APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

OTHER DOCUMENTS

OPINION, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT (JUNE 18, 2024)

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROWAN FOWLER; ALLISTER HALL; CARTER RAY,

Plaintiffs - Appellants,

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 - Appellees.

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA; GLBTQ LEGAL ADVOCATES & DEFENDERS; STATE OF KANSAS; STATE OF ARKANSAS; STATE OF IOWA; STATE OF INDIANA; STATE OF GEORGIA; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF

NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF TENNESSEE; STATE OF TEXAS; STATE OF UTAH; STATE OF WEST VIRGINIA,

Amici Curiae.

No. 23-5080

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:22-CV-00115-JWB-MTS)

Before: HARTZ, McHUGH, and FEDERICO, Circuit Judges.

McHUGH, Circuit Judge.

Starting in at least 2007, the Oklahoma State Department of Health ("OSDH") permitted transgender people to obtain Oklahoma birth certificates with amended sex designations.[1] So, for example, a transgender woman assigned male at birth could obtain an amended Oklahoma birth certificate indicating she is female. This practice ended in 2021 after an individual obtained an amended Oklahoma birth certificate with a gender-neutral sex designation. Oklahoma Governor Kevin Stitt learned about this amended birth certificate and publicly stated, "I believe that people are created by God to be male or female. Period." App. at 22.

---

[1] Plaintiffs refer to the male/female designation on identity documents as both a "sex designation" and a "gender marker." For consistency, we use "sex designation" when referring to male/female designations. But we do not alter quotes using other terms.

Shortly thereafter, Governor Stitt issued an Executive Order directing OSDH to stop amending sex designations on birth certificates.

Plaintiffs Rowan Fowler, Allister Hall, and Carter Ray are transgender people without amended Oklahoma birth certificates. This means the sex listed on their birth certificates does not reflect their gender identities. Plaintiffs all obtained court orders directing that their sex designations on official documents be amended. They then applied for amended birth certificates. OSDH denied all three applications, citing the Governor's Executive Order.

Plaintiffs sued Governor Stitt; OSDH's Commissioner of Health, Keith Reed; and the State Registrar of Vital Records, Kelly Baker (collectively, "Defendants"), in their official capacities. Plaintiffs' suit centers on Defendants' practice of denying sex-designation amendments ("the Birth Certificate Policy" or "the Policy"). Pursuant to 42 U.S.C. § 1983, Plaintiffs asserted claims under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Specifically, Plaintiffs allege the Policy violates equal protection because it unlawfully discriminates based on transgender status and sex. Additionally, Plaintiffs allege that without amended birth certificates, they must involuntarily disclose their transgender status when providing their birth certificates to others. They contend these involuntary disclosures violate their substantive due process right to privacy.

Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing Plaintiffs failed to state a claim. The district court granted the Motion, and Plaintiffs appealed. For the reasons set forth below, we reverse the district court's dismissal

of the equal protection claim. But we affirm the district court's dismissal of Plaintiffs' substantive due process claim.

I. Background

A. Factual History

Because we are reviewing the dismissal of a complaint for failure to state a claim, we draw the facts from Plaintiffs' well pleaded factual allegations and construe them in the light most favorable to Plaintiffs. *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 997 (10th Cir. 2002). We begin with a general discussion of sex, gender identity, and gender dysphoria drawn from Plaintiffs' allegations. We then outline the allegations concerning the Policy and Plaintiffs' relevant experiences.

1. Sex, Gender Identity, and Gender Dysphoria[2]

According to the Complaint, individuals are typically assigned a sex at birth based solely on the appearance of their external genitalia. Yet, all individuals have "multiple sex-related characteristics, including hormones, external and internal morphological features, external and internal reproductive organs, chromosomes, and gender identity." App. at 14. Gender identity is "a person's core internal sense of their own gender." *Id.* Each person has a gender identity, "and that gender

[2] We take no position on the correct way to define sex or treat gender dysphoria. But at this stage in the litigation, we must accept Plaintiffs' well pleaded facts as true and view those facts in the light most favorable to Plaintiffs. *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007).

identity is *the* critical determinant of a person's sex." *Id.* Furthermore, "[t]here is a medical consensus that gender identity is innate, has biological underpinnings (including sexual differentiation in the brain), and is fixed at an early age." *Id.* at 15.

Most people are cisgender, meaning their sex assigned at birth aligns with their gender identity. But some people are transgender, meaning their sex assigned at birth conflicts with their gender identity. An incongruence between sex assigned at birth and gender identity is associated with gender dysphoria. "Gender dysphoria refers to clinically significant distress that can result when a person's gender identity differs from the person's sex assigned at birth." *Id.* "If left untreated, gender dysphoria may result in serious consequences including depression, self-harm, and even suicide." *Id.* at 16. Moreover, attempts to alter gender identity "are not only unsuccessful but also dangerous, risking psychological and physical harm, including suicide." *Id.* at 15.

Internationally recognized standards of care govern the treatment of gender dysphoria. Treatment generally involves transgender people living in a manner consistent with their gender identity—a process called transition. Each person's transition varies but may include social and medical transition. "Social transition entails a transgender person living in a manner consistent with the person's gender identity." *Id.* at 16. For a transgender man, this may mean wearing traditionally male clothing, using male pronouns, and adopting grooming habits associated with men. Medical transition "includes treatments that bring the sex-specific characteristics of a transgender person's body

into alignment with their gender identity, such as hormone replacement therapy or surgical care." *Id.*

Plaintiffs allege that an essential part of transitioning is amending the name and sex designation on identity documents. Relevant here, transgender people will often request an amended birth certificate because birth certificates are "critical and ubiquitous identity document[s] used in many settings to verify a person's identity." *Id.* at 11. Birth certificates are also often used to obtain other identity documents, like driver's licenses and passports. Without amended birth certificates, transgender people may have difficulty proving their identity because of a visible discord between their gender identity and their sex designation. Additionally, transgender people without amended birth certificates have less control over when they reveal their transgender status. This is because they may need to show their birth certificates to others who may perceive a difference between their gender identity and sex designation.

2. The Birth Certificate Policy[3]

OSDH is responsible for Oklahoma's vital records, including issuing and amending Oklahoma birth cer-

---

[3] Defendants refer to the challenged state action as "Oklahoma law." Appellees' Br. at 10–11. We use "the Birth Certificate Policy" or "the Policy" because Plaintiffs allege it is the Policy, not Oklahoma law, that prevents them from obtaining amended birth certificates. Specifically, they allege that OSDH provided sex-designation amendments under Okla. Stat. tit. 63, § 1-321 for over ten years before Governor Stitt's Executive Order, that transgender people may still acquire court orders directing that their sex designations be amended, that OSDH officials cite the Executive Order when denying sex-designation amendments, and that Governor Stitt and his office have specifically instructed

tificates. Starting in at least 2007, OSDH allowed transgender people to amend the sex designations on their birth certificates. From 2018 to late 2021, at least one hundred transgender individuals received Oklahoma birth certificates with amended sex designations.

OSDH stopped amending sex designations when it began implementing the Birth Certificate Policy. Plaintiffs define the Birth Certificate Policy as the policy "of refusing to provide transgender people with birth certificates that match their gender identity."[4] *Id.* at 20.

Plaintiffs allege that the Birth Certificate Policy originates in part from a 2021 settlement between OSDH and an individual whose gender identity and assigned sex conflicted. Per the settlement, the individual received "an amended Oklahoma birth certificate with a gender-neutral designation, consistent with their gender identity." *Id.* at 21–22. Governor Stitt responded to the settlement by issuing a statement, declaring, "I believe that people are created by God to

---

OSDH officials not to provide sex-designation amendments. At this stage, we must accept these allegations as true and view them in the light most favorable to Plaintiffs. *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 997 (10th Cir. 2002). Accordingly, we accept as true that the Policy, not Oklahoma law, prevents Plaintiffs from obtaining amended birth certificates.

[4] Plaintiffs also claim the Policy includes the refusal to provide an amended birth certificate "without the mandatory inclusion of revision history that discloses a person's transgender status." App. at 20. Before the Policy, OSDH included revision history when amending a transgender person's birth certificate. The parties did not present arguments concerning revision history on appeal, so we do not consider this aspect of Plaintiffs' Complaint.

be male or female. Period." *Id.* at 22. He further stated, "There is no such thing as non-binary sex, and I wholeheartedly condemn the OSDH court settlement that was entered into by rogue activists who acted without receiving proper approval or oversight." *Id.* He promised to "tak[e] whatever action necessary to protect Oklahoma values." *Id.*

The following month, Governor Stitt issued Executive Order 2021-24 ("Executive Order"). The Executive Order states that Oklahoma law does not "provide OSDH or others any legal ability to in any way alter a person's sex or gender on a birth certificate." *Id.* The Executive Order also directs OSDH to immediately "[c]ease amended birth certificates [sic] that is in any way inconsistent with" Okla. Stat. tit. 63, § 1-321. *Id.* (first alteration in original). The Executive Order further specified that the Commissioner of Health, among others, "shall cause the provisions of this Order to be implemented." *Id.* The Executive Order requires "OSDH to inform Governor Stitt's office of any pending litigation related to amending birth certificates." *Id.*

In April 2022, Governor Stitt signed Senate Bill 1100 into law. Accordingly, § 1-321 now states, "Beginning on the effective date of this act, the biological sex designation on a certificate of birth amended under this section shall be either male or female and shall not be nonbinary or any symbol representing a nonbinary designation including but not limited to the letter 'X.'"[5] Okla. Stat. tit. 63, § 1-321(H). Plaintiffs

[5] Prior to this amendment, § 1-321 listed specific information that could be amended on a birth certificate but did not discuss sex designations. *See* Okla. Stat. tit. 63, § 1-321 (2021).

allege § 1-321(H) "does not prohibit transgender men and women from correcting their birth certificates to match their male or female gender identity," but merely limits the sex designation choices to male or female. App. at 23. But they allege § 1-321(H) as informed by the Policy is regarded by Defendants as prohibiting amendments to sex designations.

Plaintiffs further allege that Oklahoma permits individuals to amend the sex designation on a driver's license without an amended birth certificate. Furthermore, forty-seven states, the District of Columbia, and Puerto Rico all permit transgender people to amend the sex designation on their birth certificates. And the United States Department of State "permits changes to the gender marker on a citizen's passport through self-certification." *Id.* at 24.

3. The Plaintiffs

After Governor Stitt issued the Executive Order, OSDH began denying requests to amend sex designations on birth certificates. Ms. Fowler, Mr. Hall, and Mr. Ray were among the transgender people denied amended birth certificates. We briefly outline each person's relevant experiences as alleged in the Complaint.

Ms. Fowler is a transgender woman who began living openly as female in 2021, when she was forty-six years old. As part of her transition, Ms. Fowler "has taken steps to bring her body and her gender expression into alignment with her female gender identity, including through clinically appropriate treatment undertaken in consultation with health care professionals." *Id.* at 26. She has also been diagnosed with gender dysphoria, and her treatment includes

"hormone therapy and social transition to living openly as female." *Id.*

As part of her transition, Ms. Fowler petitioned to change her conventionally male first and middle names to be more consistent with her female gender identity. An Oklahoma district court granted her petition and ordered, among other things, that Ms. Fowler "shall be designated as female on official documents generated, issued, or maintained in the State of Oklahoma." *Id.*

Ms. Fowler has taken steps to change her sex designation on official records. For example, Ms. Fowler has updated her sex designation in her records with the Social Security Administration, the Transportation Security Administration, and the federal health insurance marketplace. She also updated her Oklahoma driver's license to indicate she is female, although there was some difficulty because she was initially told she needed to present an amended birth certificate.

Ms. Fowler also tried to amend the sex designation on her birth certificate. She provided OSDH with the court order directing that she "shall be designated as female on official documents" and paid the requisite fee. *Id.* OSDH cashed Ms. Fowler's check but later denied her request in an email from Ms. Baker. In the email, Ms. Baker invoked Governor Stitt's Executive Order.

According to the Complaint, not having an amended birth certificate has negatively impacted Ms. Fowler. For instance, the discrepancy between Ms. Fowler's driver's license and birth certificate resulted in uncomfortable questions when she applied for the

TSA PreCheck program. Ms. Fowler has also been unable "to update her gender-related information with credit-related entities, which have insisted that they need a corrected birth certificate." *Id.* at 30. Finally, Ms. Fowler alleges she will need to provide her birth certificate to others in the future, including employers.

Mr. Hall is a transgender man who "has taken steps to bring his body and his gender expression into alignment with his male gender identity." *Id.* at 31. He has been diagnosed with gender dysphoria, and his treatment includes "hormone therapy and social transition to living openly as male." *Id.* Because of the hormone therapy, Mr. Hall has facial hair and "a more typically masculine appearance." *Id.*

To aid his transition, Mr. Hall petitioned to change the sex designation on his official Oklahoma documents, as well as his first and middle names. An Oklahoma district court granted his petition, ordering that Mr. Hall "shall be designated as male on official documents generated, issued, or maintained in the State of Oklahoma." *Id.* Mr. Hall updated his name and sex designation in his records with the Social Security Administration. He also updated his name and sex designation on his Oklahoma driver's license. But like Ms. Fowler, he was denied an amended birth certificate, despite providing OSDH with the court order, filing an application, and paying the fee. Ms. Baker invoked Governor Stitt's Executive Order in an email denying Mr. Hall's request.

Without an amended birth certificate, Mr. Hall has been unable to amend other identity documents. For example, Mr. Hall alleges he is a member of the Choctaw Nation of Oklahoma, and he has a tribal membership card that identifies him by name and

sex. He tried to update the membership card to reflect his gender identity but was told any change required an amended birth certificate. This harms Mr. Hall because he needs his tribal membership card to access tribal services, including health services. Moreover, he will continue to need his birth certificate in the future to prove his identity and to update other identity documents.

Mr. Ray is a transgender man who "has taken steps to bring his body and his gender expression into alignment with his male gender identity." *Id.* at 34. He has also been diagnosed with gender dysphoria and, as a result, has begun hormone therapy and transitioning to living openly as male. Because of the hormone therapy, Mr. Ray "has a more typically masculine expression, including a typically male voice." *Id.*

Mr. Ray petitioned to change his name and sex designation, and an Oklahoma district court granted his petition. Mr. Ray alleges the court ordered "that the gender marker on Mr. Ray's birth certificate be changed to male and that OSDH issue a new birth certificate consistent with the changes ordered." *Id.* Mr. Ray requested an amended birth certificate, attaching the court's order and paying the necessary fee, but OSDH denied his request. Mr. Ray received an email from Ms. Baker denying his request and invoking Governor Stitt's Executive Order.

Mr. Ray has been able to change his sex designation on other documents. His Oklahoma driver's license is updated, although like Ms. Fowler, he was initially told an amended birth certificate would be required. Mr. Ray has also updated the sex designation in his Social Security Administration and school records.

Further, he is an Emergency Medical Technician (EMT), so he has updated his information with "the bodies that license and maintain a registry of EMTs." *Id.*

According to the Complaint, not having an amended birth certificate is an obstacle in Mr. Ray's life. After purchasing a home, for example, he sought to obtain services under his name and was told he needed two forms of identification, one of which could be a birth certificate. He had similar issues when attempting to update his information with a credit card company. And when he tried to update his information with the body handling EMT licensing, he was initially asked to provide his birth certificate and then required "to determine if there were alternate ways of proving his identity." *Id.* at 37. Mr. Ray alleges he will need to provide his birth certificate to others in the future.

Ms. Fowler, Mr. Hall, and Mr. Ray have all experienced discrimination and hostility when others have learned they are transgender. Additionally, they have all experienced hostility when presenting identity documents that conflict with their gender identity.

B. Procedural History

Plaintiffs initiated this action against Defendants in March 2022. They brought their claims under 42 U.S.C. § 1983. They allege the Birth Certificate Policy violates the United States Constitution, specifically the First Amendment and the Fourteenth Amendment's Equal Protection and Due Process Clauses. Plaintiffs seek declaratory relief, injunctive relief, and fees and costs under 42 U.S.C. § 1988. They do not seek money damages. The district court dismissed Plaintiffs' First Amendment claim for failure to state a claim. Plaintiffs have not appealed that dismissal, so we focus our

discussion on the equal protection and substantive due process claims.

In their equal protection claim, Plaintiffs contend that "[o]thers born in Oklahoma, who are not transgender, are not deprived of birth certificates that accurately reflect their gender identity." *Id.* at 38. They thus allege the Policy unlawfully discriminates against transgender people on the basis of transgender status and sex. Plaintiffs also argue transgender people are a quasi-suspect class, so the Policy must pass intermediate scrutiny.

In their substantive due process claim, Plaintiffs allege the Policy results in involuntary disclosure of transgender status when a transgender person must disclose a birth certificate. Plaintiffs assert these involuntary disclosures violate their fundamental right to privacy because their transgender status is highly sensitive personal information.[6]

Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing Plaintiffs failed to state a claim upon which relief can be granted. Defendants argued that the Policy does not discriminate between groups, that transgender status is not a suspect class, and that the Policy survives rational basis review. Defendants further argued Plaintiffs had not identified a fundamental right and had failed to allege that Defendants disclosed Plaintiffs' transgender status.

---

[6] Plaintiffs also alleged the Policy burdens "the right to define and express a person's gender identity and the right not to be treated in a manner contrary to a person's gender by the government." App. at 40. Plaintiffs have not pursued this theory on appeal, and we do not address it.

The district court granted Defendants' Motion to Dismiss. Concerning equal protection, the district court concluded that binding Tenth Circuit precedent holds transgender status is not a quasi-suspect class. And regardless, the district court determined that transgender status is not a quasi-suspect class because transgender people have political power. The district court stated it was unwilling to "compress[] transgender people into classifications based on sex" but did not further consider whether the Policy unlawfully discriminates on the basis of sex. *Id.* at 83.

Because the court concluded the Policy "does not infringe upon a fundamental liberty interest or implicate a suspect class," it evaluated the Policy under rational basis review. *Id.* at 86. Defendants raised two state interests, and the court considered both. First, Defendants argued the Policy protects "the integrity and accuracy of vital records, including documenting birth information and classifying individuals based on the two sexes." *Id.* The court concluded this was a legitimate state interest rationally related to the Policy because "[u]nder Oklahoma law, the purpose of a birth certificate is to record 'the facts of the birth.'" *Id.* at 87 (quoting Okla. Stat. tit. 63, § 1-311(B)). Second, Defendants argued the Policy "protect[s] the interests of women." *Id.* at 86. When considering this rationale, the court discussed the "debate raging across the country about the propriety of allowing biological men to participate in women's sports." *Id.* at 89. The court then concluded that the Policy could protect women by providing a way to identify "biological men" and exclude them from women's sports. *Id.* Having determined the Policy satisfied rational basis

review, the court concluded the Policy did not infringe on Plaintiffs' rights under the Equal Protection Clause.

The district court next considered the substantive due process claim. The court concluded that Plaintiffs had not adequately alleged a fundamental constitutional right because their asserted right—the right to privacy—was defined too generally. The court determined the asserted right is really "the right to amend the sex designation on [Plaintiffs'] birth certificate[s] to be consistent with their gender identity." *Id.* at 74. This is not a fundamental right, the court concluded, because it is not "anchored in history and tradition" and not "fundamental to our scheme of ordered liberty." *Id.* at 74, 77. Additionally, the court explained that any fundamental right to privacy is not implicated because Plaintiffs, not Defendants, disclose Plaintiffs' birth certificates.

The district court thus concluded Plaintiffs failed to state a plausible equal protection or substantive due process claim and dismissed Plaintiffs' Fourteenth Amendment claim. Plaintiffs timely appealed.

II. Discussion

We review "*de novo* the district court's grant of a motion to dismiss pursuant to Rule 12(b)(6)." *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007). We thus accept all well pleaded facts as true and view them in the light most favorable to Plaintiffs. *Id.* If the complaint includes "enough facts to state a claim to relief that is plausible on its face," then dismissal is not warranted. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

We begin by considering whether Defendants are entitled to Eleventh Amendment immunity. We conclude they are not. Next, we address Plaintiffs' equal protection and due process claims. We conclude that Plaintiffs plausibly stated a claim under the Equal Protection Clause but not the Due Process Clause.

A. Eleventh Amendment Immunity

Plaintiffs are suing state officials, so the immunity granted to the states by the Eleventh Amendment is implicated. But under *Ex parte Young*, 209 U.S. 123 (1908), Defendants are not entitled to Eleventh Amendment immunity.[7]

The Eleventh Amendment grants states sovereign immunity from suit. *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 965 (10th Cir. 2021). "This immunity extends to suits brought by citizens against their own state." *Id.* The Eleventh Amendment also "bars suits for damages and other forms of relief against state defendants acting in their official capacities." *Buchheit v. Green*, 705 F.3d 1157, 1159 (10th Cir. 2012). This bar exists because suits against state officials in their official capacities are "no different from" suits "against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

---

[7] Although neither party raised Eleventh Amendment immunity, we may address it sua sponte. *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1212 (10th Cir. 2019). We elect to address it sua sponte because "Eleventh Amendment immunity constitutes a bar to the exercise of federal subject matter jurisdiction." *Id.* (brackets and quotation marks omitted).

If Eleventh Amendment immunity applies, the federal courts do not have jurisdiction because "the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *see also Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013). However, the Eleventh Amendment does not always bar suits against nonconsenting states.[8] Relevant here, *Ex parte Young* creates an exception "for suits seeking prospective injunctive relief." *Buchheit*, 705 F.3d at 1159. To determine whether *Ex parte Young* applies, courts "need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (alteration in original) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring)). A court conducting this analysis should not analyze "the merits of the claim." *Id.* at 646.

Additionally, *Ex parte Young* allows suit only if the named state official has "'some connection with the enforcement' of the challenged" action. *Hendrickson*, 992 F.3d at 965 (quoting *Ex parte Young*, 209 U.S. at 157). "Otherwise, the suit is 'merely making [the official] a party as a representative of the state' and therefore impermissibly 'attempting to make the state

---

[8] Congress may abrogate the States' Eleventh Amendment immunity "pursuant to a valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). But Congress did not abrogate immunity in 42 U.S.C. § 1983, the statute under which Plaintiffs brought their claims. *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 (10th Cir. 2010).

a party.'" *Id.* (alteration in original) (quoting *Ex parte Young*, 209 U.S. at 157). Thus, *Ex parte Young* "require[s] that the state official have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Id.* (internal quotation marks omitted).

