates Based on Sex and Transgender Status.

Defendants’ Birth Certificate Policy strips transgender people like Plaintiffs of access to birth certificates that match their gender identity while Defendants continue to provide people who are not transgender with birth certificates that match their gender identity. That is discrimination, pure and simple, and it demands the rigors of heightened scrutiny on at least two independent grounds, as explained further below. First, the Policy discriminates based on sex. No matter how Defendants try to repackage their Policy—which literally engages in a sex-based classification of

¹ Defendants also assert that an Oklahoma statute now forbids alteration of a birth certificate sex designation “for any reason.” But that is not what the statute says, and if its purpose was to ban transgender men and women like Plaintiffs from correcting their birth certificates to match their male and female gender identity, it would have said so. 63 Okla. Stat. § 1-131 (stating that birth certificate designations “shall be either male or female and shall not be nonbinary”).

individuals—as somehow “neutral,” it plainly engages in discrimination on its face. That is true even if “sex” is wrongly viewed as including only one’s birth-assigned sex; but the Policy also discriminates in several other respects—including based on gender identity, sex stereotypes, and gender transition—all of which fall within the broad spectrum of ways in which sex-based discrimination can manifest itself. Second, the Policy also triggers heightened scrutiny because discrimination against transgender people bears all the indicia of a suspect classification. Transgender people have suffered a long, painful history of discrimination that persists today based on a characteristic unrelated to their value to society, and they lack the requisite political power necessary to shield themselves from these abuses.

Heightened scrutiny imposes a “stringent” standard: the policy at issue is presumed unconstitutional unless the government can satisfy its burden to demonstrate, at a minimum, that an exceedingly persuasive justification actually motivated its enactment. *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 799 (10th Cir. 2019). Defendants cannot meet that heavy burden here, much less at the pleading stage. Nor can they shirk their burden entirely by claiming that the Policy is exempt from any scrutiny. Compare ECF No. 24 (“Mot.”) 12 (conflating whether policies may ultimately *survive* heightened scrutiny with whether such scrutiny nonetheless attaches in the first place) with *United States v. Virginia*, 518 U.S. 515, 555 (1996) (“all gender-based classifications ... warrant heightened scrutiny”) (quotes omitted).

Notably, regardless of the precise level of scrutiny employed, or the specific right at issue, virtually every court in modern history has arrived at the same conclusion: governmental barriers that deny transgender people of identity documents matching their gender identity are unconstitutional. See, e.g., *Ray v. McCloud*, 507 F. Supp. 3d 925 (S.D. Ohio 2020); *Foster v. Andersen*, No. 18-2552, ECF No. 33 (D. Kan. Jun. 21, 2019); *F.V. v. Barron*, 286 F. Supp. 3d 1131

(D. Idaho 2018); *Arroyo Gonzalez v. Rosello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018); *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015); *see also Marquez v. Montana*, No. DV-21-873 (Yellowstone Cnty. Dist. Apr. 21, 2022);² *Corbitt v. Taylor*, 513 F. Supp. 3d 1309 (M.D. Ala. 2021); *D.T. v. Christ*, 552 F. Supp. 3d 888 (D. Ariz. 2021) *K.L. v. State, Dept. of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183 (Alaska Super. Ct. Mar. 12, 2012). Indeed, as detailed below, the Policy cannot withstand even rational basis review.

1. The Policy Engages in Sex-Based Discrimination.

Discrimination Based on Birth-Assigned Sex. The Policy discriminates based on sex in multiple ways. First, it plainly creates a sex-based classification on its face. Indeed, a policy that “cannot be stated without referencing sex” is perhaps the quintessential example of a sex-based classification. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (holding that a school policy that barred a transgender male from boys’ facilities based on his “biological gender” discriminated on the basis of sex); *Kadel v. Folwell*, No. 1:19CV272, 2022 WL 3226731, at *18-20 (M.D.N.C. Aug. 10, 2022) (holding that an insurance policy excluding coverage for “sex changes” facially discriminated against transgender people); *Corbitt*, 513 F. Supp. 3d at 1315 (holding that a policy denying transgender plaintiffs of driver’s licenses reflecting their gender identity absent surgery imposed the government’s own “sex classification”).

Here, Defendants’ Policy cannot be stated without referencing sex. The Executive Order permanently consigns transgender people to the sex designation they were assigned at birth by forbidding OSDH officials from “alter[ing] a person’s sex or gender on a birth certificate.” FAC ¶ 55. The complaint alleges that Governor Stitt and his office have “specifically instruct[ed]

² *Marquez* is available at https://www.aclumontana.org/sites/default/files/field_documents/findings_of_fact_conclusions_of_law_and_order_granting_in_part_defendants_motion_to_dismiss_and_granting_plaintiffs_motion_for_a_preliminary_injunction.pdf.

OSDH officials that they cannot correct the birth certificates of transgender people to reflect their male or female gender identity.” *Id.* ¶ 56. And if there were any doubt that the Policy is based on sex, Defendants’ position here erases it: “laws, like the birth certificate law at issue here . . . classify individuals based on biological or birth sex.” Mot. 13. By Defendants’ own admission, then, the Policy is not “neutral” with regard to sex. To the contrary, classifying individuals like Plaintiffs based on Defendants’ view of “sex” is its central and defining feature.

Notably, the Policy necessarily engages in a sex-based classification regardless of how “sex” is defined. Even if sex were narrowly (and wrongly) construed to encompass only an individual’s sex assigned at birth—or what Defendants call “biological sex,” ignoring that gender identity itself has biological underpinnings, FAC ¶ 24—the Policy nonetheless discriminates on that basis. The Policy denies Ms. Fowler of a birth certificate matching her gender identity because she was assigned male at birth. Had she been assigned female at birth, she would have a certificate matching her identity, which she could use to participate in society like everyone else. Thus, her birth-assigned sex is an undeniable but-for cause of her injury. *Cf. Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1030 (D. Alaska 2020).

That was precisely the logic of the Supreme Court’s holding in *Bostock v. Clayton Cnty.* 140 S. Ct. 1731 (2020). The Court expressly assumed—without deciding—that sex referred to nothing more than one’s reproductive biology for the sake of argument; but it concluded that discrimination against a transgender person still necessarily turned on that person’s birth-assigned sex. *Id.* at 1739. Thus, Defendants’ invitation that this Court find that “sex” excludes gender identity—in defiance of all scientific and medical understanding to the contrary, FAC ¶¶ 17-37—is not only wrong as a matter of fact, and forbidden at the pleading stage, but it is also futile as a matter of law. Simply put, “it is impossible to discriminate against a person for being ...

transgender without discriminating against that individual based on sex.”³ *Id.* at 1741.

Both before and after *Bostock*, courts have recognized that where the government denies transgender people of identity documents reflecting their gender identity, it has engaged in discrimination based on sex. *F.V.*, 286 F. Supp. 3d at 1144; *cf. Corbitt*, 513 F. Supp. 3d at 1315 (“the State sets the criteria by which it channels people into its sex classifications”); *D.T.*, 552 F. Supp. 3d at 895-96 (applying *Bostock* and recognizing that the state’s birth certificate policy did not need to use the word “transgender” to engage in sex discrimination against transgender people, because it was logically inherent in the restriction at issue).

The Tenth Circuit recognized that it is “clear” that *Bostock* overruled its prior circuit authority wrongly suggesting that discrimination against transgender people is not necessarily discrimination because of sex—which “is no longer valid precedent.” *Tudor v. SE Okla. State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021) (holding that transgender professor was entitled to tenure and other relief). Defendants nonetheless attempt to resuscitate this overruled authority, and others like it, by arguing that there is no sex discrimination so long as “biological males” as a group are not exposed to disadvantageous terms relative to women. Mot. 14. But that argument is foreclosed by *Bostock*, which held that a defendant “cannot escape liability by demonstrating that it treats males and females comparably as groups.” 140 S. Ct. at 1744.