Turning to the instant case, Plaintiffs allege an ongoing violation of federal law, and their requested relief is prospective. *See Verizon*, 535 U.S. at 645. Plaintiffs seek the following relief:

- A declaration that enforcement of the Birth Certificate Policy violates the United States Constitution,
- An order permanently enjoining Defendants and their agents from enforcing the Policy,
- An order directing Defendants to immediately provide Plaintiffs their amended birth certificates as requested,
- An order directing Defendants "to take any necessary and appropriate action to ensure that transgender people" can obtain amended Oklahoma birth certificates that match their gender identity and do not include information that would disclose their transgender status,
- An order directing "Defendants to maintain the confidentiality of information disclosing a person's transgender status," and
- Fees and costs under 42 U.S.C. § 1988.

App. at 41–42.

Viewing all facts in Plaintiffs' favor, they are seeking prospective relief because they are attempting

to stop alleged ongoing violations of federal law and are not seeking monetary compensation for past legal wrongs. *See Verizon*, 535 U.S. at 646. And to the extent Plaintiffs seek a declaration that Defendants violated federal law in the past, that does not bar application of *Ex parte Young*. This is because, as far as Oklahoma is concerned, "the prayer for declaratory relief adds nothing to the prayer for injunction." *Id.*

Furthermore, Plaintiffs sufficiently allege Defendants "have some connection with the enforcement" of the Policy. *Ex parte Young*, 209 U.S. at 157. Plaintiffs allege Mr. Reed is OSDH's Commissioner of Health and "supervises the activities of OSDH, enforces Oklahoma's vital statistics laws, and maintains and operates Oklahoma's system of vital statistics." App. at 13–14. Plaintiffs further allege Ms. Baker "is the official custodian of the vital records of the state, and she also enforces Oklahoma's vital statistics laws." *Id.* at 14. Ms. Baker also sent the emails denying Plaintiffs' applications for amended birth certificates. Accordingly, Plaintiffs have alleged Mr. Reed and Ms. Baker are sufficiently connected to the Policy's enforcement for *Ex parte Young* to apply.

Concerning Governor Stitt, Plaintiffs have alleged more than a general duty to enforce the law. *See* 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3524.3 (3d ed. 1998) ("[T]he duty must be more than a mere general duty to enforce the law."); *see also Hendrickson*, 992 F.3d at 967 (holding a governor was entitled to sovereign immunity because she did not have "a particular duty to enforce the challenged statute," and her connection to the statute "stem[med] from [her] general enforcement power"). Specifically, Plaintiffs allege Governor Stitt

oversees OSDH and "has taken actions under color of state law to prevent transgender people from accessing Oklahoma birth certificates matching their gender identity." App. at 13. They further allege that Governor Stitt's Executive Order set the Policy in motion and that OSDH invoked the Executive Order when denying Plaintiffs' applications for amended birth certificates. Consequently, Plaintiffs have alleged an adequate connection between Governor Stitt and the Policy, thus demonstrating they did not sue Governor Stitt in an attempt to make Oklahoma a party. *See Ex parte Young*, 209 U.S. at 157; *see also* Wright & Miller, *Federal Practice & Procedure* § 3524.3 ("When there is some chance that the governor may act to enforce a statute, however, some courts have been willing to retain the governor as a named defendant.").

In short, Defendants are proper parties under *Ex parte Young* and do not have Eleventh Amendment immunity. We thus turn to the merits of Plaintiffs' claims.

B. Equal Protection

The Equal Protection Clause provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This is "a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To state a viable equal protection claim, Plaintiffs must allege that the Policy purposefully discriminates against them because of their membership in a particular class. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 594 (2008); *Ashaheed v. Currington*, 7 F.4th 1236, 1250 (10th Cir. 2021). Plaintiffs must also allege that the Policy fails

under the appropriate level of scrutiny. *Ashaheed*, 7 F.4th at 1250.

We first assess whether the Birth Certificate Policy purposefully discriminates on the basis of transgender status and sex. We conclude that it does. Accordingly, we next consider whether the Policy satisfies rational basis review and intermediate scrutiny. Because the Policy cannot withstand even rational basis review, Plaintiffs have stated a viable equal protection claim.

1. Purposeful Discrimination

An equal protection claim must allege that the challenged state action purposefully discriminates based on class membership. *Id.* Purposeful discrimination may be shown "directly or circumstantially." *Id.* "Direct proof is showing that a distinction between groups of persons appears on the face of a state law or action." *Id.* (internal quotation marks omitted). When a distinction is facially apparent, purposeful discrimination is presumed and no further examination of intent is required. *Dalton v. Reynolds*, 2 F.4th 1300, 1308 (10th Cir. 2021).

If the state action is facially neutral, however, a court may infer purposeful discrimination from the "totality of the relevant facts." *Washington v. Davis*, 426 U.S. 229, 242 (1976). For example, a court may consider whether the state action disparately impacts one group. *Id.* But disparate impact "is not the sole touchstone" of purposeful discrimination. *Id.* Other touchstones include the "historical background of the decision," the "specific sequence of events leading up to the challenged decision," and "[d]epartures from the normal procedural sequence." *Vill. of Arlington Heights*

v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977). Importantly, a plaintiff need not allege that discrimination "was the sole, or even the primary, motivation." *Navajo Nation v. New Mexico*, 975 F.2d 741, 743 (10th Cir. 1992). The plaintiff need allege only that the state actor chose "a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Similarly, the plaintiff is not required to show "discriminatory animus, hatred, or bigotry." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008). "The 'intent to discriminate' forbidden under the Equal Protection Clause is merely the intent to treat differently." *Id.*

Plaintiffs argue the Policy purposefully discriminates on the basis of transgender status and sex. We first address transgender status, concluding that the Policy does discriminate on that basis. Rather than proceed directly to applying judicial scrutiny to the Policy on that basis, we next address whether the Policy also discriminates on the basis of sex. We do so despite our holding that the Policy discriminates on the basis of transgender status because the level of scrutiny to be applied may vary depending on the class subject to discrimination.

a. Transgender status

Plaintiffs contend the Policy facially discriminates on the basis of transgender status. They also contend they allege facts from which the court could infer purposeful discrimination. We address each argument in turn. We conclude that at minimum, Plaintiffs have alleged facts from which we may reasonably infer

purposeful discrimination on the basis of transgender status.

i. Facial discrimination

To show a facial classification, Plaintiffs must identify "a distinction" that appears on the Policy's face. *See Ashaheed*, 7 F.4th at 1250 (quotation marks omitted). At first glance, the Policy appears facially neutral because it prevents all Oklahomans—regardless of their sex or gender identity—from amending the sex designation on their birth certificates. But Plaintiffs argue the Policy is facially discriminatory because "by definition, only transgender people are harmed by the" Policy.[9] Reply at 12. At oral argument, Plaintiffs cited for the first time *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), for the proposition that a law may be facially discriminatory even if it theoretically applies to everyone.

In *Bray*, the Supreme Court held that opposition to abortion did not necessarily demonstrate sex-based discrimination.[10] 506 U.S. at 270. This is because "there

---

[9] Plaintiffs also contend the Policy is facially discriminatory because "the Governor's office *specifically instructed* OSDH officials not to amend the birth certificates of transgender people to match their male and female gender identity." Reply at 12. In their Complaint, Plaintiffs allege, "Upon information and belief, Governor Stitt and his office have enforced the Executive Order by specifically instructing OSDH officials that they cannot correct the birth certificates of transgender people to reflect their male or female gender identity." App. at 23. It is not clear that this specific instruction was a facial aspect of the Policy, especially because as alleged, the Policy prevents all Oklahomans from amending their sex designations.

[10] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), did not involve a claim brought under the Equal Protection

are common and respectable reasons for opposing [abortion], other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class." *Id.* Yet the Court acknowledged that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Id.* For example, a "tax on wearing yarmulkes is a tax on Jews." *Id.* But the Court did not specify that a tax on wearing yarmulkes *facially* discriminates against Jews. *See id.*

Furthermore, the Court has stated that disparate impact alone does not show purposeful discrimination. *See, e.g.*, *Davis*, 426 U.S. at 242 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."); *Vill. of Arlington Heights*, 429 U.S. at 264–65 (stating that *Washington v. Davis*, 426 U.S. 229 (1976), "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact"); *but see id.* at 266 (acknowledging that in "rare" cases like *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), or *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face").

Clause. Rather, it involved a claim brought under 42 U.S.C. § 1985(3), which required the plaintiff to show that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the [defendants'] action." *Bray*, 506 U.S. at 268 (first alteration in original) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

There is thus some tension in the caselaw concerning whether disparate impact alone is sufficient to show facial discrimination. We need not address this tension, however, because Plaintiffs have alleged facts from which we can reasonably infer discriminatory purpose. *See Navajo Nation*, 975 F.2d at 743 (declining to decide whether state action was facially discriminatory when the "disparate impact analysis" revealed discriminatory intent).

ii. Totality of relevant facts

A court may infer purposeful discrimination from the "totality of the relevant facts." *Davis*, 426 U.S. at 242. Relevant facts may include disparate impact, the "historical background" of the challenged action, the "sequence of events leading up to the challenged" action, and "[d]epartures from the normal procedural sequence." *Vill. of Arlington Heights*, 429 U.S. at 267. Below, we evaluate Plaintiffs' allegations concerning disparate impact and the Policy's history. These allegations—combined with Defendants' inability to justify the Policy—support a reasonable inference of purposeful discrimination.

First, the Policy's disparate impact on transgender people indicates discriminatory intent. Before the Policy, cisgender and transgender people could obtain Oklahoma birth certificates that accurately reflected their gender identity. After the Policy, cisgender people still have access to Oklahoma birth certificates reflecting their gender identity. Transgender people, however, may no longer obtain a birth certificate reflecting their gender identity. Consequently, the Policy affects transgender people but not cisgender people.

Defendants, however, contend there is no disparate impact because Plaintiffs have not alleged "they are being denied amendments on their certificates while non-transgender persons are not." Appellees' Br. at 20. This argument fails to recognize that cisgender people do not need sex-designation amendments because they already have birth certificates accurately reflecting their gender identity. And because cisgender people do not need amendments, the Policy has no effect on them. After all, state action may apply to everyone equally but not affect everyone equally—"[a] tax on wearing yarmulkes is a tax on Jews." *See Bray*, 506 U.S. at 270.

Other courts have held that similar laws or policies disparately impact transgender people by denying only them birth certificates that accurately reflect their gender identity. *See D.T. v. Christ*, 552 F. Supp. 3d 888, 895–96 (D. Ariz. 2021) (reasoning that requiring individuals to get a "sex change operation" before obtaining an amended birth certificate necessarily targeted transgender people); *Ray v. McCloud*, 507 F. Supp. 3d 925, 935–36 (S.D. Ohio 2020) (holding that prohibiting changes to sex listed on birth certificates "treats transgendered people differently than similarly situated Ohioans" who can amend their birth certificates to accurately reflect their identity); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1141 (D. Idaho 2018) (holding that prohibiting changes to sex listed on birth certificates denied "transgender people, as a class, access to birth certificates that accurately reflect their gender identity").

At least one district court has held that a policy prohibiting sex-designation amendments does not disparately impact transgender people. *Gore v. Lee*,

No. 3:19-cv-0328, 2023 WL 4141665, at *23 (M.D. Tenn. June 22, 2023), *appeal filed*, Case No. 23-5669 (6th Cir. 2023). The district court in *Gore* concluded there was no disparate impact because the transgender plaintiffs had not shown "that the sex designation on a transgender person's birth certificate is *incorrect*." *Id.* at *11; *see also id.* at *23. But here, Plaintiffs have plausibly alleged that because of the Policy, their birth certificates do not accurately reflect their gender identities. And while they acknowledge Oklahoma's right to maintain the original birth certificate accurately recording the sex designation made at birth, they contend that designation is no longer accurate. Thus, taking the Complaint's allegations as true, *Gore*'s reasoning is not persuasive.

Next, the events leading up to the Policy's adoption are sufficient to support a finding of discriminatory intent. Plaintiffs allege that starting in at least 2007, transgender people could amend the sex designation on their birth certificates. But after Governor Stitt learned about a settlement permitting a nonbinary person to have a gender-neutral designation, he stated, "I believe that people are created by God to be male or female. Period."[11] App. at 22. He also promised to protect "Oklahoma values" and shortly thereafter issued an Executive Order stating that Oklahoma law

[11] These events may also show purposeful discrimination against nonbinary people. But that does not negate Plaintiffs' equal protection claim because they need not allege the Policy was motivated solely by an intent to discriminate against transgender people. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (stating discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

does not "provide OSDH or others any legal ability to in any way alter a person's sex or gender on a birth certificate." *Id.* Plaintiffs also allege that Governor Stitt and his office "specifically instruct[ed] OSDH officials that they cannot correct the birth certificates of transgender people to reflect their male or female gender identity." *Id.* at 23. OSDH officials cited the Executive Order when denying Plaintiffs' applications for amended birth certificates.

This sequence of events demonstrates that the Policy was implemented "at least in part 'because of'" the effect it would have on transgender people. *See Feeney*, 442 U.S. at 279. When read in context, Governor Stitt's statement about God creating people to be male or female demonstrates disfavor with people amending their birth certificates to change the sex designation. And Governor Stitt made this statement shortly before directing OSDH to stop amending the sex listed on transgender individuals' birth certificates.

In response, Defendants contend that "expressing religious beliefs cannot possibly be considered invidious, given our country's rich tradition of religious freedom and expression." Appellees' Br. at 23. But Plaintiffs are not challenging the Governor's right to express his beliefs. They are merely highlighting his statements to show the intent of the Policy is to target transgender people. *See Vill. of Arlington Heights*, 429 U.S. at 268 (stating that "legislative or administrative history may be highly relevant" to discriminatory intent, "especially where there are contemporary statements by members of the decisionmaking body").

Defendants also argue Governor Stitt's statements are irrelevant because they "cannot be assigned to a law duly enacted by a separate branch of government."

Appellees' Br. at 23. This argument builds on Defendants' contention that Plaintiffs are really challenging Okla. Stat. tit. 63, § 1-321(H), which was enacted after Governor Stitt's Executive Order. But Plaintiffs allege that the Policy, not § 1-321(H), prevents them from obtaining amended birth certificates. Recall that § 1-321(H) simply limits sex designations on birth certificates to male or female, without speaking to requests to change from one approved sex designation to the other in an amended birth certificate. Okla. Stat. tit. 63, § 1-321(H). Accordingly, Governor Stitt's statements are germane because Plaintiffs are challenging a policy he set in motion that precludes OSDH from issuing birth certificates with amended sex designations.

We are not persuaded, however, of the relevance of one allegation Plaintiffs rely on in support of their claim of purposeful discrimination. Plaintiffs allege that the day after Governor Stitt's public statements, the OSDH Commissioner "announced his unexpected 'resignation.'" App. at 22. Plaintiffs argue this was a departure from normal procedures evincing the Policy's discriminatory intent. But Plaintiffs have not alleged enough facts for us to reasonably infer the resignation was related to the Policy, let alone that it demonstrates a discriminatory intent. We thus do not consider the Commissioner's resignation as part of our equal protection analysis.

Lastly, Defendants' inability to proffer a legitimate justification for the Policy suggests it was motivated by animus towards transgender people. As we explain later, the Policy is not rationally related to a legitimate state interest. *See infra* Section II.B.2. Indeed, the Policy is wholly disconnected from Defendants' proffered justifications. *See id.* When state action cannot be

explained by a legitimate state interest, it "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 634 (1996).

Given the Policy's disparate impact on transgender people, the events leading to the Policy's adoption, and Defendants' inability to justify the Policy as advancing a legitimate state interest, we could conclude that the Policy "seems inexplicable by anything but animus toward" transgender people. *Id.* at 632. But even without this conclusion, Plaintiffs have sufficiently alleged the Policy was motivated by an intent to treat transgender people differently. No more is required. *See Colo. Christian Univ.*, 534 F.3d at 1260. Plaintiffs have thus adequately alleged the Policy purposefully discriminates against transgender people.

b. Sex

Plaintiffs contend that because the Policy discriminates based on transgender status, it necessarily discriminates on the basis of sex as well. This argument relies on the Supreme Court's reasoning in *Bostock v. Clayton County*, 590 U.S. 644 (2020). Defendants respond that because *Bostock* is a Title VII case, it does not apply to equal protection claims. As set forth below, we agree with Plaintiffs that *Bostock*'s reasoning applies here.[12]

---

[12] Plaintiffs argue the Policy facially discriminates based on sex because it "cannot be stated, much less understood, without referencing sex." Appellants' Br. at 18–19. Although we agree with Plaintiffs' application of *Bostock v. Clayton County*, 590 U.S. 644 (2020), we need not decide whether the Policy is sex-based discrimination on its face.

In *Bostock*, the Supreme Court considered whether it is possible to fire an employee for being transgender or homosexual without discriminating against that employee based on sex. 590 U.S. at 650–52. The case arose under Title VII, which prohibits discrimination "because of . . . sex." *Id.* at 655 (quoting 42 U.S.C. § 2000e-2(a)(1)).

The Court first stated it would assume that "sex" means "biological distinctions between male and female." *Id.* The Court then explained that Title VII focuses "on individuals, not groups," because it proscribes discrimination "against any *individual*" because of the "*individual's*" sex. *Id.* at 658 (quoting 42 U.S.C. § 2000e-2(a)(1)). Title VII's focus on the individual means an employer can violate Title VII even if it treats men and women equally. *Id.* at 659 ("Nor is it a defense for an employer to say it discriminates against both men and women because of sex.").

Turning to the merits, the Court held, "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 660. To illustrate, the Court considered two hypothetical employees who are alike in all respects, except one is a transgender woman and the other is a cisgender woman. *See id.* If the employer fires only the transgender woman, the employer has "intentionally penalize[d]" her "for traits or actions that it tolerates in an employee identified as female at birth." *Id.* As the Court explained, "if changing the employee's sex would have yielded a different choice by the employer," then sex-based discrimination has occurred. *Id.* at 659–60.

The Court further held that even if the employer's "ultimate goal" is to discriminate against transgender

employees, the employer still intentionally discriminates based on sex. *Id.* at 661–62. This is because transgender status is "inextricably bound up with sex." *Id.* at 660–61. So even if the employer's goal is to discriminate based on transgender status, "the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex." *Id.* at 662. In other words, an employer who intends to discriminate based on transgender status necessarily intends to discriminate based in part on sex. *Id.* at 665 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex.").

Applied here, *Bostock*'s reasoning leads to the conclusion that the Policy intentionally discriminates against Plaintiffs based in part on sex.[13] Take Ms. Fowler, for example. If her sex were different (*i.e.*, if she had been assigned female at birth), then the Policy would not deny her a birth certificate that accurately reflects her identity. So too for Mr. Hall and Mr. Ray—had they been assigned male at birth, the Policy would not impact them. Thus, the Policy intentionally treats Plaintiffs differently because of their sex assigned at birth. *See id.* at 660–62.

Nevertheless, Defendants and the dissent suggest several reasons for why *Bostock*'s reasoning should not apply here. For the reasons we now explain, we find none persuasive. Defendants and the dissent first suggest that *Bostock* limited its own reasoning to the Title

---

[13] In our analysis, we use "sex" to mean sex assigned at birth. Plaintiffs allege "sex" has other definitions, but those definitions are not necessary to our conclusion.

VII context. The dissent, for example, notes that the Supreme Court stated, "The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'" *Id.* at 681. Although that was the only question the Supreme Court decided, the Court did not indicate that its logic concerning the intertwined nature of transgender status and sex was confined to Title VII. *See id.* at 660–61 (stating that "homosexuality and transgender status are inextricably bound up with sex").

However, the dissent contends it would have been tedious for the Supreme Court to qualify every sentence with a reminder that the analysis was limited to the context of employment discrimination. True. But the Supreme Court did not once state that its analysis concerning the relationship between transgender status and sex was specific to Title VII cases—and it could have done so without unduly encumbering the opinion. Indeed, although the employers in *Bostock* warned that the reasoning adopted by the Court would "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," *id.* at 681, the Court did not expressly limit its analysis to Title VII. Rather, the Court stated that other laws were not before it, so it would not "prejudge." *Id.* And the Court stated it was not "purport[ing] to address bathrooms, locker rooms, or anything else of the kind." *Id.* But the Court's focus on Title VII and the issue before it suggests a proper exercise of judicial restraint, not a silent directive that its reasoning about the link between homosexual or transgender status and sex was restricted to Title VII.

Defendants also dispute the applicability of *Bostock*, calling our attention to a Sixth Circuit case declining to adopt *Bostock*'s reasoning for equal protection claims. *See L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 484–85 (6th Cir. 2023), *petition for cert. filed* (U.S. Nov. 6, 2023) (No. 23-477), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023). There, the Sixth Circuit presented two reasons for not applying *Bostock*. The court first declined to apply *Bostock* because of "[d]ifferences between the language of the statute and the Constitution." *Id.* at 484; *see also Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1228–29 (11th Cir. 2023) (declining to apply *Bostock* to equal protection claims because of linguistic differences between Title VII and the Equal Protection Clause). Our sister circuits are correct that Title VII and the Equal Protection Clause are not interchangeable. The Equal Protection Clause "addresses all manner of distinctions between persons" and "implies different degrees of judicial scrutiny." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring). In contrast, Title VII is limited to certain classifications, and it does not incorporate tiers of scrutiny. *Bostock*, 590 U.S. at 655. But we see nothing about these differences that would prevent *Bostock*'s commonsense reasoning—based on the inextricable relationship between transgender status and sex—from applying to the initial inquiry of whether there has been discrimination on the basis of sex in the equal protection context. *See id.* at 660. While further analysis may preclude recovery under the appropriate level of scrutiny, the corollary between sex and transgender status remains the same.

The Sixth Circuit next concluded that "[i]mporting the Title VII test for liability into the Fourteenth Amendment also would require adding Title VII's many defenses to the Constitution: bona fide occupational qualifications and bona fide seniority and merit systems, to name a few." *L.W.*, 83 F.4th at 485. But adopting *Bostock*'s commonsense explanation for how to detect a sex-based classification does not require us to import Title VII's "test for liability." *See id.* Moreover, as Judge White pointed out in dissent, the defenses identified by the majority are codified in separate provisions of Title VII, "thus belying any notion that those defenses must apply in equal-protection cases." *Id.* at 503 n.7 (White, J., dissenting).

Nonetheless, Defendants and the dissent argue the Policy cannot be sex-based discrimination because it applies equally to all, regardless of sex. But in *Bostock*, the Supreme Court explained that an employer discriminates based on sex even if it is "equally happy to fire male *and* female employees who are homosexual and transgender." 590 U.S. at 662.

Granted, the Supreme Court reached this conclusion after emphasizing that Title VII's use of "individual" makes it clear that the "focus should be on individuals, not groups." *Id.* at 658. At first blush, this focus on individuals may seem unsuitable to equal protection claims, which often concern group treatment. *See Engquist*, 553 U.S. at 601 ("Our equal protection jurisprudence has typically been concerned with governmental classifications that 'affect some groups of citizens differently than others.'" (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961))). But the Supreme Court has consistently held that the Four-

teenth Amendment "protect[s] *persons*, not *groups*."[14] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (stating that Supreme Court precedent "makes clear that the Equal Protection Clause 'protect[s] *persons*, not *groups*'" (alteration in original) (quoting *Adarand*, 515 U.S. at 227)). And the Equal Protection Clause uses "person," much like Title VII uses "individual." U.S. Const. amend. XIV, § 1.

Of course, group classifications are not irrelevant to equal protection claims. An equal protection plaintiff must plausibly allege that she was treated differently and that "the different treatment was based on [her] membership in [a] particular class." *Engquist*, 553 U.S. at 594. A plaintiff may meet this burden by alleging she belongs to a group that was treated differently than another group. *See Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 324 n.7 (2014) (Scalia, J., concurring) ("Of course discrimination against a group constitutes discrimination against each member of

[14] The dissent correctly notes that the Supreme Court stated the Fourteenth Amendment "protect[s] *persons*, not *groups*" to explain why even benign racial classifications are subject to strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Our reasoning does not apply the Supreme Court's ultimate holding—that even members of a privileged group may assert an equal protection claim—but rather its underlying conclusion that the Constitution guarantees "the *personal* right to equal protection of the laws." *Id.* at 232 (emphasis added); *see also id.* at 230 (stating there is a "long line of cases understanding equal protection as a personal right"). Put differently, we are quoting the Supreme Court to explain why each Plaintiff has a personal right to equal protection and "suffers an injury when he or she is disadvantaged by the government because of his or her [sex], whatever that [sex] may be." *Id.* at 230.

that group."). But a plaintiff may just as well allege that she, an individual, was treated differently because of her membership in a group. *See Engquist*, 553 U.S. at 594; *see also Adarand*, 515 U.S. at 229–30 ("[W]henever the government treats any *person* unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." (emphasis added)); *id.* at 227 (stating "that all governmental action based on race—a *group* classification . . . —should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed"). In other words, she need not allege that one group was treated worse than another.

Consider jury selection, for example. The Equal Protection Clause prohibits litigants from striking "potential jurors solely on the basis of gender." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994). Accordingly, "individual jurors themselves have a right to nondiscriminatory jury selection procedures." *Id.* at 140– 41. This "right extends to both men and women." *Id.* at 141. It thus violates the equal protection clause to strike individual jurors because of their sex, even if one sex collectively is not treated worse than another. *See id.* at 140–42; *see also L.W.*, 83 F.4th at 482–83 (acknowledging that "sex-based peremptory challenges violate[] equal protection even though the jury system ultimately may not favor one sex over the other").

In other contexts, the Supreme Court has likewise held that equal application does not guarantee constitutionality under the Fourteenth Amendment. In *Loving v. Virginia*, for example, Virginia argued that

its antimiscegenation laws did not discriminate based on race because they punished Black and White citizens equally.[15] 388 U.S. 1, 8 (1967). The Court disagreed, "reject[ing] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* Since *Loving*, the Court has continued to reject "equal application" arguments. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.").[16] For this reason, we are unpersuaded by the argument that the Policy is not sex-based discrimination if it applies equally to all sexes.[17]

---

[15] Virginia's antimiscegenation laws did not criminalize the same conduct for Black and White people. *Loving v. Virginia*, 388 U.S. 1, 4 (1967). White people were prohibited from marrying all non-White people, while Black people were prohibited only from marrying White people. *Id.*; *see also id.* at 5 n.4. Nevertheless, a Black person and a White person who married each other were punished equally. *Id.* at 4. Virginia unsuccessfully argued that this "equal application" meant there was no racial discrimination. *Id.* at 7–9.

[16] Under the Equal Protection Clause, race-based claims are subject to a higher level of scrutiny than sex-based claims. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985). But we have no reason to believe the initial question— whether there is a classification—differs depending on the classification at issue.

[17] The dissent relies on then-Judge Gorsuch's opinion in *SECSYS, LLC v. Vigil* to support its contention that Plaintiffs have not sufficiently alleged intentional sex-based discrimination. 666 F.3d 678 (10th Cir. 2012) (opinion of Gorsuch, J., with Murphy, J., and Brorby, J., concurring in the result). In his opinion, then-Judge Gorsuch outlined how "'traditional' class-

Still, the dissent maintains that Plaintiffs have sufficiently alleged only that the purpose of the Policy was to disadvantage transgender people. Thus, the dissent concludes, the element of intent is unproved. The Supreme Court could have reached this same conclusion in *Bostock* and held that the employers intended to discriminate only based on transgender status, not sex. But that is not what the Court held. Rather, the Court explained that to discriminate on the basis of transgender status, "the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex." *Bostock*, 590 U.S. at 662. Similarly, the Policy here cannot discriminate against transgender people without, "along the way," intentionally treating them "worse based in part on" sex. *See id.*

Moreover, we are unpersuaded that the dissent's yarmulke example demonstrates a lack of intent here. The dissent posits that if a law prohibited wearing yarmulkes, a sex discrimination claim would likely fail, even though the law has a disparate impact on male Jews. The sex discrimination claim will likely fail, the dissent explains, because male Jews cannot show the law intends to treat men differently. Even if this were true, our conclusion here regarding intent does

---

based equal protection jurisprudence generally proceeds." *Id.* at 685. However, that case is not precedential because the other panelists concurred only in the result. *Id.* at 690. And regardless, *SECSYS* considered a claim that the plaintiff was unlawfully discriminated against because "it was willing to pay only some of an allegedly extortionate demand." *Id.* at 683 (emphasis omitted). Accordingly, the context of *SECSYS* is distinct from this case, where Plaintiffs allege the Policy discriminates against transgender people on the basis of sex. For these reasons, we do not rely on *SECSYS*.

not rest on a determination that the Policy disparately impacts men or women. Rather, applying *Bostock*'s reasoning, we conclude that because the Policy intends to discriminate based on transgender status, it necessarily intends to discriminate based in part on sex. *Id.* at 661–62. As *Bostock* explains, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 660. And that discrimination on the basis of sex is present irrespective of whether the targeted individual is a transgender male or transgender female.

The final argument against concluding the Policy is sex-based discrimination comes from Defendants. They remind us that binding Supreme Court precedent recognizes "biological differences between men and women." Appellees' Br. at 26. In *United States v. Virginia*, for example, the Court stated that "[p]hysical differences between men and women" are "enduring." 518 U.S. 515, 533 (1996). We agree such differences exist and that they may be relevant to whether state action passes judicial scrutiny. But those differences "cannot render" a classification "sex- or gender-neutral." *L.W.*, 83 F.4th at 505 (White, J., dissenting); *see also Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 60, 64 (2001) (applying intermediate scrutiny to a "gender-based classification" that "takes into account a biological difference between" women and men).

We thus join the courts that have applied *Bostock*'s reasoning to equal protection claims. *See, e.g.*, *Kadel v. Folwell*, 100 F.4th 122, 153–54 (4th Cir. 2024) (en banc); *id.* at 177–81 (Richardson, J., dissenting); *Hecox v. Little*, Nos. 20-35813, 20-35815, 2023 WL 11804896, at *11 (9th Cir. June 7, 2024); *LeTray v. City of*

Watertown, No. 5:20-cv-1194 (FJS/TWD), 2024 WL 1107903, at *7 (N.D.N.Y. Feb. 22, 2024); *D.T. v. Christ*, 552 F. Supp. 3d 888, 896 (D. Ariz. 2021); *but see L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 484–85 (6th Cir. 2023), *petition for cert. filed* (U.S. Nov. 6, 2023) (No. 23-477), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023); *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1228–29 (11th Cir. 2023); *Poe v. Drummond*, No. 23-cv-177-JFH-SH, 2023 WL 6516449, at *6 (N.D. Okla. Oct. 5, 2023), *appeal filed*, Case No. 23-5110 (10th Cir. Oct. 10, 2023). Accordingly, Plaintiffs have plausibly alleged the Policy purposefully discriminates on the basis of sex.[18]

2. Levels of Scrutiny

Although Plaintiffs have sufficiently alleged purposeful discrimination on the basis of transgender status and sex, that does not necessarily mean their claim is viable. Instead, Plaintiffs' claims must be tested under the applicable level of judicial scrutiny. *Ashaheed*, 7 F.4th at 1250.

The appropriate level of scrutiny varies depending on the classification at issue. *City of Cleburne*, 473 U.S. at 440–42. Suspect and quasi-suspect classifications receive heightened review. *Id.* at 440. Suspect classifications—race, alienage, and national origin—must pass strict scrutiny.[19] *Id.* Strict scrutiny requires that

---

[18] Plaintiffs also argue the Policy is sex-based discrimination because it relies on sex stereotypes. We need not consider this argument because we conclude the Policy, as alleged, is sex-based discrimination under *Bostock*'s reasoning.

[19] State action that burdens a fundamental right must also pass strict scrutiny. *City of Cleburne*, 473 U.S. at 440.

the challenged action be "suitably tailored to serve a compelling state interest." *Id.* Quasi-suspect classifications, like sex, must satisfy intermediate scrutiny, meaning the challenged action must be "substantially related to a sufficiently important governmental interest." *Id.* at 441. All other classifications must pass rational basis review, a lesser scrutiny. *Id.* at 440. Rational basis requires that the challenged action be "rationally related to a legitimate state interest." *Id.*

Here, Plaintiffs argue intermediate scrutiny should apply because the Policy discriminates based on sex and because transgender status is a quasi-suspect class. Defendants respond that under our precedent, transgender status is not a quasi-suspect class. *See Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) (unpublished); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227–28 (10th Cir. 2007), *overruled on other grounds by Bostock*, 590 U.S. at 651–52; *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995). We decline to decide whether transgender status is a quasi-suspect class because the Policy discriminates based on sex, so intermediate scrutiny applies regardless.

As we now explain, the Policy cannot pass rational basis review. It follows then that it cannot pass the more exacting intermediate scrutiny either.

a. Rational basis

Under rational basis review, we evaluate whether the state action is "rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. Because Plaintiffs are challenging the Policy, they "have the burden 'to negative every conceivable basis which might support it.'" *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake*

Shore Auto Parts Co., 410 U.S. 356, 364 (1973)). But "it is entirely irrelevant for constitutional purposes whether the conceived reason" was the actual motivation. *Id.* Furthermore, the proposed justification "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* Problems may also be addressed "incrementally," meaning there may be rational solutions that are nevertheless under-or overinclusive. *Id.* at 316; *see also Vance v. Bradley*, 440 U.S. 93, 108 (1979) (explaining that a classification may be "to some extent both underinclusive and overinclusive").[20]

The district court concluded the Policy was rationally related to two legitimate state interests: "protecting the integrity and accuracy of vital records" and protecting "the interests of women." App. at 86. Defendants assert these same interests on appeal. The State Amici assert two additional interests that merit consideration. We address each asserted interest below, concluding none are rationally related to the Policy.

---

[20] Plaintiffs argue we should apply a "more searching" version of rational basis because transgender people are an "unpopular group." Appellants' Br. at 42; *see also Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) ("On the other hand, several courts have read the Supreme Court's recent cases in this area to suggest that rational basis review should be more demanding when there are 'historic patterns of disadvantage suffered by the group adversely affected by the statute.'" (quoting *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012))). Because the Policy fails under the ordinary rational basis standard, we need not consider whether to apply a "more searching" version.

i. Accuracy of vital records

Defendants assert Oklahoma has a valid interest "in the accuracy [of] its own vital statistics recording facts about birth." Appellees' Br. at 47. We assume this is a legitimate state interest. Nonetheless, it is not rationally related to the Policy because even if transgender people amend the sex listed on their birth certificates, Oklahoma retains and has access to original birth certificates.

Plaintiffs want amended birth certificates for their own use—they are not trying to prevent Oklahoma from keeping and then later accessing original birth certificates. *See* Okla. Stat. tit. 63, § 1-316(B)(2) (indicating original birth certificate is retained after adoption); Okla. Admin. Code 310:105-3-5 (indicating original birth certificate for child "born out of wedlock" is retained after a child "has been legitimated"). Indeed, Defendants do not dispute that after a birth certificate is amended, they retain access to the original. Rather, they emphasize that there are good reasons to record a person's sex assigned at birth. This is a non sequitur. Plaintiffs are not challenging Oklahoma's practice of recording sex assigned at birth or of retaining such records. Plaintiffs merely want amended birth certificates for their own use that do not require any changes to the original records kept by the state. Thus, the Policy does not ensure accuracy of "vital statistics recording facts about birth" because the same statistics are available, regardless of whether the Policy exists. *See* Appellees' Br. at 47.

Nevertheless, Defendants argue Oklahoma has an interest in ensuring that all Oklahoma birth certificates uniformly reflect sex assigned at birth. But this asserted interest is at odds with the fact that Okla-

homa allows amendments to the sex designation on driver's licenses. With the Policy in place, uniformity among official state documents is lacking because Oklahomans like Plaintiffs have a birth certificate that indicates one sex and a driver's license that indicates another.

Defendants also contend sex-designation amendments are different from other permitted amendments because sex is immutable. But Oklahoma allows amendments to other seemingly immutable facts—like birth parents. *See* Okla. Stat. tit. 63, § 1-316(A)(1); *see also Ray v. McCloud*, 507 F. Supp. 3d 925, 938 (S.D. Ohio 2020) (concluding an accuracy argument was unpersuasive because people are allowed to change the parents listed on their birth certificates); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142 (D. Idaho 2018) (same).

For these reasons, the Policy is not rationally related to Defendants' asserted interest in the accuracy of vital statistics.

ii. Protecting women's interests

Defendants next argue the Policy furthers Oklahoma's interest in ensuring that individuals assigned male at birth do not compete in women's athletic events. We assume this is a legitimate interest, but we nonetheless conclude it is not rationally related to the Policy.

Oklahoma bans students assigned male at birth from competing on teams designated for women or girls. Okla. Stat. tit. 70, § 27-106(E). Oklahoma enforces this ban using affidavits, not birth certificates. *Id.* § 27-106(D) ("Prior to the beginning of each school

year, the parent or legal guardian of a student who competes on a school athletic team shall sign an affidavit acknowledging the biological sex of the student at birth."). Birth certificates (and thus the Policy) are irrelevant to ensuring only students assigned female at birth compete on athletic teams designated for women or girls. And again, Oklahoma keeps and has access to original birth certificates. So, even if Oklahoma required birth certificates for athletic purposes, it could require review of the original birth certificates. Accordingly, the Policy is not rationally related to advancing this asserted interest.

iii. State Amici's interests

The State Amici raise two additional interests that merit consideration: preventing fraud and conserving resources.

The State Amici first argue that the Policy helps prevent fraud: "[S]tates rely on vital records, including birth certificates, to determine a person's eligibility for benefits. States have an interest in maintaining a complete, accurate, and uniform system to make those determinations and avoid fraud." State Amici Br. at 13. The State Amici do not offer more information, so it is unclear what type of fraud the Policy supposedly prevents. It is also unclear how the amendments Plaintiffs seek create opportunities for fraud where the state keeps the original birth certificate. Further, the Policy results in transgender people, like Plaintiffs, having inconsistent identity documents, which may facilitate, rather than prevent, fraud. *See Ray v. Himes*, No. 2:18-cv-272, 2019 WL 11791719, at *11 (S.D. Ohio Sept. 12, 2019) (applying strict scrutiny and stating the court "cannot conceive" how preventing sex-desig-

nation amendments "helps prevent fraud rather than perpetuate it").

The State Amici also argue that amendments plainly "require some expenditure of state resources," and "it is up to the state to determine whether such expenditures are worth it." State Amici Br. at 13. Yet, the State Amici offer no discussion of what resources sex-designation amendments require. Nor do they explain how the Policy would rationally conserve those resources. While we do not require "evidence or empirical data," there must be some "rational speculation." *Beach Commc'ns*, 508 U.S. at 315. Here, there is not enough information or legal argument for us to rationally speculate.

For these reasons, the Policy is not rationally related to Oklahoma's interests in preventing fraud and conserving resources.

* * *

Plaintiffs have met their burden of negating every conceivable basis that might support the Policy. To be sure, rational basis is a low bar, and the challenged state action need not be perfect. But there must be *some* rational connection between the Policy and a legitimate state interest. There is no rational connection here—the Policy is in search of a purpose.

Because the Policy does not survive rational basis review, it cannot survive intermediate scrutiny. In fact, the disconnect is even more apparent under intermediate scrutiny, which requires a substantial relationship between the Policy and the asserted interests. *City of Cleburne*, 473 U.S. at 441. For example, consider the asserted interest of conserving resources. The Policy allows other amendments to birth certifi-

cates that presumably consume state resources, yet there is no indication that the cost of processing amended birth certificates for transgender persons is meaningfully burdensome. *See Craig v. Boren*, 429 U.S. 190, 198 (1976) (citing Supreme Court cases that have "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications").

Under the facts alleged, the Policy does not withstand scrutiny. Plaintiffs sufficiently allege a constitutional violation, and we reverse the dismissal of their equal protection claim.

C. Substantive Due Process

Plaintiffs allege that without amended birth certificates, they are forced to involuntarily disclose their transgender status when showing their original birth certificates to third parties. Plaintiffs contend these involuntary disclosures violate their right to privacy guaranteed by the Fourteenth Amendment's Due Process Clause. The district court correctly dismissed this claim because Plaintiffs have not plausibly alleged state action.

The Due Process Clause prohibits "any *State*" from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1 (emphasis added). Thus, the Due Process Clause "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

Additionally, Plaintiffs bring their claim under 42 U.S.C. § 1983, which requires "(1) deprivation of a federally protected right by (2) an actor acting under

color of state law." *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1160 (10th Cir. 2021) (quotation marks omitted). Like the Fourteenth Amendment, § 1983 requires Plaintiffs to allege the challenged action is "fairly attributable" to state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (quoting *Lugar*, 457 U.S. at 937).

The state action requirement is implicated when a plaintiff alleges that a state actor is liable for the actions of a private party. *See, e.g.*, *VDARE*, 11 F.4th at 1156. Here, Plaintiffs allege Defendants are liable for Plaintiffs' disclosures. But it is not enough that Plaintiffs challenge the Policy, which is state action. This is because Plaintiffs allege their privacy rights are violated when disclosures occur; they do not allege the violation occurred when their requests to amend were denied. *See Lugar*, 457 U.S. at 937 (stating that "the conduct allegedly causing the deprivation of a federal right" must "be fairly attributable to the State"); *see also Citizens for Health v. Leavitt*, 428 F.3d 167, 178 (3d Cir. 2005) (considering whether there was state action because although the plaintiffs challenged a rule promulgated by the Secretary of Health, the alleged injury was disclosure of medical information "by third parties"). To adequately plead Defendants are liable for Plaintiffs' involuntary disclosures, Plaintiffs must plausibly allege that those disclosures amount to state action. *See VDARE*, 11 F.4th at 1160.

We have articulated several tests for evaluating when action by a third party constitutes state action, including the "nexus test." *Gallagher*, 49 F.3d at 1448.

We evaluate Plaintiffs' claim under the nexus test because it is most appropriate for the facts of this case.[21]

"Under the nexus test, a plaintiff must demonstrate that 'there is a sufficiently close nexus' between the government and the challenged conduct such that the conduct 'may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). This requirement ensures "that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). A state "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.*

VDARE Foundation v. City of Colorado Springs is a useful demonstration of the nexus test. 11 F.4th at 1160–68. The plaintiff in *VDARE* was a nonprofit foundation that educated people about "the unsustainability of current U.S. immigration policy." *Id.* at 1156. The nonprofit reserved a private resort in Colorado Springs, Colorado, for a conference. *Id.* Over four months after the reservation, there were violent protests in Charlottesville, Virginia, following a political rally. *Id.* at 1157. Days after those protests, the Colorado Springs Mayor issued a public statement on the city's behalf that the city did not have the authority to

---

[21] The other tests are the "public function test," the "joint action test," and the "symbiotic relationship test." *Wittner v. Banner Health*, 720 F.3d 770, 775 (10th Cir. 2013). None of these tests are relevant to the facts of this case.

"direct private businesses" like the resort "as to which events they may host." *Id.* It then "encourage[d] local businesses to be attentive to the types of events they accept and the groups that they invite." *Id.* The statement further explained that the city would "not provide any support or resources" to the nonprofit's event. *Id.* The day after this statement, the resort canceled the nonprofit's reservation, even though it had been actively coordinating with the nonprofit up to that point. *Id.*

The nonprofit sued the city, alleging the city's statement coerced the resort into canceling the reservation. *Id.* at 1157–58. The district court dismissed the complaint, and we affirmed on appeal, concluding the resort's decision to cancel the reservation was not state action. *Id.* at 1158, 1160. We concluded there was not a sufficient nexus because the mayor's statement did not threaten, order, or intimidate the resort into canceling the reservation. *Id.* at 1164–68. Thus, the resort's decision was its own, and the nonprofit had not plausibly alleged state action. *Id.* at 1168.

Like the resort in *VDARE*, Plaintiffs have not alleged Defendants threatened, ordered, or intimidated them into disclosing their birth certificates. They do allege third parties require birth certificates, but they do not allege those third-party requirements amount to state action. And although Defendants are likely aware third parties will require birth certificates, that is not enough under the nexus test—"Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum*, 457 U.S. at 1004–05. Consequently, Plaintiffs have not alleged that Defendants "exercised coercive power" or "provided such significant encourage-

ment, either overt or covert," that Plaintiffs' disclosures "must in law be deemed" state action. *See id.* at 1004.

Nevertheless, Plaintiffs cite other cases where courts held a transgender plaintiff's right to privacy was violated because the state would not issue amended identity documents. But none of those cases considered the state action requirement. *See Ray*, 2019 WL 117-91719, at *10 ("While ODH is not the entity requiring disclosure or the entity actually disclosing the information, the threat of disclosure is imposed indirectly by the government through its birth certificates."); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) ("By permitting plaintiffs to change the name on their birth certificate, while prohibiting the change to their gender markers, the Commonwealth forces them to disclose their transgender status in violation of their constitutional right to informational privacy."); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (concluding plaintiffs sufficiently pled the state violated their right to privacy by making it unduly burdensome to change the sex listed on state-issued IDs); *K.L. v. Alaska*, No. 3AN-11-05431 Cl., 2012 WL 2685183, at *6 (Alaska Sup. Ct. Mar. 12, 2012) ("Here, however, the fact that the DMV currently has no procedure allowing licensees to change the sex designation does not *directly* threaten the disclosure of this personal information. Nevertheless, the Court finds that such a threat is imposed *indirectly*."). As a result, they are not persuasive.