The lynchpin of Defendants’ equal protection argument—that, the government supposedly imposes a “neutral” rule because it treats everyone according to their birth-assigned sex—fails for the same reason: it seeks to obscure discrimination by arguing that such discrimination is

³ *Bostock* also explained that “discrimination” requires *both* differential treatment *and* injury. 140 S. Ct. at 1739 (explaining that discrimination requires differences in treatment that cause injury). Thus, the fact that a non-transgender man receives a birth certificate designated male rather than female, for instance, does mean that he has suffered “discrimination,” because he already possesses a birth certificate matching his gender identity and has not suffered injury.

“equally” applied to all. Mot. 8; *cf. Grimm*, 972 F.3d at 609 (“that is like saying that racially segregated bathrooms treated everyone equally, because everyone was prohibited from using the bathroom of a different race”). By that reasoning, laws excluding same-sex couples from marriage never discriminated against gays and lesbians because they also precluded heterosexuals from marrying others of the same sex. Of course, *Obergefell v. Hodges*, 576 U.S. 644 (2015), concluded differently. Indeed, by Defendants’ logic, no adverse action against transgender people would ever be discriminatory, because any defendant could always argue that it “neutrally” requires everyone to live in a manner consistent with their birth-assigned sex—which strikes directly against what it means to be transgender. In any event, Defendants’ intent to target transgender people is apparent in light of the Policy’s origin and purpose. FAC ¶¶ 52-56.

Discrimination Based on Gender Identity, Sex Stereotypes, & Gender Transition. The Policy also discriminates based on a host of other sex-based considerations apart from birth-assigned sex, including gender identity, sex stereotypes, and gender transition. Defendants’ assertion that sex reduces to nothing more than “the binary and biological nature of the two sexes,” Mot. 13, is flatly contradicted by the scientific and medical understanding of what sex encompasses. FAC ¶¶ 17-24; *cf. Zzyym v. Pompeo*, 958 F.3d 1014, 1024 (10th Cir. 2020) (recognizing that most people are male or female but “some people are neither”). Although a person possesses multiple sex-related characteristics, including hormones, chromosomes, and reproductive organs, “gender identity is *the* critical determinant of a person’s sex.” FAC ¶ 20. Thus, “to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning.” *F.V.*, 286 F. Supp. 3d at 1144. Contrary to Defendants’ hyperbole, however, the relief sought here does not require destroying of every record of birth-assigned sex nor all sex

classifications. Plaintiffs merely seek corrected copies of birth certificates reflecting who they are.

Defendants also rely heavily on the notion that supposed “biological differences” immunize sex discrimination from any scrutiny. But the Tenth Circuit has made clear that any “physical differences” in relation to sex “[do not] resolve the constitutional question.” *Fort Collins*, 916 F.3d at 801. As here, policies “supposedly based on ‘reasonable considerations’ may in fact reflect ‘archaic and overbroad generalizations about gender.’” *Id.* at 799.

Discrimination based on sex “is not only discrimination because of maleness and discrimination because of femaleness” but, rather, it includes “discrimination because of the properties or characteristics by which individuals may be classified as male or female.” *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016). For instance, it is blackletter law that discrimination based on “sex” encompasses discrimination based on the failure to conform to sex stereotypes—not merely “biological sex.” Long ago, the Supreme Court recognized that it is discriminatory to insist that individuals match the sex stereotypes expected for them. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that employer discriminated against a woman deemed insufficiently feminine, even if the employer had no objection to women per se).

These stereotypes are also inherent in discrimination against transgender people. *See, e.g., Corbitt*, 513 F. Supp. 3d at 1315 (holding that transgender people were being channeled into the government’s sex classification and “told who they are by the State”); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576 (6th Cir. 2018) (recognizing that “stereotypical notions of how sexual organs and gender identity ought to align” are inherent in discrimination against transgender people); *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1200-01 (D. Colo. 2017) (recognizing that discrimination against transgender people is based on sex stereotyping).

Defendants’ Policy is unabashedly rooted in sex stereotypes. It imposes the government’s

view of what constitutes a “real” man, or a “real” woman, while also enforcing the expectation that transgender people should be content with the sex designated for them at birth. But as the Tenth Circuit has cautioned: “Any law premised on generalizations about ‘the way women are’—or the way men are—will fail constitutional scrutiny because it serves no important governmental objective.” *Fort Collins*, 916 F.3d at 801 (quotes partially omitted). Indeed, the Policy is based on Governor Stitt’s personal, religious views regarding how “people are created by God to be male or female” and the “Oklahoma values” that he believed must be protected by “whatever action necessary”—even in defiance of court orders. FAC ¶ 53. Adherence to sex stereotypes was thus an essential element of his *justification* for the Policy, which ultimately dooms its constitutionality. *See Navajo Nation v. New Mexico*, 975 F.2d 741, 744 (10th Cir. 1992) (holding that, where present, invidiousness is fatal to constitutionality).

Finally, the Policy discriminates based on gender transition, which is also necessarily discrimination based on sex. *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 575 (“discrimination ‘because of sex’ inherently includes discrimination against employees because of a change in their sex”); *Fabian*, 172 F. Supp. 3d at 527. By analogy, firing an employee because she converts from Christianity to Judaism “would be a clear case of discrimination ‘because of religion,’” even if the employer harbored no bias towards either Christians or Jews but only “converts.” *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008). Similarly, by discriminating against those who seek to correct their gender markers to match their gender identity, the Policy necessarily discriminates on the basis of sex.

2. The Policy Discriminates Against Transgender People, Who Constitute a Suspect Class.

The Policy also independently requires heightened scrutiny because government discrimination against transgender people bears all the indicia of suspect classification.

Heightened scrutiny is required where the government targets a class that (1) has been historically subjected to discrimination, (2) has a defining characteristic frequently bearing no relation to one's ability to perform or contribute to society, (3) has obvious, immutable, or distinguishing characteristics, and (4) is a minority or politically vulnerable. *Karnoski v. Trump*, 926 F.3d 1180, 1200 n.17 (9th Cir. 2019) (quotes omitted). As a litany of federal appeals and district courts have recognized, all these indicia are present for transgender people.⁴ FAC ¶ 129.

First, there has been a long and cruel history of discrimination against transgender people, which remains pervasive to this day. “There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.” *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Grimm*, 972 F.3d at 612; *Foster v. Andersen*, No. 18-2552, 2019 WL 329548, at *2 (D. Kan. Jan. 25, 2019) (recognizing ongoing harms). Second, this longstanding discrimination is unrelated to transgender people's value to society. *Grimm*, 972 F.3d at 612; *Highland*, 208 F. Supp. 3d at 874; *Adkins*, 143 F. Supp. 3d at 139. Third, transgender people have an obvious, immutable, or distinguishing characteristic that defines them as a discrete group. *Grimm*, 972 F.3d at 612-13; *Ray*, 507 F. Supp. 3d at 937. Finally, “transgender people are unarguably a politically vulnerable minority.” *F.V.*, 286 F. Supp. 3d at 1145; *Grimm*, 972 F.3d at 613. Because discrimination against transgender people rings every alarm alerting courts to a suspect or quasi-suspect classification,

⁴ See, e.g., *Karnoski*, 926 F.3d at 1200; *Grimm*, 972 F.3d at 610-13; *Ray*, 507 F. Supp. 3d at 937; *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 719-22 (D. Md. 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 952-53 (W.D. Wis. 2018); *F.V.*, 286 F. Supp. 3d at 1144; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (“*Highland*”); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015). Defendants cannot overcome this litany of authority, much less by relying on cases whose underpinnings *Bostock* swept away.

the Policy here is subject to heightened scrutiny.

B. The Policy Fails Even Rational Basis Review.

Although the Policy is subject to heightened scrutiny on multiple grounds (addressed both above and below), it fails even rational basis review. Even in an ordinary case, rational basis review “is not toothless.” *Dalton v. Reynolds*, 2 F.4th 1300, 1309 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 348 (2021). More importantly for purposes here, courts have routinely applied more searching rational basis review where the government has disadvantaged an unpopular group or burdened important liberty interests. *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012); *see also Golinski v. U.S. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012). In all events, the court must conduct an inquiry into “the relation between the classification adopted and the object to be attained.” *Romer v. Evans*, 517 U.S. 620, 632 (1996).

As noted above, a plethora of courts have recognized that policies barring transgender people from obtaining identity documents matching their gender identity lack any adequate government justification. *See, e.g., Ray*, 507 F. Supp. 3d at 939 (holding that the policy “[did] not even survive rational basis review because there is no logical connection between the Policy and proffered justifications”). And neither of the government’s attempted justifications here—promoting accuracy and protecting women—pass minimum constitutional muster, particularly at the pleading stage where the court must accept the complaint’s factual allegations as true.

Promoting Accuracy. The assertion that the Policy promotes “accuracy” is a wholly circular justification: Defendants claim that Plaintiffs’ birth certificates are accurate because they reflect their sex assigned at birth. But that merely restates what the Policy does—not *why* it is more accurate to saddle transgender people with identity documents that do not match their identity. *Cf. Kitchen v. Herbert*, 755 F.3d 1193, 1216 (10th Cir. 2014) (rejecting as “wholly

circular” the government’s assertion that same-sex couples cannot be recognized as spouses because they are purportedly excluded, by definition, from the institution of marriage).

The Policy does not promote any interest in accuracy and, in fact, thwarts that interest. FAC ¶ 48. As another federal court similarly recognized, the government’s refusal to correct the gender markers on transgender people’s driver’s licenses “[bore] little, if any, connection to Defendant’s purported interests” in maintaining accurate identity documents. *Love*, 146 F. Supp. 3d at 856. Other courts have recognized that policies similar to the one here undermine accuracy. *See, e.g., K.L.*, 2012 WL 2685183, at *7 (holding that the refusal to correct a transgender woman’s driver’s license not only failed to “further[] ... the state’s interest in accurate document[s] and identification” but created a risk of “inaccurate and inconsistent identification documents”). An identity document bearing a transgender person’s birth-assigned sex “inaccurately describe the discernable appearance of the [document] holder by not reflecting the holder’s lived gender expression of identity,” thus creating problems for both that person and others who see it. *Id.*; *Corbitt*, 513 F. Supp. 3d at 1323 (rejecting that “a sex designation that differs from the licenseholder’s appearance” would help in accurate identification); *F.V.*, 286 F. Supp. 3d at 1142 (birth certificate policy lacked rational basis); *Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (birth certificate policy was “not justified by any legitimate government interest”).

Those problems are borne out in Plaintiffs’ lives. *See, e.g.,* FAC ¶¶ 85-86, 116-19. Consigning a transgender woman who lives openly as a woman to an identity document labeling her as male only injects inaccuracy into situations where she presents that document to others. “A chef might label a jar of salt a jar of sugar, but the label does not make the salt any sweeter.” *Zzymm*, 958 F.3d at 1024 (rejecting government justification based on accuracy in denying intersex plaintiff of passport with gender-neutral marker).

The absence of any rational connection is particularly pronounced here, because Oklahoma previously *allowed* transgender people to correct their birth certificates for more than a decade—without somehow jeopardizing the accuracy of vital records. FAC ¶ 50. Other states that have similarly flip-flopped on their policies have failed to persuade courts of imagined harms to the accuracy of vital records, which are plainly disproven by their past practice. *Ray*, 507 F. Supp. at 938 (rejecting Ohio’s purported interest in the accuracy of records given that it previously permitted transgender people to change the sex marker on their birth certificates). More broadly, the accuracy of other states’ vital records plainly has not come to a grinding halt, even though a whopping 47 states permit transgender people to correct their birth certificates to match their gender identity. FAC ¶ 58; *cf. Fort Collins*, 916 F.3d at 803. Defendants’ insistence that the Policy is crucial to vital records accuracy thus has no “footing in the realities of the subject addressed by the [policy].” *Heller v. Doe*, 509 U.S. 312, 321 (1993).

The Policy also undermines accuracy by creating inconsistency across other identity documents for transgender people. In contrast to its birth certificate policy, Oklahoma allows transgender people to correct their driver’s licenses to reflect their gender identity, thus leaving them with one document saying male and another document saying female, a potentially confounding situation that hardly aids in identity verification. FAC ¶¶ 60, 86. Likewise, the Policy can create similar inconsistency between transgender people’s birth certificates and federal documents, such as their social security records and passports. FAC ¶¶ 75, 96, 111.

Protecting Women. Defendants assert that the Policy is justified in the name of protecting women, but that itself betrays the sex-based stereotypes that motivated the Policy, and the Policy lacks any rational connection to the protection of women in any event.

Sex discrimination is often “rationalized by an attitude of ‘romantic paternalism’” such as

the notion that “[m]an is, or should be, women’s protector and defender” and that “[t]he natural and proper timidity and delicacy” of women must be preserved. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (quotes omitted). But that is not a legitimate government interest. Defendants’ admission that the Policy—which applies to both transgender men and women—was nonetheless animated by a view that women, in particular, needed protection from transgender people correcting their birth certificates is itself a confession of sex discrimination.

In any event, the Policy also lacks any rational connection to the protection of women. Defendants never articulate how, precisely, allowing Ms. Fowler to correct her birth certificate, or allowing C.R. to correct his birth certificate, would harm any woman. Defendants never explain how women were somehow harmed during the decade-plus stretch of time when they permitted transgender people to correct their Oklahoma birth certificates. FAC ¶ 50. And Defendants never point to any harm to women in the scores of other states that allow transgender people to correct their birth certificates. *Id.* ¶ 58. Because these harms do not exist.

Defendants instead resort to stoking imagined, unsupported, and illogical fears, none of which can justify the Policy. *Cf. Fort Collins*, 916 F.3d at 803. For example, Defendants gesture vaguely towards restrooms and sports. Mot. 14. But monitors are not generally stationed outside restrooms inspecting birth certificates, nor does the relief sought here compel Defendants’ reliance upon corrected birth certificates for such access or another purpose. *Cf.* 70 Okla. Stat. § 1-125 (relying on an “original” birth certificate in defining sex for access to facilities). At the same time, Oklahoma does allow transgender people to obtain state licenses reflecting their gender identity, undermining any interest in denying them all treatment consistent with their identity. FAC ¶ 60. The Policy is thus both vastly over-inclusive and under-inclusive with respect to any rational basis. *Cf. Romer*, 517 U.S. at 632; *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973).

Ultimately, notwithstanding Defendants' hyperbole, this case is about birth certificates—and the specific justifications asserted by Defendants in defense of the Policy at issue—rather than other practices whose particular justifications are not at issue here.