Additionally, Plaintiffs argue that "the government cannot force people to choose between a valuable benefit and a constitutionally protected right." Appellants' Br. at 40. But the cases they cite rely on the un-

constitutional conditions doctrine, which states that the government cannot withhold benefits—such as tenure or a land-use permit—as a punishment for exercising constitutional rights. *See Perry v. Sinderman*, 408 U.S. 593, 598 (1972) (holding "that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights"); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 606 (2013) (holding that it was unconstitutional to deny a land-use permit to an applicant who would not yield his land). Plaintiffs have not alleged that a benefit was withheld because they exercised a constitutional right. Thus, the unconstitutional conditions doctrine is inapplicable.

Plaintiffs also contend that privacy violations may "occur even where no third-party disclosure occurs at all." Appellants' Br. at 40. In support, they cite *Lankford v. City of Hobart*, 27 F.3d 477, 479–80 (10th Cir. 1994). In *Lankford*, the plaintiff alleged that a police chief unlawfully seized her medical records from a hospital without a warrant and without her consent. *Id.* at 479. Plaintiffs here have not alleged that Defendants unlawfully accessed their private information, so *Lankford* is inapplicable. Similarly, Plaintiffs cite a case where teachers violated a student's right to privacy by requiring her to answer questions about her "sexual orientation, virginity, and sexual practices." *Botello v. Morgan Hill Unified Sch. Dist.*, No. C09-02121 HRL, 2009 WL 3918930, at *4–5 (N.D. Cal. Nov. 18, 2009). Plaintiffs here have not alleged Defendants directly required them to disclose private information, so *Botello* is inapposite.

Finally, Plaintiffs argue that Defendants are liable under a proximate cause theory. Plaintiffs do not explain why a proximate cause analysis should supplant our nexus test. But more importantly, they raised this argument for the first time in their Reply Brief, affording Defendants no opportunity to respond. Plaintiffs have waived any argument based on proximate cause. *Anderson v. U.S. Dep't of Lab.*, 422 F.3d 1155, 1174 (10th Cir. 2005) ("The failure to raise an issue in an opening brief waives that issue.").

Plaintiffs have adequately alleged that transgender people without amended birth certificates face difficult choices. But to assert a substantive due process claim, Plaintiffs needed to allege that their involuntary disclosures amount to state action. They failed to do so. We therefore affirm the district court's dismissal of Plaintiffs' substantive due process claim.

III. Conclusion

Plaintiffs stated a plausible equal protection claim. We thus REVERSE the district court's dismissal of Plaintiffs' equal protection claim and REMAND for proceedings consistent with this decision. But we AFFIRM the dismissal of Plaintiffs' substantive due process claim because Plaintiffs have failed to allege state action.

HARTZ, J., DISSENTING IN PART

I join all but § II.B.1.b of the majority opinion. In particular, I agree that the Policy unconstitutionally discriminates against transgender persons because (1) the denial of a right to obtain an amended birth certificate with a revised gender identity disadvantages and was intended to disadvantage transgender persons and (2) there is no reasonable justification for the discrimination.

I part company with the majority, however, when it declares that it would apply intermediate scrutiny to the Policy on the ground that it comes within the doctrine that requires such scrutiny under the Equal Protection Clause because it discriminates on the basis of sex. The seminal Supreme Court decision on sex discrimination held that "a mandatory preference to members of either sex over members of the other" violates the Clause. *Reed v. Reed*, 404 U.S. 71, 76 (1971). That doctrine has been invoked to invalidate a generally applicable law only when the law has intentionally treated males and females differently, to the detriment of one of the sexes. *See, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 58 (2017) ("Prescribing one rule for mothers, another for fathers, . . . is of the same genre as the classifications we declared unconstitutional in [*Reed* and four other cases].") Yet no one could say that the Policy intentionally discriminates against males, or that it intentionally discriminates against females. The Policy treats males and females (whether determined at birth or at present) identically. Which sex was intentionally discriminated against?

The majority relies on the Supreme Court opinion in *Bostock v. Clayton County*, 590 U.S. 644 (2020), as establishing that any discrimination on the basis of transgender status is *ipso facto* discrimination on the basis of sex. But that opinion addressed an employment claim under Title VII, not a challenge to a generally applicable law under the Equal Protection Clause. As will be apparent from the following discussion, the analysis employed in *Bostock* is different in essential respects from the type of analysis required for the present challenge under the Equal Protection Clause.

The *Bostock* analysis showed that an employer's adverse employment action against a transgender person necessarily discriminated against the employee on the basis of gender at birth, which it deemed discrimination on the basis of sex. The Court emphasized that its focus should be on the individual employee, not the group (the class) to which the employee belonged. That is, the question was whether the individual employee would have been treated differently if the employee was of a different sex, not whether the employer in general treated one sex better than the other. *See id.* at 658–59. It then explained as follows why an employee discriminated against for being transgender was *ipso facto* also being discriminated against because of the employee's birth gender.

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee

> identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id. at 660. In short, the employer discriminates based on sex when it decides whether to fire an employee for particular behavior depending on whether the employee was born male or female. The employee is allowed to do something if he was born a male but not if he was born a female. This establishes that two otherwise identical employees are treated differently depending on birth sex.

I recognize that there is language in *Bostock* that, out of context, could be read to say that any transgender discrimination is always prohibited discrimination on the basis of sex. But who wants to read an opinion in which every sentence is qualified by the language "in the context of employment discrimination under Title VII"? The language in the above-quoted paragraph of *Bostock* translates well to all examples of Title VII employment discrimination against transgender persons. In all such employment-discrimination cases one could show that but for the injured employee's gender at birth, the injury would not have occurred. The approach taken by the Court in *Bostock*, however, does not translate to the circumstance we confront in this case. As a lower court, we should be most reluctant to reject the reasoning of a Supreme Court opinion even when used in a different context. But when that reasoning is not a good fit in the context before us, we need not blindly apply the Court's conclusions to that different context. As the *Bostock* opinion states in response to a parade of horribles that allegedly would follow from the ruling

in that case, "The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'" *Id.* at 681. To be sure, the opinion does not list contexts in which its analysis would not apply. And there are some contexts—such as an equal-protection claim by someone fired by a government employer—in which the *Bostock* analysis is likely applicable. But resolving the game-changing issue in *Bostock* was surely enough work for the day. The Court could not possibly envision all the contexts in which its language might be invoked; and even if some other contexts could be anticipated, there was no need for the Court to think through and resolve other issues. Hence, the cautionary "The only question before us" language. We ignore that language at our peril.

The essential difference between *Bostock* and the circumstances presented here concerns proof of intent. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). In *Bostock* an inference of the requisite intent is compelling. The employer must be thinking, "I am firing this woman for misconduct (or appearance) only because of her biological (birth) gender, since I would not be firing her if her birth gender had been female." For this reason, *Bostock* could say, "[A]n employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking." 590 U.S. at 661. The requisite intent may also be obvious with respect to a generally applicable law, as when the law on its face treats members of a class differently from others.

But when, as with the Policy, the generally applicable law does not on its face distinguish between classes of people, proof of intent is more complicated. After all, there may be many unintended consequences of a generally applicable law, and the law may have a disparate impact on a class that was not the purpose of the law.

Relying on Supreme Court decisions such as *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the author of *Bostock* summarized the proper analysis to establish the intent of a generally applicable law in an opinion while on this court. It describes the first step courts take in conducting equal-protection analysis of such a law (the second step is whether the alleged discrimination is justified, which is not relevant to this partial dissent): "First, we ask whether the challenged state action intentionally discriminates between groups of persons. Discriminatory intent, however, implies more than intent as volition or intent as awareness of consequences. It requires that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' the law's differential treatment of a particular class of persons." *SECSYS, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012) (Gorsuch, J.) (citations, ellipsis, and internal quotation marks omitted). In other words, "a discriminatory effect against a group or class may flow from state action, it may even be a foreseen (or known) consequence of state action, but it does not run afoul of the Constitution unless it is an intended consequence of state action." *Id.*

The opinion then describes how one may prove the intent necessary for this type of equal-protection

violation: "Intentional discrimination can take several forms. When a distinction between groups of persons appears on the face of a state law or action, an intent to discriminate is presumed and no further examination of legislative purpose is required." *Id.* But "when the law under review is generally applicable to all persons, no presumption of intentional discrimination arises; proof is required. This is so because many laws, perhaps most and often unavoidably, affect some groups of persons differently than others even though they involve no *intentional* discrimination." *Id.* "Disparate impact, then, is not necessarily the same thing as discriminatory intent." *Id.* at 686. On the other hand, "while laws of general applicability may not be subject to a presumption of intentional discrimination, neither are they shielded from scrutiny. If the evidence shows that a generally applicable law was adopted at least in part because of, and not merely in spite of, its discriminatory effect on a particular class of persons, the first essential step of an equal protection challenge is satisfied." *Id.*

Turning to the case before us, the Policy is facially neutral. It applies generally to all persons. *No one* can obtain an amended birth certificate that changes gender. This does not, however, immunize the policy from an equal-protection attack. The majority opinion establishes that the Policy violates the Equal Protection Clause because it *intentionally* harms transgender persons. Where I disagree with the majority is in their conclusion that the Plaintiffs have also established a sex-discrimination equal-protection claim. The element of intent to disadvantage a class (male or female) is unproved.

The yarmulke example in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), can illustrate the shortcomings of the sex-discrimination analysis in the majority opinion. I will assume, contrary to some current practice, that only *male* Jews wear yarmulkes. Say, a statute prohibits the wearing of yarmulkes. Although the statute is facially neutral with respect to religion, I agree with the suggestion in *Bray* that an examination of the surrounding circumstances of enactment of the statute would almost certainly demonstrate the requisite intent to disfavor Jews. But what about discrimination on the basis of sex? Could a Jewish male succeed in a claim of sex discrimination, arguing that he is not able to fully practice his faith, whereas if just his sex were changed, leaving every other relevant attribute the same (in other words, if he were a female Jew), the law would have no effect on the practice of his faith? This argument mirrors the analytic approach of *Bostock*, which focuses on the circumstances of the individual employee (rather than on the class to which the employee belongs)—he would be disadvantaged in comparison to someone identical to him in every way except sex. But that is not enough to establish an equal-protection challenge to a generally applicable law. In this context the court looks to see whether males as a class are the object of an intent to discriminate. In the words of then-Judge Gorsuch, the term *intent* when used in assessing this kind of an equal-protection violation "implies more than intent as volition or intent as awareness of consequences. It requires that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of the law's differential treatment of a particular class of persons." *SECSYS*, 666 F.3d at 685 (citation, ellipsis,

and internal quotation marks omitted). Establishing a sex-discrimination equal-protection claim against the yarmulke law would require a showing that the discriminatory impact on males was the consequence of an *intent* to disadvantage males. That would be hard to demonstrate, given that Jewish males are a very small fraction of the total population of males. *See, e.g.*, *Feeney*, 442 U.S. at 276–81 (rejecting claim that statute providing veterans' preference for state civil-service jobs reflects a gender-based discriminatory purpose depriving women of equal protection); *id.* at 281 (Stevens, J., concurring) (noting that that there were many disadvantaged females (2,954,000) but there were also many disadvantaged males (1,867,000)).[1]

---

[1] Rather than applying the Supreme Court's approach, summarized by then-Judge Gorsuch in *SECSYS* (quoted at length above), to determining intent in an equal-protection challenge to a generally applicable statute, the majority apparently believes that the approach need not be applied because the Equal Protection Clause "protects persons, not groups," so it can simply adopt the reasoning of *Bostock* that resolved a claim of discrimination by an individual employer. Maj. Op. at 38 (cleaned up). But I know of no authority for that approach in resolving equal-protection challenges to generally applicable laws. To be sure, that quoted language appears in two Supreme Court opinions addressing equal-protection challenges to generally applicable laws. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007). But intent was not at issue in either case, since the generally applicable laws at issue discriminated on their face on the basis of race. Rather, the quoted language was part of the Supreme Court's explanation why strict scrutiny should apply to any race discrimination, even discrimination purportedly justified by beneficent reasons. The point being made, as I understand it, was that an individual can invoke the protections of the Equal Protection Clause under the same standards as anyone else, even if the individual might be considered a mem-

Here, Ms. Fowler (just as the other two Plaintiffs) brings both a transgender-discrimination claim and a sex-discrimination claim against the Policy. Her theory behind the first claim is that as a transgender woman she is being discriminated against because she cannot obtain a birth certificate that reflects her present gender. In support of her sex-discrimination claim, she states that she is treated differently than a comparator with a present identity as a female whose birth identity was also female because the comparator already has a birth certificate reflecting her present gender identity. The record supports Ms. Fowler's transgender-discrimination claim because the intended effect of the Policy was to disadvantage transgender persons in obtaining birth certificates reflecting their present identity. As the panel opinion establishes, the requisite intent was present in promulgating the Policy. But I see no evidence of the requisite intent in promulgating the Policy to disadvantage either males or females. No person, either male (at birth or at present) or female (at birth or at present) can obtain an amended birth certificate changing gender. As I asked at the outset of this partial dissent, which sex is discriminated against? *Bostock* cannot help Plaintiffs here, because it did not address a generally applicable law and resolving the Title VII claim in that case did not call for an answer to that question.

---

ber of a privileged group. *See Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 324–25 (2014) (Scalia, J., concurring) (invoking proposition that Fourteenth Amendment "protects persons, not groups" in rejecting the proposition that the Equal Protection Clause protects only "particular groups" and that only laws "burdening racial minorities" deny equal protection (cleaned up)).

The sex-discrimination issue in this case is a difficult one. But I must respectfully dissent. Perhaps one day we will get clarification from the Supreme Court.

**MEMORANDUM AND ORDER,
U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
(JUNE 8, 2023)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROWAN FOWLER, ET AL.,

Plaintiffs,

v.

KEVIN STITT, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE STATE OF OKLAHOMA, ET AL.,

Defendants.

Case No. 22-cv-115-JWB-SH

Before: John W. BROOMES, U.S. District Judge.

MEMORANDUM AND ORDER

Plaintiffs are two transgender men and one transgender woman born in Oklahoma who seek to alter their respective Oklahoma birth certificates to reflect their sex to be consistent with their current gender identity. Plaintiffs allege that the State of Oklahoma's refusal to issue revised birth certificates violates their federal constitutional rights under 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. (Doc. 41.)[1] Defendants move to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 24.) The motion is fully briefed and ready for review. (Docs. 33, 38.) For the reasons explained below, Defendants' motion is GRANTED.

I. Background

Under Oklahoma law, a certificate of birth must be filed with the Oklahoma State Registrar shortly after 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 id*. § 1-311(B). This includes information such as the date and time of birth, the child's name, the names of the parents, and the child's sex (the "sex designation").[2] By signing the certificate worksheet, the parent

---

[1] As explained in Section I *infra*, Plaintiffs filed the second amended complaint (Doc. 41) after the motion to dismiss had been fully briefed. But the parties filed a joint stipulation indicating that this pleading only contains non-substantive changes and the parties asked the court to treat the pending motion to dismiss as applying equally to the second amended complaint. (Doc. 39.) The parties' request was granted by the then-assigned district court judge. (Doc. 40.) Accordingly, the court cites to the second amended complaint herein as it is the operative pleading.

[2] In the second amended complaint, Plaintiffs refer to this as the "sex designation on their birth certificates, also known as a gender marker." (Doc. 41 at 2.) However, Plaintiffs allege that their Oklahoma birth certificates "currently indicate[]" that their "sex" is male or female. (*Id*. at 4.) Prior to April 2022, the Oklahoma statute and applicable regulations were silent on the official term, but the Oklahoma legislature has since clarified that the item is a "biological sex designation." *See* 63 O.S. § 1-

"attest[s] to the accuracy of the personal data entered thereon . . . " *See id.* § 1-311(E).

Prior to April 2022, 63 O.S. § 1-321 authorized the Oklahoma State Department of Health ("OSDH") Commissioner to amend a birth certificate in the following situations: (1) to reflect a person's new legal name change; (2) to show paternity, if paternity was not shown on the original birth certificate; (3) to change the surname of a child born out of wedlock; and (4) "in accordance with [the] regulations . . . adopted by the State Commissioner of Health." 63 O.S. § 1-321(A), (C), (D), (E). The applicable regulations authorized the following amendments: (1) "Name added to certificate if item blank"; (2) "erroneous entries"; and (3) to "correct[] an error or misstatement of fact as to any non medical information." *See* Okla. Admin. Code § 310:105-3-3(a)-(d). Under § 1-321(A), all other amendments were prohibited: "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. . . . " 63 O.S. § 1-321(A) (emphasis added).

From at least 2007 until late-2021, Oklahoma state district courts and OSDH allowed transgender

---

321(H) (2022). Thus, based on Plaintiffs' allegations that their birth certificates list "sex" as opposed to "gender," the enactment of 63 O.S. § 1-321(H), and the fact that Plaintiffs are seeking prospective relief, the court finds that the proper term is "sex designation." *See also* 63 O.S. § 1-310(a) (providing that Oklahoma birth certificates "shall include as a minimum the items recommended by the federal agency responsible for national vital statistics"); Centers for Disease Control and Prevention, *Model State Vital Statistics Act and Model State Vital Statistics Regulations*, Item 3, Page 1 (June 2021 Rev.) (recommending the "sex of the infant" be included in a birth certificate).

people to amend the sex designation on their birth certificates to match their gender identity. (Doc. 41 at 2, 12.) Between 2018 and 2021, OSDH amended the sex designations on the birth certificates of more than one hundred transgender people to match their gender identity. (*Id*. at 12.)

In early 2021, each of the Plaintiffs filed Petitions for Change of Name and Gender Marker and eventually obtained "court orders directing that the [Plaintiff's] birth certificate be amended to match their gender identity." (*See id*. at 14, 17-18, 22-23, 25-26.) On August 18, 2021, the District Court of Tulsa County granted Plaintiff Rowan Fowler's Petition. (*Id*. at 17.) "In addition to changing her name, the August 18, 2021 court order . . . also ordered, adjudged, and decreed that Ms. Fowler is female; that any designation by Oklahoma agencies of Ms. Fowler being anything other than female is incorrect; and that she shall be designated as female on official documents generated, issued, or maintained in the State of Oklahoma." (*Id*.) Plaintiff Allister Hall obtained a similar order on August 24, 2021. (*Id*. at 22.) And Plaintiff Carter Ray obtained a similar order on June 24, 2021.[3] (*Id*. at 25.) After obtaining their orders, Plaintiffs promptly sought to amend their birth certificates by providing OSDH with a copy of the court order and paying the requisite fee. (*Id*. at 18, 22, 25.)

---

[3] The allegations concerning Ray's court order are slightly different than the others. The second amended complaint alleges that the court "ordered, adjudged, and decreed that the gender marker on Mr. Ray's birth certificate be changed to male and that OSDH issue a new birth certificate consistent with the changes ordered." (Doc. 41 at 25.)

Up until that point, the parties agree that it was OSDH's practice to grant such applications and make the necessary amendments. (*See id.* at 12; Doc. 24 at 11 ("[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.")) However, this practice apparently ended in October 2021 as the result of litigation commenced by a plaintiff who sought an amended birth certificate with a gender-neutral designation. Commissioner of Health Lance Frye and other OSDH officials eventually entered into a settlement which enabled the plaintiff to obtain an amended birth certificate with a non-binary, gender-neutral designation. (Doc. 41 at 12-13.)

In response to this settlement, Governor Stitt issued a statement on October 21, 2021, in which he stated that: "I believe that people are created by God to be male or female. Period." (*Id.* at 13.) He further stated that: "There is no such thing as non-binary sex, and I wholeheartedly condemn the OSDH court settlement that was entered into by rogue activists who acted without receiving proper approval or oversight. I will be taking whatever action necessary to protect Oklahoma values." (*Id.*) The following day, on October 22, Commissioner Frye announced his resignation, which was effective immediately. (*Id.*)

On November 8, 2021, Governor Stitt 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." The Executive Order provides, in full:

> It has come to my attention that the Oklahoma State Department of Health (OSDH) has

entered into a settlement agreement which was not reviewed or approved by my Administration. This settlement requires OSDH to amend birth certificates in a manner not permitted under Oklahoma Law. This Order ensures that this unauthorized action will be corrected.

63 O.S. § 1-321 establishes how and when a birth certificate may be amended under Oklahoma Law. Neither this statute nor Oklahoma law otherwise provide OSDH or others any legal ability to in any way alter a person's sex or gender on a birth certificate. Moreover, neither this statute, nor OSDH's administrative rules, give the agency authority to enter agreements that circumvent the laws of this state.

Therefore, I, J. Kevin Stitt, Governor of the State of Oklahoma, pursuant to the power vested in me by Article VI of the Oklahoma Constitution, hereby order that OSDH immediately:

1. Cease amending birth certificates that is in any way inconsistent with 63 O.S. § 1-321.
2. Remove from its website any reference to amending birth certificates that is inconsistent with its authority under 63 O.S. § 1-321.
3. Inform the Governor's office of any pending litigation that is related to amending birth certificates in Oklahoma.

4. Provide the Governor's office with any other information that OSDH feels is responsive to this Executive Order.

I also encourage our lawmakers, upon reconvening for the 2nd Regular Session of the 58th Legislature this coming February to:

1. Immediately pass legislation that will clarify, to the extent necessary, that changes in sex or gender on a birth certificate or a designation of non-binary is contrary to Oklahoma Law.

2. Include in the legislation a provision that requires the Commissioner of Health to promulgate any administrative rules necessary to effectuate the purposes of this statute.

Okla. Admin. Code § 1:2021-24 (Nov. 8, 2021).

Plaintiffs' applications were all denied between January and March 2022 when they received an email from Defendant Baker "which invoked the Governor's Executive Order in the denial." (Doc. 41 at 18, 23, 26.) Plaintiffs allege that Governor Stitt and his office have enforced the Executive Order by specifically instructing OSDH officials that they cannot correct the birth certificates of transgender people to reflect their male or female gender identity. (*Id*. at 14.)

On April 26, 2022, Governor Stitt signed into law Senate Bill 1100 ("SB1100"), which amends 63 O.S. § 1-321 by adding the following provision: "Beginning on the effective date of this act, the biological sex designation on a certificate of birth amended under this section shall be either male or female and shall

not be nonbinary or any symbol representing a nonbinary designation including but not limited to the letter 'X'". 63 O.S. § 1-321(H) (2022); *see also* 2022 Okla. Sess. Laws, c. 87, § 4, emerg. eff. April 26, 2022.