II. The Policy Violates the Due Process Clause by Infringing Privacy and Liberty.

The Policy also requires heightened scrutiny under the Due Process Clause, both because it infringes Plaintiffs' right to informational privacy and Plaintiffs' rights to liberty, autonomy, and dignity. Either basis independently triggers application of heightened scrutiny.

A. The Policy Violates Plaintiffs' Right to Informational Privacy.

Plaintiffs have alleged ample facts to show that the Policy impinges on their fundamental right to informational privacy. It forces them to disclose that their assigned sex at birth does not match their gender identity—thus disclosing their transgender status (and related medical information)—every time they present their birth certificate to others. That involuntary disclosure reveals intensely private information that places them in jeopardy for serious harm. Defendants contend that the Tenth Circuit has never recognized a right to privacy; that the information at issue is not worthy of protection; and that the government has not caused any disclosure. All of these arguments miss the mark.

First, as the Tenth Circuit recently confirmed in binding precedent, “[w]e have long held that the constitutional right to privacy prohibits the government from inquiring into or disclosing private information” that is shielded by the Constitution. *Stewart v. City of Oklahoma City*, -- F.4th --, 2022 WL 4084668, at *7 (10th Cir. 2022) (quotes omitted); *see also Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001); *Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000); *Eastwood v. Dep't of Corrs.*, 846 F.2d 627, 630-32 (10th Cir. 1988). And it has specifically rejected Defendants' contention that circuit precedent has departed from

this holding. *Stewart*, 2022 WL 4084668, at *7 n.8 (explaining that the qualified immunity case on which Defendants rely here “does not change our analysis”).

Second, a person’s transgender status is extraordinarily sensitive, personal, and private information that demands constitutional protection. Simply being transgender “is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others.” *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999). The Tenth Circuit agrees that “[t]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.” *Anderson v. Blake*, 469 F.3d 910, 915 (10th Cir. 2006) (quoting *Powell*, 175 F.3d at 111). “Much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, ‘there are few areas which more closely intimate facts of a personal nature than one’s transgender status.’” *Arroyo Gonzalez*, 305 F. Supp. 3d at 333. Courts have thus held that policies relegating transgender people to identity documents that disclose their transgender status infringe upon their privacy. *See, e.g., Ray*, 507 F. Supp. 3d at 931-32; *Arroyo Gonzalez*, 305 F. Supp. 3d at 333; *Love*, 146 F. Supp. 3d at 853-56.

Indeed, the involuntary disclosure of a person’s transgender status—particularly in contexts where one would otherwise keep that information private—can place a person’s physical safety and bodily integrity in jeopardy. *Ray*, 507 F. Supp. 3d at 934 (emphasizing the “heightened risk of harm transgender people face when forced to disclose”); *Powell*, 175 F.3d at 111. “A mismatch between the gender indicated on the document and the gender of the holder calls down discrimination.” *Adkins*, 143 F. Supp. 3d at 139-40. There remains “a great deal of animosity” towards transgender people, as confirmed by a “plethora” of evidence—including disturbing hate crimes statistics. *Love*, 146 F. Supp. 3d at 855-56. Plaintiffs’ own life experiences confirm that these threats are all too real. *See, e.g., FAC* ¶¶ 79-82, 98, 116.

Defendants rely heavily on *Leiser v. Moore*, 903 F.3d 1137 (10th Cir. 2018), but it only confirms that, whatever the boundaries of a right of informational privacy in more marginal cases, it plainly protects the involuntary disclosure of a person’s transgender status. The Tenth Circuit specifically contrasted the facts in that case (involving disclosure of a cancer diagnosis to elicit support from family and friends), which it found insufficient to overcome a qualified immunity defense for damages, with other disclosures—such as “a person’s HIV status and transsexualism”—which would bring about “public opprobrium [or] expose a person to discrimination and intolerance.” *Id.* at 1145 (quotes omitted). Indeed, the court’s juxtaposition indicates that it viewed the latter as conscience-shocking disclosures. *Id.* at 1144; *cf. Grimes v. County of Cook*, 455 F. Supp. 3d 630, 639 (N.D. Ill. 2020) (independent grounds for liability).

Third, Defendants cannot wash their hands of responsibility by pointing the finger at transgender people and blaming them for the injuries that Defendants have caused. The mere fact that Governor Stitt, for instance, has not personally presented Ms. Fowler’s birth certificates to third parties is no defense to liability. *Botello v. Morgan Hill Unified Sch. Dist.*, No. C09-02121 HRL, 2009 WL 3918930, at *4 (N.D. Cal. Nov. 18, 2009) (recognizing privacy “is not limited to the state’s disclosure of personal information—it also includes a plaintiff’s compelled disclosure of personal information”). Defendants bear responsibility for the intended consequences of the Policy they have created and enforced. *Cf. K.L.*, 2012 WL 2685183, at *6 (recognizing that the government did not directly disclose party’s transgender status but that its driver’s license policy nonetheless caused the privacy violations); *Love*, 146 F. Supp. 3d at 856. Notably, the government does not maintain birth certificates simply to file them away in a cabinet; it provides people with copies of their own birth certificates so they can be used. 63 Okla. Stat. § 1-323(A)(1). The disclosure of one’s birth certificate to others is thus not merely foreseeable but, in fact, is part of

the reason why the government provides copies of birth certificates in the first place. FAC ¶ 39.

Defendants also cannot escape liability by blaming Plaintiffs for living in accordance with their gender identity—which they have a constitutional right to do. Mot. 20 (suggesting that transgender people’s “statements, mannerisms, or appearance” are to blame for disclosure). By that logic, virtually any outing of a transgender person could be excused as something they brought on themselves. But the Policy undeniably causes privacy violations that would not otherwise exist, because the display of a gender marker on a birth certificate that is discordant with one’s gender identity reveals to others that the birth certificate holder is transgender.

Finally, it is no answer to suggest that transgender people can simply never present their birth certificates to others, particularly when non-transgender people are able to do so freely. People must produce birth certificates to participate fully in public life. FAC ¶ 40. The government cannot coerce people to choose between a valuable benefit and a constitutionally protected right. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *accord Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). In other words, the government may not accomplish indirectly that which it could not accomplish directly.

B. The Policy Burdens Plaintiffs’ Rights to Liberty, Autonomy, and Dignity.

The Policy also triggers heightened scrutiny because the government has stripped transgender people of their prior ability to define, express, and live in accordance with their gender identity and instead foisted the government’s view of their sex onto them in its place. It is one thing for Governor Stitt to personally “believe that people are created by God to be male or female”—but it is an entirely different matter to impose his view of sex onto others, with the power of government at his back. FAC ¶ 53. This intrusion into Plaintiffs’ personal lives invades a constitutionally sheltered sphere of individual liberty, autonomy, and dignity.

“The Constitution promises liberty to all within its reach,” including the right “to define and express their identity.” *Obergefell*, 576 U.S. at 651-52. Protected liberty interests are those that implicate “individual dignity and autonomy” and include actions that “shape an individual’s destiny.” *Id.* at 645, 663. They serve as a foundation for other liberties. A person’s core internal sense of their own gender, and what that means for their everyday life, is profoundly central to their personal identity. “The right to identify our own existence lies at the heart of one’s humanity.” *Arroyo Gonzalez*, 305 F. Supp. 3d at 334 (holding that the denial of accurate birth certificates to transgender people violates the “autonomy branch” of constitutional protection).

Transgender people possess this liberty in equal measure with everyone else. “And so, we must heed their voices: ‘the woman that I am,’ ‘the man that I am.’” *Id.* Otherwise, “new groups could not invoke rights once denied,” and states could continue to bar same-sex or interracial couples from marriage, for example. *Obergefell*, 576 U.S. at 671. Our founders “did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons.” *Id.* at 664. The Tenth Circuit has similarly instructed that “in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right.” *Kitchen*, 755 F.3d at 1215.

Whenever the government has placed sex at issue, it has historically treated non-transgender people in a manner consistent with their gender identity. Indeed, Defendants themselves confirm a history of doing so—contrary to their arguments elsewhere based on *Dobbs* professing the absence of any history in support of the liberty interest here. Mot. 2 (describing recording of vital statistics, including sex, as “pre-dating the American Revolution”). The fact that the government has not consistently afforded that same treatment to transgender people does not divest them of their right to equal dignity. *See Kitchen*, 755 F.3d at 1215.

While all individuals have a right to be treated consistent with their gender identity, the liberty infringement at issue here is also magnified because it intrudes into Plaintiffs' medical autonomy. *Cf. D.T.*, 552 F. Supp. 3d at 895 (holding that transgender plaintiffs who were denied birth certificates matching their gender identity absent surgical treatment had cognizable claim under the Due Process Clause, which protects both the right to define and express one's identity and choices about medical treatment); *Marquez, supra*; *see also Eknes-Tucker v. Marshall*, -- F. Supp. 3d --, 2022 WL 1521889, at *7-9 (M.D. Ala. 2022). The ability to live in accordance with one's gender identity in all aspects of life is essential to treating gender dysphoria and averting its otherwise devastating consequences. FAC ¶¶ 17-37, 135, 138. If liberty has any meaning at all, it protects against government officials dictating the terms of our personal identity.

III. The Policy Violates Transgender People's First Amendment Rights to Free Speech.

Defendants ask this Court to dismiss Plaintiffs' First Amendment claim because the speech at issue, they contend, belongs to the government, not to Plaintiffs. But birth certificates are considered "identity documents" for a reason: they reflect the individual identity of the document holder. And the gender marker displayed on an individual's birth certificate expresses intimate information relating to that particular individual. By forcing transgender Oklahomans to maintain and produce birth certificates containing the state's ideological message about their gender, rather than their own truthful message, Oklahoma unconstitutionally compels their speech. Defendants' attempts to recast this as "government speech" are wholly without merit.

A. Gender Markers on Birth Certificates Do Not Constitute Government Speech Because They Are Attributed to the Individual, Not the Government.

Defendants fundamentally mischaracterize the purpose and utility of birth certificates, inaccurately asserting that birth certificates merely record "factual information" at the time of a person's birth and function as a permanent legal record. Mot. 1, 22. Oklahoma's own laws

demonstrate that birth certificates are not immutable records of circumstances at a single point in time. *See, e.g.*, 63 Okla. Stat. §§ 1-316 (providing for new birth certificates upon adoption, annulment of adoption, and establishment of paternity), 1-321 (allowing for amendments after name changes, acknowledgments of paternity, and court orders adjudicating paternity). Rather, birth certificates are contemporaneous identification documents that people are routinely expected to present to others to participate fully in society, including when obtaining a passport, a driver’s license, a social security card, or a voter registration card. FAC ¶¶ 2, 40.

“The First Amendment stringently limits a State’s authority to compel a private party to express a view with which the private party disagrees.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015). Although the State is generally entitled to its own viewpoints, it may not force a private party to be an instrument for “fostering public adherence to an ideological point of view he finds unacceptable.” *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (quotes omitted). Moreover, the State’s interest in expressing a viewpoint “cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). The Tenth Circuit has elaborated on this principle, holding that individuals become couriers of the State’s viewpoint when they are so “closely linked with the expression in a way that it makes [them] appear to endorse the government’s message.” *Cressman*, 798 F.3d at 949.

Here, birth certificates and the information shown on them are reasonably understood to reflect personal information relating to the particular individual.⁵ *Pleasant Grove City, Utah v.*

⁵ Defendants concede that a birth certificate conveys information concerning an individual and that it is disclosed by that individual to third parties for identification purposes. Mot. 3, 19. Defendants cannot have it both ways, alleging Plaintiffs’ privacy claim fails because disclosure is not attributable to the State, and then simultaneously alleging birth certificates are government speech that cannot be attributed to the Plaintiffs.

Sumnum, 555 U.S. 460, 471 (2009). Identity documents answer a fundamental question: who are you? When an employee at a clerk’s window is presented with an identity document stating the individual on the other side of the window is “male,” it requires no great leap for that employee to assume the individual is communicating that he is male. At the very least, whether a recipient of a birth certificate would attribute the gender marker to its presenter or to the government is a question of fact that precludes dismissal.⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The primary speech case on which Defendants rely is readily distinguishable. In *Walker*, the Supreme Court held that Texas’s specialty license plates constituted government speech because license plates had long been used by states to broadcast messages and mottos, and they “are often closely identified in the public mind” with the state. 135 S. Ct. at 2248-50.

Birth certificates, on the other hand, have not historically or typically been used by state governments to broadcast messages. Birth certificates contain personal identifying information, and are kept confidential except in strictly limited cases, *see* 63 Okla. Stat § 1-323, and therefore do not serve the purpose of broadcasting government viewpoints. Moreover, the Supreme Court has regarded the *Walker* decision as “the outer bounds of the government speech doctrine” and has instructed lower courts to “exercise great caution before extending ... government-speech precedents” because the doctrine “is susceptible to dangerous misuse.” *Matal v. Tam*, 137 S. Ct. 1744, 1758-60 (2017).

Defendants also wrongly assume that because birth certificates are government records, registered with the state, and include the state’s name that they are government speech. Mot. 22. But that logic has been flatly rejected by the Supreme Court. In *Matal*, the Supreme Court held

⁶ Plaintiffs also object to Defendants’ improper attempt to use materials outside the pleadings, although the fact that a birth certificate indicates that the State of Oklahoma created the form into which information is then inserted is neither surprising nor particularly helpful to Defendants.

that the registration of trademarks with the U.S. Patent and Trademark Office did not per se “convert[] the mark[s] into government speech.” 137 S. Ct. at 1748. To hold otherwise, the Supreme Court explained, “would constitute a huge and dangerous extension of the government-speech doctrine, for other systems of government registration could easily be characterized in the same way.” *Id.* Moreover, the Court affirmed the lower court’s ruling, which expressly characterized birth certificates as private speech. *In re Tam*, 808 F.3d 1321, 1348 (Fed. Cir. 2015) (“The PTO’s processing of trademark registrations no more transforms private speech into government speech than when the government ... records ... birth certificates[.] To conclude otherwise would ... allow rampant viewpoint discrimination.”).

Finally, the Supreme Court has made clear that application of the government speech doctrine turns on the extent to which the government controls the content—not just the medium—of the speech at issue. *See Matal*, 137 S. Ct. at 1760. When contrasted against the specialty license plates in *Walker*, birth certificates are more akin to the trademark registrations in *Matal* because their actual content is independently supplied by private parties and then registered with the government. *See* 63 Okla. Stat. § 1-311. The State, for example, does not decide a person’s name, nor does the State have authority to unilaterally determine a person’s parentage or even their sex. Because registration does not convert otherwise private speech into government speech, and because the State does not control the content of birth certificates, the gender markers contained on Oklahoma’s birth certificates do not constitute government speech.

B. The Policy Compels Plaintiffs to Endorse the State’s Message About Their Gender and Prohibits Them From Conveying Their Own Protected Message.