Since then, Oklahoma officials have denied the requests of other transgender people to amend the sex designation on their birth certificate to match their gender identity. (Doc. 41 at 13-14.) They have denied such requests even where they were accompanied by court orders directing that the transgender person's birth certificate be amended to match their gender identity. (*Id.* at 14.) OSDH officials have stated that they believe they cannot grant such requests because of the Executive Order. (*Id.*) Oklahoma continues to permit other changes to birth certificates (such as for adoption and legal name).

On March 14, 2022, Plaintiffs filed this lawsuit against Governor Stitt, OSDH Commissioner of Health Keith Reed, and State Registrar of Vital Records Kelly Baker. (Doc. 1.) According to Plaintiffs:

> Possessing accurate identity documents that are consistent with a person's gender identity —which represents a person's core internal sense of their own gender—is essential to a person's basic social, economic, physical, and mental well-being. A birth certificate is a critical and ubiquitous identity document used in many settings to verify a person's identity. Access to employment, education, housing, health care, voting, banking, credit, travel, and many government services all hinge on having appropriate and accurate personal documentation that reflects a person's true identity. Birth certificates are also often used

> to obtain other essential identity documents, such as driver's licenses and passports.
>
> While others born in Oklahoma have access to an accurate birth certificate matching their gender identity, transgender people are barred from obtaining an accurate birth certificate matching their gender identity. Oklahoma's refusal to issue such birth certificates erects a barrier to the full recognition, participation, and inclusion of transgender people in society. Indeed, few things are as essential to personhood and regular interaction in the world as being able to accurately present a person's identity to those with whom they come into contact.

(*Id*. at 1-2.)

In this lawsuit, Plaintiffs challenge Defendants' "*policy and practice of refusing* to provide transgender people with birth certificates that match their gender identity" (the "Policy").[4] (*Id*. at 11 (emphasis added.))

---

[4] Plaintiffs do not directly challenge the applicable Oklahoma statute and regulations. Plaintiffs seem to contend that Oklahoma law has affirmatively granted transgender people the right to amend their sex designation on a birth certificate since at least 2007. However, Plaintiffs offer little more than a conclusory statement in a footnote to support this position. (*See* Doc. 33 at 10 n.1.) As explained above, the Oklahoma legislature only authorized the Commissioner of Health to amend birth certificates in the situations specifically set forth in the statute and the regulations. *Cf. Okla. Alcoholic Bev. Control Bd. v. Central Liquor Co*., 421 P.2d 244, 249 (Okla. 1966) ("Certainly our Legislature was well aware of this widely employed practice and could easily have inserted language authorizing discounts based upon quantity had it intended such an exception to Section 536. It did not do so."). Neither the statute nor the regulations auth-

Plaintiffs allege that Defendants' Policy infringes upon fundamental rights protected by the United States Constitution and discriminates against transgender people which bears indicia of a suspect classification requiring heightened scrutiny by the courts. Plaintiffs bring three claims under 42 U.S.C. §§ 1983 & 1988 alleging violations of 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. Plaintiffs allege that Oklahoma's Policy "lacks any narrowly-tailored, substantial, or even rational relationship to a valid government interest, and it is not the least restrictive means of achieving a valid government interest." (Doc. 41 at 16.) Plaintiffs contend that the Policy is "not supported by any compelling, substantial, or even legitimate government interest," and is instead "maintained and motivated by animus toward transgender people." (*Id*. at 15-16.)

Plaintiffs filed the first amended complaint on July 29, 2022. (Doc. 21.) On August 26, 2022, Defendants filed the present motion to dismiss pursuant to Rule 12(b)(6). (Doc. 24.) The motion was fully briefed as of October 14, 2022 when Defendants filed their reply.

---

orize the Commissioner to amend the sex designation. As such, Defendants' enforcement of Oklahoma law would only be unconstitutional if the underlying law is unconstitutional. Nevertheless, it does not appear that Plaintiffs are *required* to challenge the statute, so the court will refer to the challenged state action as the "Policy," as Plaintiffs have framed it in the second amended complaint. *See Veritext Corp. v. Bonin*, 2022 WL 1719275, at *3 (E.D. La. 2022) ("Many cases that include enforcement related injunctive relief do allege that the underlying state statute is unconstitutional or violates federal law, but this type of allegation does not appear to be a requirement.").

(Doc. 38.) In the interim, then-assigned District Court Judge Gregory Frizzell denied Plaintiff Ray's motion to proceed pseudonymously. (Doc. 4; Doc. 37.) As a result, Defendants consented to Plaintiffs filing a second amended complaint to comply with the court's order, and the parties filed a joint stipulation to apply the pending motion to dismiss to Plaintiffs' second amended complaint. (Doc. 39.) The parties agreed that the second amended complaint would only contain non-substantive changes such as the full disclosure of Plaintiff Ray's name and updates to the Plaintiffs' ages due to the time that had passed since the case had been filed. (*Id*. at 1.) Judge Frizzell granted the parties' request on November 7, 2022. (Doc. 40.) Plaintiffs filed the second amended complaint on November 7, 2022.

On January 11, 2023, Defendants filed a Rule 26(c) motion to stay discovery pending resolution of the motion to dismiss. (Doc. 42.) Finding good cause shown, Judge Frizzell granted the motion on January 25. (Doc. 49.) The case was transferred to the undersigned on February 15, 2023. (Doc. 50.)

II. Legal Standard

Upon a motion to dismiss, the court must determine whether a complaint states a legally cognizable claim by making allegations that, if true, would show that the plaintiff is entitled to relief. The pleading "must contain 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)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court

to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556).

III. Analysis[5]

Defendants contend that Plaintiffs fail to state a cognizable claim under the Free Speech Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, or the Due Process Clause of the Fourteenth Amendment. The court addresses each claim in turn.

A. Free Speech

The court begins by addressing Plaintiffs' First Amendment claim. Plaintiffs claim that Defendants' refusal to amend their birth certificates violates their First Amendment right to freedom of speech in two ways: (1) it restricts their ability to define and express their gender identity; and (2) it compels them "to endorse the government's position as to their own gender," and "disclose their transgender status" when they show their birth certificates to third parties. (Doc. 41 at 32.) Defendants move to dismiss, arguing

---

[5] In some respects, Plaintiffs, who obtained state court orders directing OSDH to amend their birth certificates, are asking the court to enforce these orders. To the extent that Plaintiffs' claims are based on Defendants' violations of state court orders, they must seek enforcement from the court(s) that issued the orders, as this court generally does not have jurisdiction to enforce orders made by another court or to compel that court to take any action. *See Sameer v. Khera*, 2018 WL 4039964, at *1 (E.D. Cal. 2018) (citing cases); *LaBranche v. Becnel*, 2013 WL 12091147, at *2 (E.D. La. 2013) ("[F]ederal courts, as courts of original jurisdiction, do not sit as appellate courts to review, modify, nullify, or enforce the orders of the state courts.").

that the contents of a birth certificate are government speech which does not implicate the First Amendment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment protects against prohibitions of speech, and also against laws or regulations that compel speech. "Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (citations and quotations omitted); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

1. Prohibition on Speech

First, Plaintiffs contend that Defendants' Policy impermissibly "prohibits Plaintiffs from conveying their own constitutionally-protected message about their identity and gender." (Doc. 33 at 32.) But this "argument rests on a faulty conception of expressive conduct." *Interest of C.G.*, 976 N.W.2d 318, 341 (Wis. 2022). The Free Speech Clause's protection "extend[s] . . . only to conduct that is inherently expressive." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006); *see also Cressman v. Thompson*, 798 F.3d 938, 952-53 (10th Cir. 2015) (stating that the "animating principle" behind pure-speech protection is "safeguarding self-expression"). For example, when Plaintiffs present themselves to society in conformance with their gender identities, their conduct is expressive. The expressive component of their transgender identity is not created by the sex designation listed on their birth certificates, but by

the various actions they take to present themselves as a man or woman, *e.g.*, dressing in gender-specific clothing, or changing their legal name. *See Interest of C.G.*, 976 N.W.2d at 341. In no way does Defendants' Policy restrict Plaintiffs' ability to express themselves in this manner or otherwise prevent them from bringing their bodies and their gender expression into alignment with their subjective gender identities. (*See* Doc. 41 at 17.)

Defendants' Policy is only implicated when Plaintiffs present their birth certificates to a third-party. However, "[t]he act of presenting identification," or "handing government documents . . . to someone else, has never been considered a form of expressive conduct in either legal precedent or in the historical record." *Interest of C.G.*, 976 N.W.2d at 341, 345 ("[I]dentifying one's self is an act, not a mode of expression."); *see also United States v. Cline*, 286 F. App'x 817, 820 (4th Cir. 2008) (holding that production of identification documents does not implicate any right protected by the First Amendment); *United States v. Jaensch*, 678 F. Supp. 2d 421, 431 (E.D. Va. 2010) (same); *Petition of Variable for Change of Name v. Nash*, 190 P.3d 354, 355 (N.M. Ct. App. 2008). A person observing a Plaintiff present himself in conformance with his gender identity would not understand that Plaintiff to be expressing himself as a gender that he does not identify with simply based on the sex designation on his birth certificate. Perhaps the birth certificate might cause a person to realize that a Plaintiff is transgender, but this insight does not stop Plaintiffs from expressing themselves in whatever manner they choose. And while this may inhibit the success of their intended goal to be perceived as a man or woman, "[t]hat

impediment does not render the production of identification expressive conduct." *See Interest of C.G.*, 976 N.W.2d at 341.

Accordingly, the court finds that Oklahoma's prohibition on changing a person's sex designation on their birth certificate does not restrict Plaintiffs' rights to freedom of speech or expression.

2. Compelled Speech

Next, Plaintiffs contend that Defendants' Policy compels transgender people to use birth certificates that convey Defendants' viewpoint about their gender.[6] (Doc. 33 at 32.) According to Plaintiffs, Defendants' Policy "represents a particular ideology: that a person's gender should be based exclusively on the sex associated with their external genitalia at birth." (*Id.*) Plaintiffs contend that they "cannot be made to endorse the State's message by being forced to communicate it to others." (*Id.*) But Defendants contend that the contents of a birth certificate are government speech which does not implicate the First Amendment.

Government-compelled speech is antithetical to the First Amendment. Forcing an individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable . . . 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve

[6] As noted, *supra*, the Oklahoma legislature has made it clear that the relevant information on the birth certificate is a biological sex designation. Thus, as a factual matter, Plaintiffs are simply wrong: to the extent the birth certificate conveys the government's viewpoint on the subject at all, it only conveys a viewpoint on Plaintiffs' biological sex, not any gender with which they might identify.

from all official control.'" *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). For example, the government cannot coerce affirmations of belief, compel unwanted expression, or force one speaker to host the message of another as a public accommodation. *See Hurley*, 515 U.S. at 573; *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 633-34.

However, the "First Amendment's Free Speech Clause does not prevent the government from declining to express a view." *Shurtleff v. City of Boston, Mass.*, 142 S. Ct. 1583, 1589 (2022). The government-speech doctrine provides that: "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). As explained by the Supreme Court:

> That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.

Id.

"The doctrine is usually invoked when the question is whether the control that the government exercises

over a particular forum (in *Walker*, license plates) constitutes government regulation of private speech (which cannot discriminate on the basis of content) or is no more than the government determining what content it wishes to convey itself." *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1176 (10th Cir. 2021) (Hartz, J., dissenting) (citing *Walker*, 576 U.S. at 206-07). Thus, "[t]here is no violation of the First Amendment protections of free speech when the government favors particular content, or even a particular viewpoint, so long as it is the government that is speaking." *Id.*

In *Shurtleff*, the Supreme Court explained that the "boundary between government speech and private expression can blur when . . . a government invites the people to participate in a program." 142 S. Ct. at 1589 ("In those situations, when does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers' views?"). Thus, the court looks to several types of evidence to guide the analysis, including: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.* at 1589-90.

Here, the court finds that the content of a birth certificate constitutes government speech which does not implicate the First Amendment. Specifically, birth certificates constitute a purposeful communication of data chosen by the State of Oklahoma, on behalf of the government. The public would reasonably view a birth certificate as spoken by the government—who is certify-

ing the information therein to be accurate—as opposed to the birth certificate holder.

Indeed, government bodies have long used vital records to speak to the public. *See, e.g.*, Am. Bar Ass'n, *Birth Certificates* (Nov. 20, 2018), *available at* https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/birth-certificates/ (noting that the United States began collecting birth data at the national level in 1902, via the U.S. Census, but certain individual states (which were actually colonies at the relevant time) had already been collecting birth data as far back as the 1630s). Because these are inherently government documents, the State of Oklahoma—not the birth certificate holder—controls every aspect of the issuance and appearance of a birth certificate. The State determines what information is required on a birth certificate, and what information can —and cannot—be subsequently amended. *See Walker*, 576 U.S. at 212 ("[L]icense plates are, essentially, government IDs. And issuers of ID typically do not permit the placement on their IDs of message[s] with which they do not wish to be associated.") (quotations omitted). If state law permitted individuals to communicate their own messages in birth certificates without restriction, birth certificates would cease to function as reliable government-issued identification. *See id.*; *Doe v. Kerry*, 2016 WL 5339804, at *18 (N.D. Cal. 2016). Accordingly, the reasonable interpretation would be that a birth certificate is conveying a message on the government's behalf—not the birth certificate holder's. *See also Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring) ("[The government-speech doctrine] presents no serious problems when the government speaks in its

own voice—for example, when . . . a governmental body issues a report.").

And while the government may be communicating information that a birth certificate holder does not agree with, it is not impermissibly compelling unwanted expression. The cases cited by Plaintiffs are not persuasive because they involved government speech containing an "ideological message" or a political position. *See Janus v. Am. Fed'n of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018) (addressing Illinois law which forced employees to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities); *NIFLA v. Beccera*, 138 S. Ct. 2361, 2375 (2018) (addressing California law which forced pro-life pregnancy centers to notify women that California provides free or low-cost services, including abortions, and give them a phone number to call). These cases implicated the First Amendment because the government's ideological message would be attributed to—or deemed to be endorsed by—the private citizen. But here, the sex designation on a birth certificate simply conveys one of "the facts of birth" that the legislature directed to be recorded at the time of birth. *See* 63 O.S. § 1-311(B). This does not communicate any ideological or political message and is thus distinguishable from the compelled, ideological speech at issue in *Janus* and *NIFLA*.

The court thus finds that Defendants' Policy does not violate the First Amendment's prohibition on government-compelled speech. *See United States v. Arnold*, 740 F.3d 1032, 1034– 35 (5th Cir. 2014) (explaining that "compelled disclosure of information on an IRS form" is not unlawful compelled speech"); *see Interest*

of C.G., 976 N.W.2d at 345 (rejecting compelled speech challenge to statute that prohibits sex offenders from changing their legal name, noting that "[t]he State has not branded Ella with her legal name, and when Ella presents a government-issued identification card, she is free to say nothing at all or to say, 'I go by Ella'"). The Policy imposes no restraint on Plaintiffs' freedom to communicate any message to any audience; it does not compel Plaintiffs to engage in any actual or symbolic speech; and it does not compel Plaintiffs to endorse or communicate any political or ideological views. Plaintiffs may not agree with the information contained in their birth certificates. But for government to work, private parties cannot invoke the protections of the First Amendment to force their elected officials to espouse other views or, more particularly in this case, to collect and record the data Plaintiffs want rather than the data that the government wants to collect; instead, it is through the ballot box that such parties may provide a check on the government's own speech or otherwise compel the government to collect and record data more to their liking. *See Shurtleff*, 142 S. Ct. at 1589; *see also Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 487 (Wis. 2021) (explaining that the freedoms protected by the First Amendment do not entitle the speaker to a favorable outcome in her endeavor).

Accordingly, the court finds Plaintiffs' have failed to state a claim under the First Amendment.

B. Defendants' Policy does not infringe upon a fundamental right protected by the Fourteenth Amendment's Due Process Clause.

Next, Plaintiffs bring a Fourteenth Amendment substantive due process claim under two theories. First, Plaintiffs allege that the fundamental right to privacy includes the freedom from involuntary disclosure of transgender status. And second, Plaintiffs allege that Defendants' Policy "burdens transgender people's liberty interests, including the right to define and express a person's gender identity and the right not to be treated in a manner contrary to a person's gender by the government." (Doc. 41 at 30-31.) Defendants move to dismiss Plaintiffs' due process claims because Plaintiffs have not identified a fundamental right that is protected by the Fourteenth Amendment. (Doc. 24 at 24.)

"Constitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244-45 (2022) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 186-189, 6 L. Ed. 23 (1824)). The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Constitution makes no express reference to a right to privacy concerning one's gender, nor does it reference a right to be treated consistent with one's gender identity. Thus, Plaintiffs must show that the right is somehow implicit in the constitutional text, *i.e.*, that the Due Process Clause provides substantive protection for Plaintiffs' "liberty" interest. *Dobbs*, 142 S. Ct. at 2245.

Under the Supreme Court's jurisprudence, the Due Process Clause protects two categories of substantive rights. "The first consists of rights guaranteed by the first eight Amendments." *Id.*; *see also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 763-67 (2010). The second category, which Plaintiffs rely upon here, "comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution." *Dobbs*, 142 S. Ct. at 2246.

The latter category is one of the most controversial issues in constitutional law. *See Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) ("Substantive due process has at times been a treacherous field for this Court."). In essence, substantive due process is a judicial doctrine that allows courts to conclude that the "liberties" specially protected by the Due Process Clause include additional rights beyond those specifically protected by the Bill of Rights. The Supreme Court has used this doctrine to recognize the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing cases).

The fundamental quandary with this doctrine, however, is that it lacks any well-defined limiting principle.[7] *See Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (cautioning that the "guideposts

---

[7] As President Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing." *Dobbs*, 142 S. Ct. at 2446 (quoting Address at Sanitary Fair at Baltimore, Md. (Apr. 18, 1864), reprinted in 7 The Collected Works of Abraham Lincoln 301 (R. Basler ed. 1953)).

for responsible decisionmaking in this unchartered area are scarce and open-ended"). Indeed, the natural human tendency to confuse what the Fourteenth Amendment protects with a jurist's ardent views about the liberty that Americans should enjoy, "has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives." *Dobbs*, 142 S. Ct. at 2447. Judicial caution is thus imperative and courts should "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 judicial branch. *Glucksberg*, 521 U.S. at 720. And when determining whether this breaking of new ground amounts to recognizing rights long understood but not stated, or instead amounts to constitutionalizing the judge's own notions of right and wrong, courts should consider whether the relief sought amounts to a proper exercise of the judicial power, or whether it requires the exercise of powers reposed elsewhere under our constitutional system.

The Constitution divides the powers of the federal government into three distinct categories: the legislative power, the executive power, and the judicial power. Those powers spring from the "People of the United States." U.S. Const. preamble. Under Article II of the Constitution, the entirety of the executive power is vested in the President of the United States. *Id.* Art. II, § 1, cl. 1; *see also Seila Law LLC v. Consumer Fin. Prot. Bur.*, 140 S. Ct. 2183, 2197 (2020) (noting that the entire executive power is vested in the President and "belongs to the President alone"). Similarly, Article III vests the entirety of the judicial power in the Supreme Court "and in such inferior

Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III; *see also Marbury v. Madison*, 5 U.S. 137, 173 (1803) ("The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States . . . "). By contrast, Article I vests Congress with only a portion of the legislative power. *See* U.S. Const. Art I (limiting the scope of Congress's powers to those "legislative Powers herein granted").

Each of these distinct powers is fundamentally different in its nature than the other powers. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) ("To the framers, each of these vested powers had a distinct content."); *see also Wayman v. Southard*, 23 U.S. 1, 46 (1825) ("The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law"). Reduced to its essence, the legislative power is the power to make law. *See* The Federalist No. 78 (A. Hamilton) (defining legislative authority as the power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated"). It includes the ability to not only enact laws, but also to abolish laws and to change laws. *See Az. State Leg. v. Az. Indep. Redistricting Comm'n*, 576 U.S. 787, 828 (2015) (Roberts, J., dissenting) (noting that the legislative power consists of the "power to make and repeal laws"). The executive power contemplates the authority to execute or carry out the laws, and to enforce them, but not to make laws in the first instance. *See Youngstown Sheet & Tube Co. v. Sawyer*,

343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). And the judicial power is the power to construe and apply the law. *See Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). Indeed, it is limited by the Constitution to be exercised in the context of cases and controversies, which has long been understood to prohibit federal courts from rendering advisory opinions regarding the interpretation or constitutionality of a law outside of a live case or controversy. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, (1936) ("The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions. And even within the context of an existing case, the judicial power comprehends only that a court should say what the law is, not what it ought to be.").

To alter or add to the Constitution requires an exercise of legislative power. This can be understood intuitively, or at least inductively, from the nature of the three powers of government. The act of establishing a constitution in the first instance is clearly an exercise of legislative power—the power to make law. No one could suggest that a president or a court could undertake to enact a new constitution through their respective executive or judicial powers. Similarly, it requires an exercise of legislative power to abolish a constitution, as was the case when the Articles of

Confederation were abolished and replaced with the Constitution. Yet when it comes to altering the Constitution, such as by augmenting it with new rights not articulated therein or understood as being contemplated by the relevant constitutional provision at the time it was enacted, some view this as falling within the scope of the judicial power. *See, e.g.*, *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (articulating the legal theory of a "living constitution," which suggests that the Constitution's meaning changes over time); *see also American Bush v. City of South Salt Lake*, 140 P.3d 1235, 1256 (Utah 2006) (Durrant, J., concurring) ("Adherents to this approach consider the constitution a living, evolving document that is malleable, sensitive to, and capable of reflecting changing social conditions, attitudes, perceptions, and trends."). However, if it requires legislative power to enact a constitution, and legislative power to abolish a constitution, then simple logic dictates that legislative power, not judicial power, is required to alter a constitution. Were it not for the need to avoid the obvious problem of triggering the process contemplated under Article V of the Constitution, we would likely refer to an alteration of the meaning of that instrument as an "amendment."

Just as intuition and consideration of the basic nature of the powers of government shows that legislative power is wielded when changing constitutional meaning, the same conclusion can be reached deductively by analyzing relevant provisions of the Constitution. Article V of the Constitution describes the amendment process. That provision authorizes Congress to propose amendments, but it does not empower Congress to approve them. Instead, ratification is left to the

People, acting through their respective state legislatures, or through state conventions, depending on the mode of ratification proposed by Congress. In either case, the question arises as to what power the People exercise when they ratify changes to the Constitution. It cannot be the judicial power, because in Article III they gave the entirety of the judicial power to the courts. Likewise, it cannot be an exercise of the executive power, because the totality of that power was given to the president under Article II. The only remaining alternative is the legislative power because, as plainly stated in Article I, the People invested Congress with only a portion of that power. U.S. Const. Art. I ("All legislative Powers *herein granted* shall be vested in a Congress of the United States. . . . " (Emphasis added)). Thus, it is beyond cavil that in approving changes to the Constitution under Article V, the People are exercising a portion of their retained legislative power because that is the only power they have left.

Based on the foregoing, one might wonder how a court, invested only with the judicial power, could undertake to engraft new rights onto the Constitution when that appears to be a prerogative that the People reserved to themselves. More specifically, when a court undertakes to alter the Constitution in that manner, from whom does it acquire the legislative power necessary to do so? Certainly not from Congress, for not even Congress is authorized to alter the Constitution, though the text of Article V makes clear that Congress has an indispensable role in that process. What becomes readily apparent from an analysis of the nature of each of the three powers of government, and the manner in which the People separated and granted those powers in Articles I, II, III, and V of the Consti-

tution, is that the only way a court could undertake to alter the Constitution is to appropriate to itself the legislative power that the People reserved to themselves to perform that very task.

Some have suggested that the framers of the Constitution could never have intended the meaning of that document to remain static over the more than two centuries since it was originally ratified, and that the difficulties inherent in the amendment process envisioned in Article V necessitate a means for keeping it up to date with the needs of an ever-changing society. *See Holland*, 252 U.S. at 433 ("The case before us must be considered in the light of [our] whole experience and not merely in that of what was said a hundred years ago."); R. Randall Kelso, *Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt a Living Constitution*, 72 U. Miami L. Rev. 112, 117-18 (2017) (opining that when jurists adopt "a static or fixed approach to constitutional interpretation that seeks to determine how the framers and ratifiers would have decided the case in 1789 (or 1791 for the Bill of Rights, or 1868 for the Fourteenth Amendment's Due Process or Equal Protection Clauses), they are not following either the historically valid original intent or original meaning of the Constitution"). Moreover, since the courts regard themselves as the final arbiters of the Constitution, many feel that the more or less incremental changes that flow from decisions of the Supreme Court provide a proper means to accomplish that important task. *See, e.g.*, Franita Tolson, *Benign Partisanship*, 88 Notre Dame L. Rev. 395, 429 (2012) (arguing that the Supreme Court "can resolve at least some of the [constitutional] issues created by gerrymandering by incrementally changing the norms that

govern the process of redistricting"). But early authorities on the meaning of the Constitution did not see it that way.

During the debates on ratification of the Constitution in the winter of 1788, one of the leading Anti-Federalist voices opposing ratification of the proposed constitution was an author writing under the pseudonym "Brutus." In an essay published in the *New York Journal* in January of 1788, Brutus lamented that, under the proposed constitution, the federal courts would be empowered "to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." Brutus No. XI (Jan. 31, 1788), reprinted in *The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles and Letters During the Struggle Over Ratification, Part Two: January to August 1788*, at 131 (Bernard Bailyn ed., 1993). Continuing, he noted that "in their decisions [the federal courts] will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution." *Id.* at 132; *see also* Brutus No. XII (Feb. 7 & 14, 1788), *reprinted in* The Debate on the Constitution, *supra*, at 171 (explaining that the Supreme Court's ability to interpret the Constitution according to the spirit of the law will serve to expand federal power at the expense of the states).

Alexander Hamilton responded directly to Brutus' concerns on this point in Federalist 81. Hamilton began by summarizing Brutus' contentions:

> The arguments or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the proposed supreme court of the United States, which is to be a

> separate and independent body, will be superior to that of the legislature. The power of construing the laws, according to the *spirit* of the constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power in the last resort, resides in the house of lords, which is a branch of the legislature; and this part of the British government has been imitated in the state constitutions in general. The parliament of Great-Britain, and the legislatures of the several states, can at any time rectify by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the supreme court of the United States will be uncontrollable and remediless." This, upon examination, will be found to be altogether made up of false reasoning upon misconceived fact.

The Federalist No. 81 (A. Hamilton). Hamilton promptly countered Brutus' argument by observing "there is not a syllable in the plan under consideration, which *directly* empowers the national courts to construe the laws according to the spirit of the constitution. . . . " *Id.* (emphasis in original). Moreover, to the extent that the courts might usurp legislative power in construing the constitution in this manner, Hamilton observes:

> Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so

> extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There can never be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations.

Id.

Thus, prior to ratification, leading voices among both the Federalists and the Anti-Federalists decried the notion that the federal courts might depart from the text of the Constitution and interpret the laws according to the spirit of that document. The Anti-Federalists regarded this as one of a number of risks so grave as to justify denying ratification altogether, while the Federalists viewed it as an approach not authorized by the Constitution and one, in any event, which would be curtailed by the threat of impeachment.

Nearly fifty years later, Supreme Court Justice Joseph Story addressed similar concerns in his oft-cited work from 1833, *Commentaries on the Constitution of the United States*. In commenting on the propriety of judges altering established constitutional meaning in order to accommodate the changing views of public opinion or the perceived needs of a changing society, Story observed:

> Temporary delusions, prejudices, excitements, and objects have irresistible influence in mere questions of policy. And the policy of one age may ill suit the wishes, or the policy of another. The Constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever.

1 Joseph Story, *Commentaries on the Constitution of the United States*, at 410 (1833). Repeatedly emphasizing the ills of an evolving constitution in the hands of the judges, Story noted that courts were bound by the established meaning of the Constitution until the people availed themselves of the right to alter it through the amendment process:

> No man in a republican government can doubt, that the will of the people is, and ought to be, supreme. But it is the deliberate will of the people, evinced by their solemn acts, and not the momentary ebullitions of those, who act for the majority, for a day, or a month, or a year. The constitution is the will, the deliberate will, of the people. They

> have declared under what circumstances, and in what manner it shall be amended, and altered; and until a change is effected in the manner prescribed, it is declared, that it shall be the supreme law of the land, to which all persons, rulers, as well as citizens, must bow in obedience. When it is constitutionally altered, then and not until then, are the judges at liberty to disregard its original injunctions. . . .
>
> . . . .
>
> The only means known to the constitution, by which to ascertain the will of the people upon a constitutional question, is in the shape of an affirmative or negative proposition by way of amendment, offered for their adoption in the mode prescribed by the constitution.

3 Joseph Story, *Commentaries on the Constitution of the United States*, at 473, 475 (1833). And in a sobering admonition, Story reminded judges of the difficulties attendant to fulfilling their duties on this point:

> The truth is, that, even with the most secure tenure of office, during good behaviour, the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but, that they will be too ready to yield themselves to the passions, and politics, and prejudices of the day. In a monarchy, the judges, in the performance of their duties with uprightness and impartiality, will always have the support of some of the

> departments of the government, or at least of the people. In republics, they may sometimes find the other departments combined in hostility against the judiciary; and even the people, for a while, under the influence of party spirit and turbulent factions, ready to abandon them to their fate. Few men possess the firmness to resist the torrent of popular opinion. Still fewer are content to sacrifice present ease and public favour, in order to earn the slow rewards of a conscientious discharge of duty; the sure, but distant, gratitude of the people; and the severe, but enlightened, award of posterity.

Id. at 476-77.

In sum, the nature of, and differences between, the legislative and judicial powers makes it abundantly clear that altering the Constitution requires an exercise of the legislative power, not the judicial power. Moreover, simple deductive reasoning demonstrates that when the People exercise their authority to amend the Constitution under Article V, they are exercising the legislative power because that is the only one of the three powers of government retained by the People under Articles I, II, and III. And finally, authoritative sources from the first fifty years of our constitutional history roundly condemned the notion that judges could circumvent the amendment process by interposing their own views of what the Constitution should say and mean.

There can be no doubt that views on this topic have changed considerably since Justice Story penned his admonitions. With the passage of time it appears that the lawyers and the judges became discontented

with the restraints placed on their power by the Constitution. Undoubtedly many were motivated with good intentions to deal with societal problems that were not being addressed by other departments of government, and which they thought could be solved with a few minor adjustments to the established meaning of certain constitutional provisions. The trajectory of that change, and the risks associated therewith were aptly summarized by Professor Paul L. Gregg in his article, *The Pragmatism of Mr. Justice Holmes*, published at the height of World War II:

> Many there are among the followers of Holmes' philosophy, who do not take the Constitution seriously. Let it stand, they say, but let it be a tool and not a testament; let it be an instrument for affecting social reforms that the people want. This is, in brief, the tenor of such recent books as Mr. Justice Jackson's *The Struggle for Judicial Supremacy*, and Levy's *Our Constitution – Tool or Testament*, as well as countless other books and law review articles too numerous to catalogue here. Of many quotations which might be cited to show the temper of the new pragmatism in Constitutional law, one will suffice for our present purpose. It was written by Mr. Justice Frankfurter sometime before his elevation to the Supreme Court. He says:
>
> > "Whether the Constitution is treated primarily as a text for interpretation or as an instrument of government may make all the difference in the world. The fate of cases, and thereby of legislation,

> will turn on whether the meaning of the document is derived from itself or from one's conception of the country, its development, its needs, its place in civilized society."
>
> Felix Frankfurter, *Mr. Justice Holmes* 58 (1931).

Before the weaving of pragmatism into the fabric of American jurisprudence, chiefly by Holmes and Pound, men had always assumed that the Constitution, by its very nature, is a document to be interpreted by reference to itself; that it is the deposit of the fundamental principles – absolute at least within the frame of our Constitutional system – by which the fate of cases and legislation should be determined; that it is the guarantee of substantial individual rights against encroachment by dominant majorities or minorities. In short, the Constitution has until recently been thought of as the ultimate safeguard against what has aptly been call "an unbridled juristic impressionism buffeted by gusts of popular frenzy." But in the new juristic pragmatism there is no safeguard. The Constitution is to be interpreted in terms of current public policy and popular will.

History – recent history for that matter – shows that, in the absence of fixed principles of law and legal rights, the popular will soon dwindles into the will of the party in power, and the party will shrivels into the will of the party leader. Where there are no absolute principles of individual rights, there will soon

be no democracy.

Paul L. Gregg, *The Pragmatism of Mr. Justice Holmes*, 31 Geo. L.J. 292-93 (1943) (some internal citations omitted).

Perceptive of the past, perhaps prescient of the future, Professor Gregg seemed to accurately grasp what Justice Story warned of a century earlier – the consequences of a judicial philosophy, well-intentioned though it may be, that disregards the nature of the Constitution and the powers of government conveyed therein as it was understood when conceived, and instead appropriates to the judges powers that were reserved exclusively to the People.

With these and other concerns in mind, the Supreme Court has undertaken efforts to prevent substantive due process from turning into a freewheeling exercise of judicial subjectivity that effectively amends the Constitution. First, when a court considers whether to recognize rights under substantive due process, such rights should be acknowledged only if there is an established history and tradition of protecting them, with the tradition stated at "the *most specific* level" of abstraction. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion) (emphasis added); *see also Glucksberg*, 521 U.S. at 769-70 (Souter, J., concurring) ("When identifying and assessing the competing interests of liberty and authority, for example, the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive . . . [j]ust as results in substantive due process cases are tied to the selections of statements of the competing interests."). And second, the *Dobbs* Court recently emphasized that the asserted right

must be "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." *Dobbs*, 142 S. Ct. at 2246 (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019)).

1. Framing the asserted right at the most specific level of abstraction

Plaintiffs contend that Defendants' Policy infringes upon transgender people's fundamental rights (1) to "informational privacy," and (2) to "liberty, autonomy, and dignity." (Doc. 33 at 23.) Under the first theory, Plaintiffs contend that the constitutional right to informational privacy protects against involuntary disclosure of "information that is highly personal and intimate," such as a person's transgender status. (Doc. 41 at 30.) Plaintiffs allege that the "involuntary disclosure of a person's transgender status can . . . cause significant harm, including by placing a person's personal safety and bodily integrity at risk," and deprives Plaintiffs of control over the circumstances around such disclosure. (*Id.* at 31.) Under the second theory, Plaintiffs contend that the "constitutional protections that shelter a person's medical decisions, bodily autonomy, dignity, expression, and personhood prohibit the government from interfering with the right to live in accordance with a person's gender identity." (*Id.*)

But these asserted rights are articulated in broad, general terms. Instead, "substantive due process" analysis "must begin with a *careful description* of the asserted right, for the doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever we are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (internal quotations

and brackets omitted) (emphasis added). A careful analysis reveals that any right against involuntary disclosure of highly-sensitive and confidential medical information is not at issue in this case. Unlike in the cases Plaintiff relies upon, Plaintiffs are not alleging that Defendants involuntarily disclosed any information to anyone.[8] *See A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) (recognizing there is a constitutional right to privacy regarding disclosure by a police officer of the results of an arrestee's HIV test without the arrestee's knowledge or consent); *Herring v. Keenan*, 218 F.3d 1171, 1173 (10th Cir. 2000) (same); *Leiser v. Moore*, 903 F.3d 1137, 1141 (10th Cir. 2018) (discussing in dicta authority from the Second Circuit holding that there is a constitutional right to privacy regarding disclosure of an individual's transsexualism, but not expressly ruling on the issue because it was not relevant to the case). These cases do not address what is distinctive about this lawsuit: Plaintiffs want to *compel* the government to amend its own records to reflect Plaintiffs' desired characteristics. However, the substantive component of the Due Process clause protects "substantive liberties of the person," *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 853 (1992), and acts to substantively restrain the state from the "affirmative abuse of power," *DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs.*, 489 U.S. 189, 196 (1989) (quotation omitted). "Substantive due

---

[8] Oklahoma law generally prohibits the government from providing a copy of a birth certificate to unauthorized individuals. *See* 63 O.S. § 1-323(A) (stating that it is unlawful to issue a copy of a birth certificate except to certain authorized individuals, *e.g.*, the person subject to the birth certificate, parents, legal representatives, etc.).

process rights do not encompass a right to compel a state to do something *for* someone not under some form of custody or restraint." *Doyle v. Okla. Bar Ass'n*, 998 F.2d 1559, 1568 (10th Cir. 1993) (emphasis in original). Thus, any fundamental right to informational privacy is not implicated in this case. *Cf. NASA v. Nelson*, 562 U.S. 134, 155-57 (2011) (holding that the government's mere collection of information did not violate an assumed privacy interest when the information was sufficiently protected against public disclosure).

Nor is the broadly-defined right to "liberty, autonomy, and dignity" at issue in this case. At least not in the sense that Defendants are prohibiting Plaintiffs from bringing their bodies and gender expression into alignment with their respective gender identities. On the contrary, Plaintiffs are generally free to live, exist, and express themselves in conformance with their chosen gender identities. Defendants' Policy has imposed no restrictions on how Plaintiffs present themselves to society and the State has even allowed Plaintiffs to legally change their names and the sex designation on their drivers' licenses. As such, it is disingenuous to characterize Defendants' Policy as one broadly infringing upon Plaintiffs' medical decisions, bodily autonomy, dignity, expression, and personhood. *Compare with Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down a Texas statute criminalizing homosexual sodomy because the plaintiffs' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government").

The court thus rejects Plaintiffs' broad, general formulation of the rights at issue. At the most specific

level of abstraction, Plaintiffs are asserting the right to amend the sex designation on their birth certificate to be consistent with their gender identity. *See Michael H.*, 491 U.S. at 127 n.6. Although this right has been recognized by a handful of other federal courts, this right has never been recognized by the Supreme Court or the Tenth Circuit.

2. Analyzing whether the right is anchored in history and tradition

Because the asserted right does not have a sound basis in precedent, the court must instead turn to the history and tradition that map the essential components of our Nation's concept of ordered liberty to determine what the Fourteenth Amendment means by the term "liberty." This necessarily requires a "careful analysis" of the "historical support" of the right at issue. *Dobbs*, 142 S. Ct. at 2246-47 ("*Timbs* and *McDonald* concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution."). For example, the Supreme Court in *Glucksberg* analyzed more than 700 years of "Anglo-American common law tradition" to determine whether the Due Process Clause confers the right to assisted suicide, and in *Timbs* the Court "traced the [asserted] right back to Magna Carta, Blackstone's Commentaries, and 35 of the 37 state constitutions in effect at the ratification of the Fourteenth Amendment." *Dobbs*, 142 S. Ct. at 2246-47 (citing *Glucksberg*, 521 U.S., at 711; *Timbs*, 139 S. Ct. at 687-90). "Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the 'liberty' protected

by the Due Process Clause because the term 'liberty' alone provides little guidance." *Dobbs*, 142 S. Ct. at 2247.

But here, Plaintiffs have failed to allege sufficient facts for the court to conclude that the right to amend the sex designation on their birth certificate has historically been protected. Plaintiffs allege that transgender people in Oklahoma had the right to amend their sex designation "from at least 2007 if not earlier, through most of 2021." (Doc. 41 at 12.) Even assuming this right existed somewhat prior to 2007, Plaintiffs point to no authority to suggest that it existed prior to 1908[9] when Oklahoma first began filing birth records. Thus, the right certainly did not exist on July 9, 1868, when the Fourteenth Amendment was adopted. *See Dobbs*, 142 S. Ct. at 2254 ("Not only are respondents and their *amici* unable to show that a constitutional right to abortion was established when the Fourteenth Amendment was adopted, but they have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise.").

In their brief, Plaintiffs offer little historical analysis concerning the law in other jurisdictions. But it appears that until recently,[10] there was little-to-no

---

[9] *See* Okla. State Dep't of Health, *Birth Certificates* (2023), *available at* https://oklahoma.gov/health/services/birth-and-death-certificates/birth-certificates.html ("Oklahoma began filing birth records in October of 1908. It was not mandatory, however, that these records be filed until 1917. Because birth records were not required for identification as they are today, not all records prior to 1940 were placed on file consistently.").

[10] The first court case recognizing the right as being protected by the U.S. Constitution was not decided until 1975. *See Darnell v.*

support in any American jurisdiction for a constitutional right to change the sex designation on a person's birth certificate. To the court's knowledge, no state constitutional provision presently recognizes such a right. And while Plaintiff contends that "47 states [currently] permit transgender people to correct their birth certificates to match their gender identity," Plaintiff offers no historical context for when the statutory protections were granted. (Doc. 33 at 21.)

Nor have Plaintiffs established that the asserted right is an essential component of ordered liberty. Plaintiffs cite *Obergefell* for the proposition that "individual dignity and autonomy," including the right "to define and express their identity," is a fundamental liberty interest. (Doc. 33 at 27.) But the *Obergefell* Court did not claim that this broadly-framed right was absolute. *See Obergefell v. Hodges*, 576 U.S. 644, 703 (2015) (Roberts, J., dissenting) (noting that "the majority does not suggest that its individual autonomy right is entirely unconstrained"). While individuals are certainly free to think and to say what they wish about their identity, they are not always free to act in accordance with those thoughts. *See Dobbs*, 142 S. Ct. at 2257; *see also Pennekamp v. State of Fla.*, 328 U.S. 331, 351 (1946) (Frankfurter, J., concurring) ("[T]he Constitution [does] not allow absolute freedom of expression—a freedom unrestricted by the duty to respect other needs fulfillment of which make for the dignity and security of man.").

Lloyd, 395 F. Supp. 1210 (D. Conn. 1975) (holding that the State Commissioner of Health's refusal to change the sex recorded on the applicant's birth certificate from male to female in order to reflect her sex reassignment surgery infringed on the applicant's equal protection rights).

More importantly, an individual's freedom to act does not confer the right to *compel the government to act*. *See, e.g.*, *Brown v. Cooke*, 362 F. App'x 897, 900 (10th Cir. 2010) ("[T]here is [no] fundamental right of citizens to compel the Government to accept a common-law name change and reform its records accordingly."); *Doyle*, 998 F.2d at 1568 ("Substantive due process rights do not encompass a right to compel a state to do something for someone not under some form of custody or restraint. . . . "). Plaintiffs' freedom to define and express their identity may correspond to one of the many understandings of "liberty," but it is certainly not an integral component of "ordered liberty," as that term has been defined by the Supreme Court. *See Dobbs*, 142 S. Ct. at 2257 ("License to act on the basis of such beliefs may correspond to one of the many understandings of 'liberty,' but it is certainly not 'ordered liberty.'").

In sum, Plaintiffs fail to allege sufficient facts to conclude that there is a long history and tradition of protecting the right to amend the sex designation on a birth certificate, or that such right is fundamental to our scheme of ordered liberty. Because Plaintiffs are not asserting a fundamental right, Defendants' Policy will be upheld if it is rationally related to a legitimate government purpose. *See* Section III.D *infra*.

C. Plaintiffs are not a suspect or quasi-suspect class under the Equal Protection Clause.

Next, Plaintiffs claim that Defendants' Policy violates the Fourteenth Amendment's Equal Protection Clause. Plaintiffs contend that Defendants' Policy engages in sex-based discrimination, which is subject

to heightened scrutiny. (Doc. 33 at 12.) But Defendants argue that "transgender status is not, as a matter of law, a suspect classification under the Equal Protection Clause." (Doc. 24 at 17.) Defendants thus contend that Plaintiffs' claim should be analyzed under the rational basis framework.

The Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.A. It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But the guarantee of equal protection coexists, of course, with the reality that most legislation must classify for some purpose or another. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). Thus, the Equal Protection Clause "does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). When considering an equal protection claim, the court must first determine what level of scrutiny applies; then, the court must determine whether the law or policy at issue survives such scrutiny.

In determining what level of scrutiny applies to an equal protection claim, the court looks to the basis of the distinction between the classes of persons. *See generally United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). "If the challenged government action implicates a fundamental right, or classifies individuals using a suspect classification, such as race or national origin, a court will review that challenged action applying strict scrutiny." *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1109 (10th Cir. 2008). In such a

case, "the government has the burden of proving that [its] classifications are narrowly tailored measures that further compelling governmental interests." *Id.* (quoting *Johnson v. California,* 543 U.S. 499, 505 (2005)).

"If, instead, the challenged government action classifies people according to a quasi-suspect characteristic, such as gender or illegitimacy, then [the] court will apply intermediate [or heightened] scrutiny." *Id*. at 1109-10. In those cases, the test would be whether the government can demonstrate that its classification serves "important governmental objectives" and is "substantially related to achievement of those objectives."

But if the challenged government action does not implicate either a fundamental right or a protected class, the court will apply rational basis review. *Carney v. Okla. Dep't of Public Safety*, 875 F.3d 1347, 1353 (10th Cir. 2017). Under the rational basis standard, Plaintiffs' claim will fail "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (citing *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

The court begins by noting that the Fourteenth Amendment contains no language concerning "inherently suspect classifications," or, for that matter, merely "suspect classifications." *See* U.S. Const. amend. XIV. The familiar "tiers of scrutiny" is thus a judicially-created doctrine that can be traced back to the famous *Carolene Products* footnote. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that "a more searching judicial inquiry" is warranted when prejudice against "discrete and insular minorities" undercuts the "operation of those political processes ordinarily to be relied upon to protect

minorities, and which may call for a correspondingly more searching judicial inquiry"). Over the years, the Court has developed a three-tiered system offering varying degrees of protection depending upon whether a group is designated as a suspect, quasi-suspect, or non-suspect class.