The Supreme Court has repeatedly struck down laws forcing individuals to express a viewpoint with which they disagree. *See Janus v. Am. Fed’n of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018) (“Forcing free and independent individuals to endorse ideas they find

objectionable is always demeaning.”); *see also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). Notably, the government also may not force individuals to disclose unwanted facts any more than forcing them to disclose unwanted viewpoints. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004). Here, Defendants compel transgender people to use birth certificates that convey Defendants’ viewpoint about their gender. Their Policy represents a particular ideology: that a person’s gender should be based exclusively on the sex associated with their external genitalia at birth. While the State may choose to embrace that position, at least as a First Amendment matter, Plaintiffs cannot be made to endorse the State’s message by being forced to communicate it to others. As the Supreme Court has affirmed, “the people lose when the government is the one deciding which ideas should prevail.” *NIFLA v. Beccera*, 138 S. Ct. 2361, 2375 (2018).

Even as the Policy forces transgender people to endorse Defendants’ viewpoint concerning the meaning of sex, it simultaneously prohibits Plaintiffs from conveying their own constitutionally-protected message about their identity and gender. *See, e.g., Doe v. Bell*, 754 N.Y.S.2d 846, 851 (Sup. Ct. 2003). The Policy forces transgender people to contradict what lies at the very core of their personal identity and their beliefs. And the unconstitutionality of forcing this speech is underscored because only transgender people are targeted by this content-based restriction on their speech. Non-transgender people are not similarly compelled, because their birth certificates match who they are, and do not convey a message with which they disagree. It is a clear sign of content-based compelled speech when “the State has left unburdened those speakers whose messages are in accord with its own views.” *NIFLA*, 138 S. Ct. at 2378.

CONCLUSION

For the foregoing reasons, Defendants’ motion should be denied in full.

DATED: September 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 30, 2022, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to all ECF registrants, including Defendants Kevin Stitt, Keith Reed, and Kelly Baker.

/s/ Shelly L. Skeen
Shelly L. Skeen

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROWAN FOWLER, *et al.*,

Plaintiffs,

v.

No. 22-CV-00115-GKF-SH

KEVIN STITT, *et al.*

Defendants.

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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October 14, 2022

The constitutional question before this Court has little to do with transgender status and everything to do with biological sex. The question is not whether the U.S. Constitution permits a state to discriminate against transgender individuals—the Oklahoma Birth Certificate Law does nothing of the sort. The question instead is whether the Constitution prohibits a state from recording sex on a birth certificate, as that term has been understood throughout our country’s history. It does not. Plaintiffs’ complaint boils down to arguing that accurate birth certificates, at their core, are unconstitutional.

Plaintiffs rarely address the arguments raised in Defendants’ Motion to Dismiss head-on. Instead, Plaintiffs exaggerate the legal and factual realities of this dispute while constantly knocking down strawmen. In an attempt to make their claims appear stronger, Plaintiffs absurdly analogize the State’s inclusion of (and refusal to alter) biological sex on a birth certificate to enforcing laws “excluding same-sex couples from marriage[.]” Doc. 33 at 8, engaging in “adverse action against transgender people[.]” *id.*, “insist[ing] that individuals match the sex stereotypes expected for them[.]” *id.* at 9, “firing an employee because she converts from Christianity to Judaism[.]” Doc. 33 at 10, “outing of a transgender person[.]” *id.* at 19 and “forc[ing] individuals to disclose unwanted facts” *Id.* at 25.

While distracted with these strawmen, Plaintiffs neglect the heavy burden they must overcome to state a plausible legal claim for invalidating the Birth Certificate Law under the U.S. Constitution. Plaintiffs must do more than allege a *disagreement* with the legislative choice to maintain (and refuse to alter) biological sex on state-issued birth certificates. *Compare* Doc. 33 at 2-3, 5-6, 8, 12-15, 22 *with* Doc. 24 at 5-7, 10, 15-17, 21. Plaintiffs must allege sufficient facts to establish the Constitution *forbids* the State from making a legislative choice to maintain biological sex on state-issued birth certificates.

Plaintiffs cannot overcome this burden as a matter of law because the Constitution does not protect an individual’s right to compel the state to alter its own government-issued birth documents

so that individuals allegedly “injur[ed]” by their own biology can “access . . . birth certificates that match . . . gender identity[.]” Doc. 33 at 6, 3. The Constitution does not require a State to replace objective sex with subjective gender identity—especially not on its own government-issued records which function to report objective information *about birth*. Dismissal is proper.

I. PLAINTIFFS CANNOT ESTABLISH THE BIRTH CERTIFICATE POLICY INTENTIONALLY DISCRIMINATES AS A MATTER OF LAW BY MERELY IDENTIFYING AN INDIVIDUAL’S SEX.

According to Plaintiffs, any law even “referencing sex” “plainly creates a sex-based classification[.]” Doc. 33 at 5, and “discriminates on that basis.” *Id.* at 6. Because the Birth Certificate Law allows the State to record an individual’s sex on certificates of birth, Plaintiffs conclude the law discriminates based on sex. Plaintiffs don’t attempt to reconcile this conclusion with the long-standing principle that mere “[c]lassification is not discrimination.” Doc. 24 at 9 (quoting *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941)); *see also id.* at 13 (“The Equal Protection Clause does not forbid classifications.”) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Plaintiffs ignore these authorities. This Court, however, cannot. *See United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990).¹

Plaintiffs focus so heavily on an incorrect assumption that identifying an individual’s sex *is* discrimination because the core theory undergirding their complaint is that sex does not really exist aside from gender identity and thus cannot be recorded. To be clear: Plaintiffs do not actually seek to “correct[.]” inaccurate information contained on government records. Doc. 33 at 13 (complaining that registering “birth-assigned sex ‘inaccurately describe[s] . . . the holder’s lived gender expression of identity.’”). The Birth Certificate Law accurately registers biological sex—not subjective gender

¹ The fact that some cases casually refer to the class-based application of legal prohibitions or entitlements as a “classification” does not diminish this principle. *See, e.g., Virginia*, 518 U.S. at 546; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978); *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792 (10th Cir. 2019). In each of these cases, the challenged policies did far more than merely identify individuals based on sex or race; rather, they tied benefits or exclusions to those classifications. In *Fort Collins*, for example, the “classification” was “gender-based” discrimination because it provided that men could go topless but women could not. 916 F.3d at 799. No such differential treatment is occurring here.

identity. *See* 63 O.S. § 1-321(H). Plaintiffs’ complaint instead recasts biological sex as “assigned” sex, insinuating that determining biological sex at birth is some arbitrary exercise. *See* Doc. 21 at ¶¶ 69, 91, 106. Plaintiffs seek to force the State to replace its biological sex marker with subjective gender identity, but they cannot directly articulate their true claim because binding authority confirms that biological sex exists apart from gender identity.

Plaintiffs rely heavily on inapposite cases involving laws that went beyond merely identifying or classifying one’s sex and race neutrally and instead tied certain benefits or exclusions to the classifications on an allegedly differential basis. *See, e.g.*, Doc. 33 at pp. 5-8 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Kadel v. Folwell*, No. 1:19CV272, 2022 WL 3226731 (M.D.N.C. Aug. 10, 2022); *Tudor v. SE Okla. State Univ.*, 13 F.4th 1019 (10th Cir. 2021); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020); and *Obergefell v. Hodges*, 576 U.S. 644 (2015)). Similarly, Plaintiffs frequently bypass independent constitutional analysis by touting a string-cite of district court opinions reaching their desired outcome on birth certificates. *See* Doc. 33 at p. 4-5, 7, 11, 12, 13, 17, 18. But this Court is not required to substitute its own reasoned judgment for that of another district court or even several district courts, any more than Oklahoma is required to substitute its legislative judgments for that of another state legislature.