Because "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," the starting point for evaluating the constitutionality of a law under the Equal Protection Clause has long been the rational basis test. *F.C.C. v. Beach Comm'c'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also Metro. Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 583 (1935). Thus, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights 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." *Beach Comm'c'ns, Inc.*, 508 U.S. at 313. "This standard of review is a paradigm of judicial restraint." *Id*. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

However, the Supreme Court has recognized that a more searching level of judicial inquiry is appropriate when a law discriminates based on "suspect" characteristics. Obviously, race is the paradigmatic suspect classification under the Fourteenth Amendment. *See Sugarman v. Dougall*, 413 U.S. 634, 649 (1973) (Rehn-

quist, J., dissenting) (citation omitted) ("The principal purpose of those who drafted and adopted the Amendment was to prohibit the States from invidiously discriminating by reason of race, and, because of this plainly manifested intent, classifications based on race have rightly been held 'suspect' under the Amendment."). The Supreme Court has expanded the list of suspect classes to also include national origin and alienage. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (holding classification based on alienage is a suspect classification); *Oyama v. California*, 332 U.S. 633, 646-47 (1948) (holding classification based on national origin is a suspect classification). Laws that facially discriminate against a suspect class are subject to strict scrutiny and rarely survive judicial review. *See Cleburne*, 473 U.S. at 440 (explaining that the classifications of race, alienage, or national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . . ").

Recognizing that not every classification was always inherently suspect, but that rational basis review was insufficient to protect against some types of invidious discrimination, the Supreme Court developed a third category, referred to as "quasi-suspect" classifications, which are subject to intermediate scrutiny. To date, the Supreme Court has only placed two classifications in this category: sex and illegitimacy. *See Reed v. Reed*, 404 U.S. 71 (1971) (holding classifications based on sex calls for heightened standard of review); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (holding that classifications based on legitimacy were not inherently suspect but that "[i]n a case like this,

the Equal Protection Clause requires more than the mere incantation of a proper state purpose").

Unfortunately, *Reed*, *Trimble*, and their progeny offer little guidance for determining whether intermediate scrutiny should apply to classifications based on characteristics beyond sex or illegitimacy.[11] There is at least superficial consensus that courts should be skeptical of—and should scrutinize more carefully—classifications involving politically powerless groups that have historically been discriminated against. But beyond this basic truism, much is unsettled. Indeed, the Supreme Court has not provided a carefully-crafted test or precisely-defined criteria for determining quasi-suspectness. *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 Seattle U. L. Rev. 135, 138 (2011) ("Since the outcome of an equal protection case is largely determined by whether the group is designated as a suspect, quasi-suspect, or nonsuspect class, one may assume that the test for distinguishing between the three types of classes has been carefully crafted and precisely defined. But despite decades of case law on this specific issue, nothing could be further from the truth."). Instead, it has pointed to some

---

[11] In *Reed*, the Court did not perform any sort of suspect classification analysis, but simply determined that the sex classification lacked a rational relationship to the goal of the law. *See Reed*, 404 U.S. at 75-76 ("The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."); *see also id*. at 76 ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'").

vague and ill-defined considerations, including a history of discrimination, a circumstance of immutability, and political powerlessness.[12] *See generally Frontiero v. Richardson*, 411 U.S. 677 (1973) (Brennan, J., plurality opinion). Even when a Supreme Court majority has agreed on the correct characteristics of a suspect class, it has not settled on the required elements and the appropriate weight each element should receive.[13] *See* Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. Pa. J. Const. L. 739, 777 (2014).

The Court's abstract quasi-suspect framework did not enjoy strong majority support and was subject to sharp criticism at the time. *See United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("We have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice."); *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (criticizing the components of intermediate scrutiny as "so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particu-

---

[12] In a plurality opinion, the Supreme Court first examined these factors and concluded that they justify applying strict scrutiny to state action that discriminates against women. *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (Brennan, J., plurality opinion) (discussing reasons why women constitute a suspect class). Later, however, the Court settled upon intermediate scrutiny as the standard for analyzing claims of sex-based discrimination. *See Craig v. Boren*, 429 U.S. 190 (1976).

[13] For example, in *Plyler v. Doe*, the Court conceded that the formula for determining suspect status suffers from lack of specificity. 457 U.S. 202, 216 n.14 (1982) (noting that "[s]everal formulations *might* explain our treatment of certain classifications as 'suspect,'" and then tentatively listing several factors (emphasis added)).

lar types of legislation"); *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting) ("[U]nless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that the Court can choose a 'minority' it 'feels' deserves 'solicitude' and thereafter prohibit the States from classifying that 'minority' different from the 'majority.' I cannot find, and the Court does not cite, any constitutional authority for such a 'ward of the Court' approach to equal protection.").

Because of this sharp divide, the Supreme Court has been reluctant to expand the scope of quasi-suspect classifications. In fact, since adding illegitimacy in 1977, the Supreme Court has declined every opportunity to recognize a new quasi-suspect class. *See, e.g.*, *City of Cleburne*, 473 U.S. at 445-46 (refusing to recognize mental disabilities as a quasi-suspect classification, as "it would be difficult to find a principled way to distinguish" that classification from "a variety of other groups"); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (holding that age classifications are subject to rational basis review); *see also id.* at 319-20 (Marshall, J., dissenting) (noting that the Supreme Court "has apparently lost interest in recognizing further 'fundamental' rights and 'suspect' classes"); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (avoiding the question of whether a classification based on sexual orientation merits heightened scrutiny); *Obergefell*, 135 S. Ct. at 2597-2604 (same).

As it currently stands, there is no indication that the Supreme Court is willing to extend heightened scrutiny to any other classifications. *See* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 757-

58 (2011) (arguing that the Supreme Court has, in essence, closed the "heightened scrutiny canon," and thus no new groups will be added to the suspect or quasi-suspect categories). This includes, as is relevant here, classifications based on gender identity, either by recognizing transgender people as a distinct quasi-suspect class or by compressing transgender people into classifications based on sex.

Nor has the Tenth Circuit expressly indicated a willingness to extend heightened scrutiny to classifications based on transgender status either. The Tenth Circuit first addressed this issue in *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995). In that case, the court rejected a transgender inmate's claim that by denying estrogen treatment, the defendants violated the plaintiff's equal protection rights. The court relied on a Ninth Circuit case which held "that transexuals are not a protected class . . . because transsexuals are not a discrete and insular minority, and because the plaintiff did not establish that 'transsexuality is an immutable characteristic determined solely by the accident of birth' like race, or national origin.'" *Brown*, 63 F.3d at 971 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977)). The Tenth Circuit did discuss that "[r]ecent research may support reevaluating *Holloway*," but the court determined that the plaintiff's "allegations are too conclusory to allow proper analysis of this legal question." *Id.* Thus, the court decided to "follow *Holloway* and hold that [the plaintiff] is not a member of a protected class in this case." *Id.*

The Tenth Circuit had the opportunity to revisit this issue in 2015. But the court did not engage in any meaningful analysis. The court simply confirmed that,

"[t]o date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims," and analyzed the plaintiff's equal protection claim under rational basis. *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) (citing *Brown*, 63 F.3d at 971).

The court notes that there have been calls for the Tenth Circuit to revisit its holding in *Brown*. *See, e.g.*, *Griffith v. El Paso Cnty., Colo.*, 2023 WL 2242503, at *9 (D. Colo. 2023) (stating that the court "has little trouble stating that the Tenth Circuit needs to revisit its holding in *Brown v. Zavaras*" because *Holloway* has since been overruled and the holding "is out-of-step with the 'many district courts' that 'have analyzed the relevant factors for determining suspect class status and held that transgender people are at least a quasi-suspect class'"). But until the Tenth Circuit does so, *Brown* remains good and binding law. For this reason, and because "courts have been very reluctant, as they should be in our federal system" to create new suspect classes, the court declines to expand the application of intermediate scrutiny to a new quasi-suspect class. *See Johnston v. Univ. of Pittsburgh of the Comm. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (declining to recognize transgender status as a class entitled to heightened scrutiny because neither the Supreme Court nor the Third Circuit have ruled otherwise); *see also Cleburne*, 473 U.S. at 441 ("[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to

whether, how, and to what extent those interests should be pursued.").

Moreover, the premature designation of suspect classifications would disrupt the necessary balance between the judicial branch and the democratic process.[14] Finding that transgender people are a quasi-suspect class would have implications that reach beyond the limited issue presented in this case (*i.e.*, Plaintiffs' right to amend their birth certificates), as it would subject *all* future legislation concerning transgender people to heightened scrutiny. The legislature must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their policies. As Justice Powell noted in *Frontiero*:

> There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people.

---

[14] To the extent that Plaintiffs argue for application of the *Frontiero* factors, the court finds they do not support a finding that transgender people are part of a quasi-suspect class. Notably, the principal purpose underlying intermediate scrutiny into the realm of legislative judgment is directly related to the political power factor. Intermediate scrutiny is appropriate in those instances in which, because of the status of the group affected by the classification, the group has *no* effective means of redressing any discrimination through the normal political process. But here, the court is not convinced that transgender people are powerless to effectuate change through the normal democratic process. Indeed, as Plaintiffs point out, 47 states currently allow transgender people to amend their birth certificates. (Doc. 33 at 21.) It is unreasonable to assume that transgender people as a whole are simply incapable of effectuating change via the normal democratic process. *See Cleburne*, 473 U.S. at 440 ("[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic process.").

> But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

Frontiero, 411 U.S. at 692 (Powell, J., concurring). Justice Powell's admonition is particularly instructive now, when Congress and legislatures across the country are struggling with a broad array of legislation to address the multitude of concerns and conflicts arising around the subject of transgender rights. *See, e.g.*, H.R. Res. 269, 118th Cong. (2023) ("Recognizing that it is the duty of the Federal Government to develop and implement a Transgender Bill of Rights to protect and codify the rights of transgender and nonbinary people under the law and ensure their access to medical care, shelter, safety, and economic security."); S.B. 613, 2023 Reg. Sess. (Okla., enacted May 1, 2023) (banning gender-affirming care for minors); S.B.23-188, 74th G.A. (Colo., enacted Apr. 14, 2023) (establishing gender-affirming care as "legally protected"); S.B. 180, 2023-24 Leg. Sess. (Kan., eff. July 1, 2023) (defining male and female based on sex assigned at birth and declaring that "distinctions between the sexes" in bathrooms and other spaces serves "the important governmental objectives" of protecting "health, safety and privacy").

Accordingly, the court finds that Plaintiffs do not constitute a quasi-suspect class for equal protection purposes. *See Brown*, 63 F.3d at 971; *Griffith*, 2023 WL 2242503, at *9.

D. Defendants' Policy is rationally related to its stated purpose.

Because Defendants' Policy does not infringe upon a fundamental liberty interest or implicate a suspect class, the challenged action is subject to rational basis review. *Carney*, 875 F.3d at 1353. Defendants argue that the Policy survives rational basis review, as it furthers at least two legitimate state interests: (1) protecting the integrity and accuracy of vital records, including documenting birth information and classifying individuals based on the two sexes; and (2) using those classifications to protect the interests of women. (Doc. 24 at 22-23.) While Plaintiffs primarily contend that Defendants' Policy is subject to heightened review, Plaintiffs contend that it fails even rational basis review. (Doc. 33 at 19.) According to Plaintiffs, Defendants' Policy "does not promote any interest in accuracy and, in fact, thwarts that interest." (*Id.* at 20.) Plaintiffs further contend that protecting women is not a legitimate interest, nor is Defendants' Policy rationally related to that interest. (*Id.* at 22.)

A law or policy complies with the Fourteenth Amendment's Due Process and Equal Protection Clauses under the rational basis test if there is a "rational relationship between the [policy] and the government's stated purpose." *Bolden v. City of Topeka*, 327 F. App'x 58, 61 (10th Cir. 2009). State actions subject to rational-basis review are "presumed constitutional," and courts uphold the actions "if there is any reasonably conceivable state of facts that could provide a rational basis for" them. *Petrella v. Brownback*, 787 F.3d 1242, 1266 (10th Cir. 2015) (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

The Supreme Court has often indicated that rational basis review should not inquire into the actual purpose of the challenged classification. Those attacking the rationality of the state action thus have the burden "to negative every conceivable basis which might support it." *Beach Comm'c'ns*, 508 U.S. at 315 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

Here, there is a rational basis for a policy of categorically prohibiting the amendment of the sex designation on a birth certificate. Under Oklahoma law, the purpose of a birth certificate is to record "the facts of the birth." *See* 63 O.S. § 1-311(B). The legislature has delegated authority to the State Commissioner of Health "to protect the integrity and accuracy of vital statistics records." *Id.* § 1-321(A). Protecting the integrity and accuracy of vital records is obviously a legitimate state interest. *See, e.g.*, *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) ("[R]ational reasons exist for a biology based birth registration regime, reasons that in no way offend *Obergefell*—like ensuring government officials can identify public health trends and helping individuals determine their biological lineage, citizenship, or susceptibility to genetic disorders."). And this interest is logically furthered by a law prohibiting subsequent alterations to the "facts of birth." *See MH v. First Judicial Dist. Ct. of Laramie Cnty.*, 465 P.3d 405, 412 (Wyo. 2020) (Kautz, J., concurring) ("[C]hanges to a birth certificate which seek to alter 'the facts of the birth' undermine the integrity and the accuracy of the birth certificate.").

Plaintiffs contend that Defendants' Policy actually thwarts the government's interest in promoting accu-

racy because it promotes inconsistency under the law. (Doc. 33 at 20.) Notably, Oklahoma previously allowed other transgender people to change the sex designation on their birth certificates, while denying Plaintiffs that same opportunity. And Oklahoma currently still allows transgender people to change the sex designation on their driver's licenses, leading to transgender people having inconsistent identity documents. *See, e.g.*, *K.L. v. State, Dep't of Admin.*, 2012 WL 2685183, at *7 (Ak. Sup. Ct. 2012) (holding that the refusal to correct a transgender woman's driver's license failed to "further[] . . . the state's interest in accurate document[s] and identification" and created a risk of "inaccurate and inconsistent identification documents").

However, neither the Due Process Clause nor the Equal Protection Clause demand logical tidiness. The fact that a law is imperfect does not make it irrational. *See Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required."); *Murgia*, 427 U.S. at 314 (explaining that where rationality is the test, "perfection in making the necessary classifications is neither possible nor necessary"). Indeed, the government "must be allowed leeway to approach a perceived problem incrementally." *Beach Comm'c'ns*, 508 U.S. at 316. "'[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.'" *Id.* (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)) (finding a rational basis where

the state made geographic distinctions to determine tax rates for slot machines)).

Moreover, the court can readily conceive of reasons that a state might want to preserve the accuracy of the facts of a birth related to biological sex. By way of example, there is currently a debate raging across the country about the propriety of allowing biological men to participate in women's sports. *Compare* 70 O.S. § 27-106(E)(1) (2022) (prohibiting "students of the male sex" from participating on athletic teams designated for "females," "women," or "girls"); *with* Cal. Educ. Code § 221.5(f) (2014) ("A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."). Women fought for decades to achieve equality in sports, resulting in victories such as Title IX of the Education Amendments of 1972, which required equal opportunities for women to participate in athletics at federally-funded education institutions. *See* 20 U.S.C. § 1681. Now, all of a sudden, it appears that some of those hard-won victories may be slipping away as biological men, who may not be particularly competitive in male sports, compete as transgender women and begin to displace women from the podiums in women's sporting events. As legislative bodies grapple with solutions to this problem and contemplate protections for women in women's sports, they might readily conclude that birth certificates provide a ready, reliable, non-invasive means of verifying the biological sex of participants in women's athletics should they choose to enact statutes that restrict participation by biological men.

It is not the role of the court to decide whether Defendants have chosen the best path, or the least restrictive means. *See Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (stating that, under the rational basis standard, "[s]econd-guessing by a court is not allowed"); *Beach Comm'c'ns*, 508 U.S. at 313 ("[E]qual protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."). The court's role is limited to determining the constitutionality of Defendants' Policy. Under the Fourteenth Amendment, the State of Oklahoma is not required to make special accommodations for transgender people, so long as their actions toward such individuals are rational. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367-68 (2001). The State "could quite hardheadedly—and perhaps hardheartedly"—hold to laws or policies "which do not make allowance" for persons whose gender identity conflicts with that recorded at the time of their birth. *Id.*; *see also New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("The judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . . "). "If special accommodations for [transgender people] are to be required, they have to come from positive law and not through the Equal Protection Clause." *Garrett*, 531 U.S. at 357.

Because there is a reasonably conceivable state of facts that provides a rational basis for Defendants' Policy, the court finds that the Policy does not violate the Fourteenth Amendment. Accordingly, Plaintiffs fail to state a cognizable claim under the Due Process or Equal Protection Clauses.

IV. Conclusion

IT IS THEREFORE ORDERED that Defendants' motion to dismiss (Doc. 24) is GRANTED.

IT IS SO ORDERED. Dated this 8th day of June, 2023.

/s/ John W. Broomes
United States District Judge

ORDER DENYING PETITION FOR REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT (SEPTEMBER 9, 2024)

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.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Amici Curiae.

No. 23-5080

(D.C. No. 4:22-CV-00115-JWB-MTS) (N.D. Okla.)

Before: HARTZ, McHUGH, and FEDERICO, Circuit Judges.

ORDER

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
Clerk

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (NOVEMBER 7, 2022)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. ROWAN FOWLER;
2. ALLISTER HALL; and
3. CARTER RAY,

Plaintiffs,

v.

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

Defendants.

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

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs are transgender people born in Oklahoma who wish to correct their respective Oklahoma birth certificates to accurately reflect their sex, consistent with their gender identity. They also seek access to birth certificates that they can use without the involuntary disclosure of their transgender status, which can expose them to discrimination, harassment, and violence.

2. Possessing accurate identity documents that are consistent with a person's gender identity—which represents a person's core internal sense of their own gender—is essential to a person's basic social, economic, physical, and mental well-being. A birth certificate is a critical and ubiquitous identity document used in many settings to verify a person's identity. Access to employment, education, housing, health care, voting, banking, credit, travel, and many government services all hinge on having appropriate and accurate personal documentation that reflects a person's true identity. Birth certificates are also often used to obtain other essential identity documents, such as driver's licenses and passports.

3. While others born in Oklahoma have access to an accurate birth certificate matching their gender identity, transgender people are barred from obtaining an accurate birth certificate matching their gender identity. Oklahoma's refusal to issue such birth certificates erects a barrier to the full recognition, participation, and inclusion of transgender people in society. Indeed, few things are as essential to personhood and regular interaction in the world as being able to

accurately present a person's identity to those with whom they come into contact.

4. Until recently, the State of Oklahoma allowed transgender people to correct the sex designation on their birth certificates, also known as a gender marker, to match their gender identity. That abruptly changed, however, after the Governor banned such corrections in late 2021, overriding the long-standing practice of Oklahoma state officials responsible for vital statistics and in conflict with state court orders directing gender marker corrections. Oklahoma's current bar not only stands in sharp contrast to its own prior practice but also the approach of nearly all other states and the District of Columbia, which generally have established processes by which transgender people can change the gender markers on their birth certificates. Indeed, the Governor's bar is also inconsistent with Oklahoma's current practice of permitting transgender people to change sex designations on their driver's licenses and other identifying documents to match their gender identity.

5. Oklahoma's current practice with respect to birth certificates, which each Defendant enforces, violates federal constitutional guarantees, including the rights to equal protection, due process, and freedom from compelled speech. As confirmed by Oklahoma's prior practice, the practices of other states, and Oklahoma's current practice with respect to driver's licenses and other identifying documents, there is no governmental justification to support Oklahoma's refusal to provide transgender people with accurate birth certificates matching their gender identity and without disclosure of their transgender status.

JURISDICTION AND VENUE

6. This action arises under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation, under color of state law, of rights secured by the United States Constitution.

7. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the laws and the Constitution of the United States.

8. Venue is proper in the Northern District of Oklahoma under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in the district.

9. This Court has the authority to enter a declaratory judgment and to provide injunctive relief pursuant to Federal Rules of Civil Procedure 57 and 65, and 28 U.S.C. §§ 2201 and 2202.

10. This Court has personal jurisdiction over Defendants because they are domiciled in Oklahoma and because their refusal to provide Plaintiffs with an accurate birth certificate matching their gender identity occurred within Oklahoma.

PARTIES

A. Plaintiffs

11. Plaintiff Rowan Fowler is a transgender woman who was born in Oklahoma and who currently resides in Oklahoma. Ms. Fowler wishes to correct her Oklahoma birth certificate, which currently indicates that her sex is male, to accurately reflect her sex as female, consistent with her female gender identity.

12. Plaintiff Allister Hall is a transgender man who was born in Oklahoma and who currently resides in Oklahoma. Mr. Hall wishes to correct his Oklahoma birth certificate, which currently indicates that his sex is female, to accurately reflect his sex as male, consistent with his male gender identity.

13. Plaintiff Carter Ray is a transgender man who was born in Oklahoma and who currently resides in Oklahoma. Mr. Ray wishes to correct his Oklahoma birth certificate, which currently indicates that his sex is female, to accurately reflect his sex as male, consistent with his male gender identity.

B. Defendants

14. Defendant Kevin Stitt ("Governor Stitt") is the Governor of the State of Oklahoma. Governor Stitt has taken actions under color of state law to prevent transgender people from accessing Oklahoma birth certificates matching their gender identity, including through the issuance of an Executive Order as described further below. Governor Stitt oversees the Oklahoma State Department of Health ("OSDH"), including its Commissioner of Public Health.

15. Defendant Keith Reed ("Mr. Reed") is the Commissioner of Health for OSDH. Mr. Reed supervises the activities of OSDH, enforces Oklahoma's vital statistics laws, and maintains and operates Oklahoma's system of vital statistics. Mr. Reed's administration and enforcement of the vital statistics laws are actions under color of state law.

16. Defendant Kelly Baker ("Ms. Baker") is the State Registrar of Vital Records. In her role as the Registrar, Ms. Baker is the official custodian of the

vital records of the state, and she also enforces Oklahoma's vital statistics laws. Ms. Baker exercises authority over the issuance and alteration of Oklahoma birth certificates. Ms. Baker's administration and enforcement of the vital statistics laws are actions under color of state law.

STATEMENT OF FACTS

A. Sex, Gender Identity, and Gender Dysphoria

17. A person has multiple sex-related characteristics, including hormones, external and internal morphological features, external and internal reproductive organs, chromosomes, and gender identity. These characteristics may not always be aligned.