Plaintiffs’ faulty equation of neutral classification with invidious discrimination colors their misunderstanding of Defendants’ equal protection arguments. For example, Plaintiffs characterize Defendants’ equal protection argument as “foreclosed by *Bostock*[,]” despite the fact that Defendants *rely on Bostock*. Compare Doc. 33 at 7 with Doc. 24 at 11-12. *Bostock*’s recognition that transgender status cannot happen without a divergence between gender identity and sex is precisely why Plaintiffs’ invitation to erase biological sex altogether finds no support in the Equal Protection Clause. To give an example, discrimination against a transgender female for wearing a dress at work is only sex discrimination because the transgender female is a biological male, and the stereotype at issue is that

a male cannot wear a dress to work. There is no sex stereotype Defendants are aware of that says a female cannot wear a dress to work, and the entire theory of stereotypes in *Bostock* relies on the view that biological sex is immutable regardless of gender identity. Plaintiffs simply assume that recording sex on government records is just as invidious as intentionally treating “a person worse because sex—such as firing the person” for being transgender. *See Bostock*, 140 S. Ct. at 1740.

Bostock did not assume “without deciding” that biological sex exists. Doc. 33 at 6-7. Instead, *Bostock* observed that the term sex in a particular statute could refer “to biological distinctions between male and female” or it could potentially capture “a broader scope” under the term’s original meaning. *Bostock*, 140 S. Ct. at 1739. Under *either* path, the Court’s baseline acknowledgement that “biological distinctions between male and female” exist would stand. *Bostock*, in other words, did not overturn longstanding precedent that biological sex exists; instead, it assumed without deciding that Congress meant that statute to cover only biological sex in the workplace context. *See id.* The same ambiguity does not arise in Oklahoma’s statutes because our Legislature has confirmed that the sex marker on birth certificates is a “biological sex designation[.]” 63 O.S. § 1-321(H), explicitly incorporating the “biological distinctions between male and female” that *Bostock* and other Supreme Court cases have recognized. In short, Plaintiffs’ claims hinge on setting aside *Bostock* by denying the existence of objective biological sex. *See* Doc. 33 at 6 (claiming, preposterously, that “all scientific and medical understanding” indicates that sex and subjective gender identity are the same).

Plaintiffs also misunderstand Defendants’ explanation of why the Birth Certificate Law is neutral on its face and in application. It is not neutral because “it treats everyone according to their birth-assigned sex[.]” Doc. 33 at 7, but because it does not “treat” anyone *any way*. *See* Doc. 24 at 7-8. It involves no adverse action, no deprivation of any benefit, and no differential treatment. It simply and permissibly records an objective fact on a government-issued document, and applies this standard equally to all persons regardless of sex, gender identity, etc. *See* Doc. 24 at 7-9. Again, Plaintiffs cannot

explain how the act of recording (and then refusing to alter) biological sex on a certificate of birth “requires everyone to live in a manner consistent with their birth-assigned sex” Doc. 33 at 8.

The absurdity of Plaintiffs’ conflation of neutral classification and class-based discrimination is perhaps most obvious in their suggestion that the very act of recording biological sex *is somehow itself* “unabashedly rooted in sex stereotypes.” Doc. 33 at 9. Supreme Court precedent forecloses this argument by finding “[p]hysical differences between men and women . . . are enduring: “[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.” Doc. 24 at 12 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Plaintiffs cannot escape this binding precedent by ignoring it or by trying to recast it as a disputable “matter of fact” to be debated later. Doc. 33 at 6. Indeed, Plaintiffs’ remarkable admission that their “birth-assigned sex is an undeniable but-for cause of [their] injury” reveals that basic biology is the apparent root cause of Plaintiffs’ grievances—not the Birth Certificate Law. *Id.* The Constitution does not prevent a State from recognizing biological realities on a state-issued birth certificate.

Despite failing to plausibly allege the Birth Certificate Law intentionally discriminates against any class of individuals in any form, Plaintiffs nonetheless insist heightened scrutiny is triggered because transgender individuals feel subjectively marginalized by the law. *See id.* at 4. To support their novel “indicia of suspect classification” argument (that collapses the discrimination and suspect class inquiries), Plaintiffs again ignore both the Tenth Circuit and the Supreme Court’s refusals to recognize transgender status as a suspect class apart from sex. *Compare* Doc. 33 at 10 *with* Doc. 24 at 10. Rather than declaring transgender status a separate suspect class, despite being urged to, *Bostock* taught only that adverse employment action based on stereotypes about biological sex is sex-based discrimination. This holding is logically *impossible* if biological sex does not exist apart from gender identity. As the Tenth Circuit has acknowledged, there are “inherent physical differences” between sexes, and heightened scrutiny is only required when a policy “prescribes one rule for women . . . and a different

rule for men.” *Free the Nipple v. City of Fort Collins, Colo.*, 916 F. 3d 792, 800-802. If a statute is “facially gender-neutral,” as the birth certificate policy clearly is, then “[i]nvidiousness still matters” and needs to be analyzed at the threshold. *Id.* at 800; *see also SECSYS, LLC v. Vigil*, 666 F.3d 678, 687 (10th Cir. 2012). To recognize transgender status as a separate, suspect classification triggered by the mere inclusion of biological sex on a government record, without first finding intentional or invidious discrimination, would inevitably require all laws to deny the existence of biological sex.

Even intermediate scrutiny, however, would not save Plaintiffs’ claims. Intermediate scrutiny does not allow courts “to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.” *Rostker v. Goldberg*, 453 U.S. 57, 68, (1981). And here, Plaintiffs’ quibbles over the “inconsistency” between different public policy decisions adopted for birth certificates and driver’s licenses only highlight the substantial government interest behind maintaining accurate birth certificates. *Cf.* Doc. 33 at 12-14; *see* Doc. 24 at 16. For example, although driver’s licenses and birth certificates are government-issued records, a birth certificate registers facts *about birth* at the time of *birth*. A driver’s license does not; it uses a current or near-current photo and related information to aid in the immediate recognition of the individual. The fact that an individual can change the sex marker on a driver’s license illustrates the Birth Certificate Law is substantially related, even narrowly tailored, to the important government interests.

Plaintiffs’ next attempt to save their equal protection claim transforms rational basis into something it is not. *Compare* Doc. 33 at 12-15 *with* Doc. 24 at 15-16. In *Dalton v. Reynolds*, cited by Plaintiffs for the proposition that rational basis review “is not toothless[.]” the state “offered no rational reason” for the challenged policy, and the Court could “think of none.” 2 F.4th 1300, 1309 (10th Cir. 2021), *cert. denied*, *Reynolds v. Dalton*, 142 S. Ct. 348 (2021). Far from altering the rational basis standard, *Reynolds* confirms that so long as the state articulates a conceivable basis supporting the law,

the Court must uphold it.² Defendants identified several rational bases, and Plaintiffs’ attacks go far beyond the deference that is owed under rational basis review. *See* Doc. 24 at 15-16. Deciding what types of information to register on a birth certificate, and whether to record biological sex or some other subjective metric, “is a matter of public policy” to be decided by the Oklahoma Legislature—not by Plaintiffs or this federal Court. *K. v. Health Div., Dep’t of Hum. Res.*, 560 P.2d 1070, 1072 (Or. 1977); *see also In re Ladrach*, 513 N.E.2d 828, 832 (Oh. Prob. 1987); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex.Civ.App. 1999); *In re Estate of Gardiner*, 42 P.3d 120, 136–37 (Kan. 2002).

In the end, Plaintiffs’ claim that Oklahoma’s Birth Certificate Law would not survive rational basis gives away the game: Plaintiffs believe *any* citation of or reliance on biological sex, as opposed to gender identity, is simply irrational when a state does it. Their view is by no means one the Constitution *requires* the State to accept. To be sure, Plaintiffs halfheartedly attempt to disavow this view, claiming that the “relief sought here does not require destroying of every record of birth-assigned sex nor all sex classifications.” Doc. 33 at 8-9. But Plaintiffs fail to identify a *single* limiting principle under their theory—such as an instance where documenting biological sex would be constitutional. To the contrary, they rely substantially on cases like *Grimm* that enjoined a state from enforcing biological sex distinctions in regard to bathroom facilities and the like. *See, e.g.*, Doc. 33 at 8. And they elsewhere claim that the State’s reliance on biological sex is a position “unabashedly rooted in sex stereotypes.” Doc. 33 at 9-10. Their protestations to the contrary, Plaintiffs make perfectly clear their belief that any and all recognition of biological sex in the law is unconstitutional.

II. THERE IS NO CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY IN BIOLOGICAL SEX.

A party claiming a substantive due process violation must provide a “careful description” of the asserted liberty interest, because “vague generalities ... will not suffice.” *Chavez v. Martinez*, 538 U.S.

² Plaintiffs cite no binding precedent whatsoever for their suggestion this Court can manufacture a “more searching rational basis review” on a whim. Doc. 33 at 12. This Court should reject Plaintiffs’ invitation to create a novel standard of review that finds no support in this circuit.

760, 775–76 (2003) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Here, Plaintiffs employ vague generalities to describe the alleged liberty interest asserted: a “right ‘to define and express their identity[,]’” “be treated consistent with their gender identity” or “live in accordance with one’s gender identity” Doc. 33 at 20-21; *see also id.* at 12, 17. Plaintiffs never explain what, exactly, this liberty interest is supposed to guarantee,³ or how the guarantee is deeply rooted in history and tradition or essential to the Nation’s scheme of ordered liberty—as the U.S. Supreme Court has just insisted in *Dobbs* must be done. Compare Doc. 33 at 16-21 with Doc. 24 at 18-20. Nor do Plaintiffs explain how the Birth Certificate Law, which merely provides for the accurate reporting of sex on birth certificates, infringes upon the supposed right to express subjective gender identity. Plaintiffs nonetheless declare the State infringes upon this undefined liberty interest by refusing to alter the biological sex recorded on a government-issued certificate of birth to “match[] their gender identity” Doc. 33 at 12. Conclusory allegations are not enough to save Plaintiffs’ claims from dismissal.

In addition, Plaintiffs’ due process claims cannot succeed because an individual’s “assigned sex at birth[,]” *i.e.* biological sex, is not “intensely private” or “excruciatingly private and intimate” information such that the mere inclusion of the same on a state-issued certificate of birth would infringe upon an individual’s constitutional rights. Doc. 33 at 18. Plaintiffs make no attempt to justify this claim either. Plaintiffs instead focus their argument exclusively on “transgender status,” which is not reported on a birth certificate and not at issue here. *See* Doc. 24 at 17-20. As with their equal protection argument, their due process argument only succeeds if objective biological sex does not exist and gender identity and sex collapse into the same category.

³ Plaintiffs quote from dicta in *Obergefell v. Hodges* but omit crucial limiting language: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, **within a lawful realm**, to define and express their identity.” 576 U.S. 644, 651–52 (2015) (emphasis added). That “lawful realm” does not extend to forcing a state to erase biological sex in birth certificates.

Moreover, Plaintiffs only bolster Defendants’ argument that inclusion of biological sex involves no government disclosure whatsoever by confirming the State only “provides people with copies of **their own** birth certificates” Doc. 33 at 16-17 (emphasis added). The State does not violate an individual’s *constitutional rights* by maintaining (and refusing to amend) biological sex on a record registering facts of birth—no matter how much an individual dislikes this policy choice or believes that their “birth-assigned sex is an undeniable but-for cause of her injury.” *Id.* at 6.

III. A BIRTH CERTIFICATE IS NOT PRIVATE SPEECH, AND PLAINTIFFS CANNOT COMPEL THE STATE TO SPEAK A CERTAIN WAY IN ITS OWN RECORDS.

Plaintiffs’ disagreement over the “purpose and utility of birth certificates” does not transform what is plainly government speech to private speech, nor does it establish that a birth certificate constitutes expressive conduct sufficient to invoke the First Amendment. Doc. 33 at 21. To survive dismissal, Plaintiffs must show the government-issued birth certificate is expressive conduct “to demonstrate that the First Amendment even applies.” *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). “To hold otherwise would be to create a rule that all conduct is presumptively expressive.” *Id.* But the Supreme Court has “decline[d] to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.” *Id.*

As the Wisconsin Supreme Court recently explained, in the driver’s license context: “[t]he act of presenting identification . . . has never been considered a form of expressive conduct in either legal precedent or in the historical record[,]” and therefore “[t]he act of producing identification is conduct unprotected by the First Amendment.” *Interest of C. G.*, 976 N.W.2d 318, 341 (Wis. 2022). In concluding the state’s refusal to change a transgender woman’s masculine name did not violate the First Amendment, the court noted:

[t]he expressive component of her transgender identity is not created by the legal name printed on her identification but by the various actions she takes to present herself in a specific manner, e.g., dressing in women’s clothing, wearing make-up, growing out her hair, and using a feminine alias.

Id. While presenting a driver’s license with a masculine name “might cause the viewer to have doubts about whether Ella is biologically female, thereby inhibiting the success of her intended goal to be perceived as a woman[,]” that “insight does not stop Ella from expressing herself in whatever manner she chooses[,]” and therefore “does not render the production of identification expressive conduct” *Id.* at 341-42. For many of the same reasons, Plaintiffs here cannot establish a state-issued birth certificate is expressive conduct or speech sufficient to invoke the First Amendment.

As with their other claims, Plaintiffs’ defense of their First Amendment claims again rests on the faulty assumption that biological sex is a fiction, not an objective reality. Plaintiffs make their arguments by assuming biology is a mere “ideological message” with which they can disagree. *See* Doc. 33 at 21. Therefore, in their view, the inclusion of biological sex on a government-issued birth certificate forces them “to express a viewpoint with which they disagree.” *Id.* at 24. This Court should reject the absurd notion that biological sex is a debatable ideology—a position expressly foreclosed by Supreme Court precedent. Without this assumption, neither the First Amendment claim nor any of Plaintiffs claims can survive as a matter of law.

CONCLUSION

The State’s refusal to alter accurate factual information registered on a government-issued certificate of birth does not “strip[] transgender people of legal recognition of their identity.” Doc. 33 at 1. Nor does it infringe upon any right guaranteed under the U.S. Constitution. The act of recording and maintaining accurate vital records does not discriminate, does not dictate individual behavior, does not deprive an individual of any benefit, does not disclose an individual’s gender identity, does not require an individual conform to sex stereotypes, and does not convey any ideological message. It merely and simply records biological sex—an immutable characteristic. For these reasons, and those stated in Defendants’ Motion to Dismiss, Doc. 24, dismissal is proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2022, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants with entries of appearance filed of record.

s/ Audrey A. Weaver

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CERTIFICATE OF SERVICE

I certify that on November 13, 2023, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system. The seven required paper copies, each of which is an exact replica in form and content, will be dispatched via commercial carrier for receipt within five business days after the court issues a notice that the electronic version is accepted for filing.

s/ Zach West

ZACH WEST

Director of Special Litigation