18. The phrase "sex assigned at birth" refers to the sex recorded on a person's birth certificate at the time of birth. Typically, a person is assigned a sex on their birth certificate solely based on the appearance of external genitalia at the time of birth. Other sex-related characteristics (such as a person's chromosomal makeup, hormones, or gender identity, for example) are typically not assessed or considered at the time of birth.

19. External reproductive organs alone are not determinative of a person's sex and can be in conflict with a person's own gender identity.

20. Instead, gender identity—a person's core internal sense of their own gender—is the primary determinant of a person's sex. Every person has a gender identity, whether they are transgender or not, and that gender identity is *the* critical determinant of

a person's sex, including for transgender people whose sex-related characteristics are not in typical alignment.

21. Gender identity and transgender status are thus inextricably linked to a person's sex and are sex-related characteristics.

22. For the majority of people, their sex assigned at birth conforms with their gender identity. That is not the case, however, for transgender people.

23. Transgender persons are people whose gender identity diverges from the sex they were assigned at birth. A transgender man's sex is male (even though he was assigned the sex of female at birth), and a transgender woman's sex is female (even though she was assigned the sex of male at birth).

24. There is a medical consensus that gender identity is innate, has biological underpinnings (including sexual differentiation in the brain), and is fixed at an early age. As such, efforts to change a person's gender identity are unethical and harmful to a person's health, dignity, and well-being.

25. Attempts to change a person's gender identity to bring it into alignment with the person's sex assigned at birth are not only unsuccessful but also dangerous, risking psychological and physical harm, including suicide.

26. Living in a manner consistent with a person's gender identity is critical to the health and well-being of all transgender people.

27. Likewise, the refusal to treat a person in a manner consistent with their gender identity is harmful to that person's dignity and well-being.

28. The incongruence between a transgender person's gender identity and sex assigned at birth can sometimes be associated with gender dysphoria. Gender dysphoria refers to clinically significant distress that can result when a person's gender identity differs from the person's sex assigned at birth. Treatment for gender dysphoria is governed by internationally recognized standards of care. If left untreated, gender dysphoria may result in serious consequences including depression, self-harm, and even suicide.

29. Living in a manner consistent with a person's gender identity is not only critical to the health and well-being of all transgender people, but it is also a key aspect of treatment for gender dysphoria.

30. The process by which transgender people come to live in a manner consistent with their gender identity, rather than their sex assigned at birth, is known as transition. The steps that transgender people take to transition, as well as to treat their gender dysphoria, vary with the needs of each person, but these steps generally include one or more of the following: (1) social transition; (2) hormone therapy; and/or (3) gender-affirming surgery.

31. Social transition entails a transgender person living in a manner consistent with the person's gender identity. For example, for a transgender man, social transition may include, among other things, changing his first name to a name typically associated with men; using male pronouns; changing his identity documents to indicate his male gender; wearing clothing and adopting grooming habits typically associated with men; and otherwise living as a man in all aspects of life.

32. Social transition is thus an important aspect of transition for a transgender person. Social transition represents an important part of a transgender person's ability to appear and act in a manner consistent with their gender identity, regardless of their physical characteristics.

33. Medical transition, a critical part of transitioning for many transgender people, includes treatments that bring the sex-specific characteristics of a transgender person's body into alignment with their gender identity, such as hormone replacement therapy or surgical care.

34. Whether medical transition is necessary or appropriate depends on a person's particularized needs and health. A person's ability to access treatment—especially gender affirming surgery—may be limited by financial resources, insurance coverage, provider availability, and other barriers to health care. Like any other health care decision, undergoing either hormone replacement therapy or surgical care, is a profoundly personal decision, done in consultation with medical professionals.

35. The various components associated with transition—social transition, hormone replacement therapy, or surgical care—do not change a person's sex, but instead bring a person's physical appearance and lived experience into better alignment with their sex, as determined by their gender identity.

36. Because living in a manner consistent with a person's gender identity is critical to the health and well-being of transgender people, being able to possess identity documents consistent with a person's gender

identity is also necessary for a person's optimal physical and mental health and well-being.

37. Thus, depriving transgender people of birth certificates that match their gender identity harms their health and well-being. This deprivation also interferes with the international and accepted standard of care for gender dysphoria by impeding a transgender person's ability to live in a manner consistent with their gender identity, and can seriously aggravate the negative consequences for transgender people experiencing gender dysphoria.

B. The Need for Accurate Birth Certificates Matching a Person's Gender Identity

38. A birth certificate is more than a piece of paper. It reflects government recognition of a person's gender—just as a marriage certificate reflects government recognition of a person's relationship. The government's refusal to provide transgender people with birth certificates matching their gender identity is a stigmatizing refusal to acknowledge their gender that deprives them of their equal dignity.

39. A person's birth certificate is a trusted and essential government-issued document that serves as proof of a person's identity. For this reason, the government makes a copy of a birth certificate available to the person reflected on the birth certificate, rather than merely reserving it for the government's own use.

40. The use of birth certificates to demonstrate identity is ubiquitous in our society. Birth certificates are commonly used in a wide variety of contexts and are one of the primary ways of proving age and citizenship.

In the ordinary course of life, a birth certificate is often relied upon by employers and educational institutions for enrollment. It can also serve as the foundation to securing other important identity documents (such as driver's licenses, state identification cards, social security cards, voter registration cards, passports, and other state and federal identification documents). For example, the Oklahoma Department of Public Safety frequently relies on birth certificates in issuing or renewing state issued identification and driver's licenses.

41. Because of these and other instances in which a birth certificate serves as proof of identity or citizenship, every person needs a birth certificate that accurately reflects their identity. However, transgender people born in Oklahoma, unlike other people born in Oklahoma, are now denied the ability to obtain an accurate birth certificate.

42. The sex designation originally placed on a transgender person's birth certificate is inaccurate because it is based on visual assumptions about that person's sex made at the time of their birth, without taking into consideration any other relevant considerations that determine a person's sex, including, most importantly, gender identity.

43. Depriving transgender people of birth certificates that accurately reflect their sex, consistent with their gender identity, forcibly discloses private and sensitive information about them in contexts where it would otherwise remain undisclosed (such as when seeking employment), regardless of whether a person's transgender status may otherwise be known by others (for example, by friends or family), and regardless of a

person's desire not to disclose that personal information.

44. Transgender people denied an accurate birth certificate are thus deprived of significant control over the circumstances surrounding disclosure of their transgender status, including when, where, how, and to whom their transgender status is disclosed.

45. Being compelled to present a birth certificate that inaccurately reflects a transgender person's sex exposes that person to serious invasions of privacy. A person's transgender status (and medical diagnosis of gender dysphoria) constitutes deeply personal and sensitive information over which a transgender person has a reasonable expectation of privacy, and the disclosure of which can jeopardize a person's safety and risk bodily harm.

46. As a result of being forced to use identity documents that are inconsistent with who they are, transgender people experience high rates of discrimination (including being denied service or asked to leave public accommodations, workplaces, or housing), harassment, and violence. A national survey conducted by the National Center for Transgender Equality in 2015 revealed that nearly one third of respondents who had shown an identity document with a name or gender that did not match their gender presentation were verbally harassed, denied benefits or service, asked to leave, or assaulted. The lack of access to accurate identity documents can be a barrier to the full and safe engagement of transgender people in society and deter them from equal participation in public life.

47. More generally, transgender people experience substantial discrimination and harassment in a wide variety of contexts, including with respect to employment, education, public accommodations, health care, housing, and interactions with the government, including law enforcement. Transgender people are also disproportionately targeted for hate crimes. These realities make the involuntary disclosure of a person's transgender status particularly harmful and dangerous.

48. Furthermore, denying transgender people accurate birth certificates, consistent with their gender identity, undermines rather than serves the purpose of verifying that a transgender person is, in fact, the same person reflected on that person's birth certificate. For example, a transgender woman who has taken steps to bring her body and lived experience into alignment with her gender identity may correctly be perceived as female by others. But a birth certificate with a male gender marker conflicts with her gender identity, causing others to question whether she is the same person reflected on the birth certificate, and exposing her to invasions of privacy, prejudice, discrimination, humiliation, harassment, stigma, and even violence.

C. Oklahoma's Birth Certificate Policy

49. OSDH exercises responsibility for issuing and changing Oklahoma birth certificates. Each of the Defendants enforces a policy and practice of refusing to provide transgender people with birth certificates that match their gender identity (the "Birth Certificate Policy"). That includes the refusal to correct the gender markers on transgender people's birth certificates to match their gender identity. The Birth Certificate Policy

challenged here also includes the refusal to provide a birth certificate matching a transgender person's gender identity without the mandatory inclusion of revision history that discloses a person's transgender status, such as a person's sex assigned at birth and former name associated with that assigned sex.

50. Defendants' refusal to permit transgender people to correct the gender markers on their birth certificates to match their gender identity represents a complete reversal of OSDH's prior practice. For several years, from at least 2007 if not earlier, through most of 2021, OSDH allowed transgender people to correct the gender markers on their birth certificates to match their gender identity. Upon information and belief, the OSDH officials who oversaw that practice, including Defendant Baker as Registrar, believed that doing so was consistent with their responsibility to protect the integrity and accuracy of Oklahoma's vital records. Since 2018 alone, OSDH has corrected the gender markers on the birth certificates of more than one hundred transgender people to match their gender identity, without any harm to others.

51. There is no Oklahoma statute categorically prohibiting OSDH from changing the gender marker on people's birth certificates to match their gender identity. The general statute addressing amendment of certificates, 63 Okla. Stat. § 1-321, provides that certificates may be amended in accordance with the statutory scheme and regulations regarding vital statistics to protect the integrity and accuracy of vital statistics records. For several years, and at least prior to the Governor's Executive Order discussed below, state courts in Oklahoma and elsewhere have issued orders directing that the birth certificates of trans-

gender people born in Oklahoma be corrected to match their gender identity. In response to those orders, OSDH amended transgender people's Oklahoma birth certificates to match their gender identity.

52. The current Birth Certificate Policy originates in part from actions taken by Governor Stitt in response to the resolution of litigation involving OSDH officials. In 2021, then-Commissioner of Health Lance Frye and other OSDH officials entered into a settlement that enabled a plaintiff, whose gender identity did not match their sex assigned at birth, to obtain an amended Oklahoma birth certificate with a gender-neutral designation, consistent with their gender identity.

53. In response to the settlement, Governor Stitt issued a statement on October 21, 2021, in which he stated, "I believe that people are created by God to be male or female. Period." He further stated, "There is no such thing as non-binary sex, and I wholeheartedly condemn the OSDH court settlement that was entered into by rogue activists who acted without receiving proper approval or oversight." He promised, "I will be taking whatever action necessary to protect Oklahoma values."

54. The very next day, on October 22, 2021, then-Commissioner Frye, announced his unexpected "resignation," which was effective immediately.

55. Shortly thereafter, on November 8, 2021, Governor Stitt issued Executive Order 2021-24 ("Executive Order"). The Executive Order asserts that Oklahoma law does not "provide OSDH or others any legal ability to in any way alter a person's sex or gender on a birth certificate." The Executive Order di-

rected OSDH to immediately "[c]ease amended birth certificates that is in any way inconsistent with 63 O.S. § 1-321." The Executive Order specifies that the Commissioner of Health, among others, "shall cause the provisions of this Order to be implemented." It also imposes obligations for OSDH to inform Governor Stitt's office of any pending litigation related to amending birth certificates and to provide any information responsive to the Executive Order. These obligations facilitate Governor Stitt's continued enforcement of the Executive Order and ongoing monitoring of what specific actions by OSDH might be deemed "inconsistent" with his office's interpretation of what is proscribed by the Executive Order, which is not self-evident.

56. Defendants have enforced the Birth Certificate Policy through written communications that OSDH officials have sent to transgender people denying their request to correct the sex designation on their birth certificate to match their gender identity. They have denied such requests even where they were accompanied by court orders directing that the transgender person's birth certificate be amended to match their gender identity. OSDH officials have stated that they believe they cannot grant such requests because of the Executive Order. Upon information and belief, Governor Stitt and his office have enforced the Executive Order by specifically instructing OSDH officials that they cannot correct the birth certificates of transgender people to reflect their male or female gender identity.

57. On April 26, 2022, Governor Stitt signed into law Senate Bill 1100 ("SB1100"), which states in relevant part that birth certificate sex designations "shall be either male or female and shall not be non-

binary or any symbol representing a nonbinary designation including but not limited to the letter 'X.'" 63 Okla. Stat. § 1-321. Because designating a transgender man as "male" on his birth certificate, and designating a transgender woman as "female" on her birth certificate, do not involve a nonbinary designation, SB1100 does not prohibit transgender men and women from correcting their birth certificates to match their male or female gender identity. To the extent that Defendants nonetheless regard SB1100 as a bar to such corrections, it falls within the scope of the challenged Birth Certificate Policy.

58. The Birth Certificate Policy also stands in sharp contrast to the approach taken in at least 47 states, the District of Columbia and Puerto Rico, which permit transgender people to change the gender markers on their birth certificates to match their gender identity. For example, every other state within the Tenth Circuit (Kansas, New Mexico, Colorado, Wyoming, and Utah) has a process by which transgender people can change the gender markers on their birth certificates.

59. Similarly, the U.S. Department of State permits changes to the gender marker on a citizen's passport through self-certification. Other federal agencies, such as the Social Security Administration, also allow transgender people to correct their gender in their records to match their gender identity.

60. Oklahoma's Birth Certificate Policy is also contrary to its practice with respect to driver's licenses. The Oklahoma Department of Public Safety allows transgender people to change the sex designations on their driver's licenses to reflect their gender identity. Indeed, the Oklahoma Administrative Code specifically

envisions that a supporting "court order or birth certificate for gender change" may be provided to update a cardholder's gender marker. Okla. Admin. Code § 595:10-1-18(c)(6).

61. OSDH also includes revision history that can disclose a person's transgender status when changing the name on a person's birth certificate following a legal name change. Thus, for example, a transgender woman who had legally changed her first name from John to Jessica would receive an amended birth certificate with "+JESSICA" in the #1 field displaying a person's name and a notation stating "+DENOTES AMENDED ITEMS . . . CHG'D #1 FROM JOHN."

62. Similarly, before the Executive Order, when OSDH corrected a transgender person's gender marker in the past, it included revision history disclosing a person's transgender status. For example, a transgender woman would receive an amended birth certificate with "+FEMALE" in the #4 field displaying a person's sex designation and a notation stating "+DENOTES AMENDED ITEMS . . . CHG'D #4 FROM MALE."

63. The Birth Certificate Policy is not supported by any compelling, substantial, or even legitimate government interest.

64. The Birth Certificate Policy lacks any narrowly-tailored, substantial, or even rational relationship to a valid government interest, and it is not the least restrictive means of achieving a valid government interest.

65. The Birth Certificate Policy is maintained and motivated by animus toward transgender people, including to the extent that it rests upon any actual or asserted statutory barriers to providing transgender

people with birth certificates matching their gender identity.

66. Regardless of any Oklahoma statute or regulation, and how any state court interprets Oklahoma law, the federal constitution independently secures the right of transgender people to correct their birth certificates to match their gender identity. Because OSDH officials, including Defendants Reed and Baker, control the issuance and amendment of birth certificates, they have a constitutional duty to provide transgender people with access to birth certificates matching their gender identity.

D. Plaintiffs' Experiences

Plaintiff Rowan Fowler

67. Plaintiff Rowan Fowler is a 47-year-old woman who was born in Ponca City, Oklahoma and who currently resides in Tulsa, Oklahoma.

68. Ms. Fowler received an associate's degree in graphic design from Oklahoma State University Institute of Technology in Okmulgee, and is a graphic designer by trade, although she has also worked most recently as an event planner.

69. Ms. Fowler is transgender. She was assigned the sex of male at birth, but she knew that something was "not right" about that fact for her entire life. However, she did not have the language to describe her feelings until she took a psychology class in college when she was 19 years old. It was in that context that she learned about what was then referred to as "transsexualism," which is an outdated term formerly used

in describing people whose gender identity did not match the sex they were assigned at birth.

70. In light of the stigma surrounding transgender people, her own internalized transphobia, and other barriers to transitioning including access to gender-affirming health care, Ms. Fowler was not in a position to transition to live openly as a woman until later in her adult life.

71. Ms. Fowler began her transition to live openly as female in 2021, when she was 46 years old.

72. Since beginning her transition, Ms. Fowler has taken steps to bring her body and her gender expression into alignment with her female gender identity, including through clinically appropriate treatment undertaken in consultation with health care professionals. Ms. Fowler has received a diagnosis of gender dysphoria, the treatment for which has included hormone therapy and social transition to living openly as female.

73. On August 18, 2021, the District Court for Tulsa County granted Ms. Fowler's Petition for Name Change and Other Relief. Ms. Fowler changed her first and middle names, which were traditionally male, to names that were consistent with her female gender identity. She chose to take her mother's middle name of "Kay" for her own middle name as a way of honoring her family.

74. In addition to changing her name, the August 18, 2021 court order granting Ms. Fowler's petition also ordered, adjudged, and decreed that Ms. Fowler is female; that any designation by Oklahoma agencies of Ms. Fowler being anything other than female is incorrect; and that she shall be designated as female on official documents generated, issued, or maintained

in the State of Oklahoma. In short, the court order affirmed Ms. Fowler's identity for who she knew herself to be. Receiving it was one of the happiest days of Ms. Fowler's life, because it validated her existence as a woman, and she hoped it would also facilitate her recognition as a woman by others.

75. Ms. Fowler has taken steps to update her name and gender marker on her Oklahoma driver's license to match her female gender identity. In doing so, however, Ms. Fowler encountered difficulty because staff had initially insisted that she needed to present a corrected birth certificate to update her driver's license, and a supervisor's intervention was ultimately required to process the update to her license. Ms. Fowler has updated her name and gender in her records with the Social Security Administration as well as with the Transportation Security Administration for its Pre-Check program. She has also updated her name and gender in her records with the federal health insurance marketplace.

76. As a result of the Birth Certificate Policy, however, Ms. Fowler's birth certificate fails to reflect her gender identity, which is female. In August 2021, Ms. Fowler sought to update her birth certificate to match her gender identity by providing OSDH with a copy of the court order granting her Petition for Name Change and Other Relief and paying the requisite fee to OSDH. In September 2021, OSDH cashed her check. On January 11, 2022, however, she received an email from Defendant Baker denying her request to update her gender marker, which invoked the Governor's Executive Order in the denial.

77. Defendants' refusal to issue Ms. Fowler a birth certificate consistent with her gender identity is a

persistent and stigmatizing reminder that the State of Oklahoma refuses to recognize her as a woman. That refusal also imposes a barrier on her ability to function successfully as a woman in all aspects of her life, including any time when she presents her birth certificate to others. Presenting an identity document that identifies her as male is not only humiliating but also dangerous, putting her at risk of violence.

78. Ms. Fowler is aware of the high incidence of discrimination, harassment, and violence directed at transgender people. This awareness comes, in part, from her involvement with the local community, including her work volunteering with Oklahomans for Equality and facilitating the gender support group with the Dennis R. Neill Equality Center in Tulsa. She knows that transgender Oklahomans have reported being physically attacked because they are transgender. Ms. Fowler has had experiences where she feared for her safety, including one instance when a stranger followed her around in public at night, causing her to retreat into a store out of fear for her safety.

79. Businesses that are open to the general public may not be equally open to transgender Oklahomans. Ms. Fowler has been denied equal service at a range of businesses in Oklahoma that are ostensibly open the general public, such as bars, restaurants, and hair and nail salons, because she is a transgender woman.

80. Possessing a birth certificate that is incongruent with Ms. Fowler's gender identity and expression increases her exposure to harassment, discrimination, and violence. She has experienced first-hand the hostility that transgender people often experience when presenting identification that conflicts with their lived gender.

81. On one occasion in 2021 after beginning her transition, Ms. Fowler attempted to patronize a bar in Tulsa with friends. It was one of her first times going out in public in typically feminine attire. The bouncer asked for her identification, and Ms. Fowler presented her driver's license, which had not yet been updated to reflect her gender identity. After examining her license, the bouncer then said words to the effect of: "We don't serve your kind here. You can find someplace else to drink."

82. The experience with the bar was deeply humiliating to Ms. Fowler. It also made Ms. Fowler feel like she was a burden on her friends, some of whom had already gone inside the bar and had to come back outside to find another place to go.

83. On another occasion around the same time in 2021, Ms. Fowler went with others to a restaurant in Broken Arrow, Oklahoma, and she ordered an alcoholic beverage. Upon the waiter's request, Ms. Fowler presented her driver's license, which had not yet been updated to reflect her gender identity. After inspecting her license, the waiter said words to the effect of "fucking tranny" as he was walking away—loud enough for others to hear it—and did not return to the table. The word "tranny" is a derogatory term to describe transgender people.

84. Because Ms. Fowler was early in her transition and still getting accustomed to living openly as a woman, even leaving the house had already felt difficult at the time. The experience with the restaurant was soul-crushing. It also contributed to Ms. Fowler fearing her safety when going about her everyday life as a transgender woman in Oklahoma. For months after her experience with the restaurant in Broken Arrow,

Ms. Fowler avoided going outside what she viewed as her "safety bubble," relatively speaking, around downtown Tulsa, for fear of who and what she might encounter in areas more hostile to transgender people.

85. Inaccurate identity documents can also cause confusion. On another occasion in 2021, Ms. Fowler presented her driver's license upon the request of a cashier while checking out at the grocery store. While the cashier had previously addressed Ms. Fowler correctly as female up until that point, the cashier switched to incorrectly addressing her as male after seeing Ms. Fowler's driver's license that, at the time, inaccurately showed her sex as male.

86. Similarly, the mismatch between Ms. Fowler's birth certificate and her other identity documents has caused problems for Ms. Fowler. When she went to apply for the TSA PreCheck program in 2022, for instance, Ms. Fowler had to answer uncomfortable questions to explain the mismatch.

87. Defendants' refusal to provide Ms. Fowler with a birth certificate matching her identity has also presented a barrier in Ms. Fowler's efforts to update her gender-related information with credit-related entities, which have insisted that they need a corrected birth certificate from her.

88. Ms. Fowler will continue to need her birth certificate in the future, including to prove her identity to others, such as employers, and to furnish it when necessary for health insurance-related purposes.

Plaintiff Allister Hall

89. Plaintiff Allister Hall is a 26-year-old man who was born in Tulsa, Oklahoma and who currently resides in Owasso, Oklahoma.

90. Mr. Hall attended college in Oklahoma and was working towards a bachelor's degree in English Literature. He was training to become a teacher and was one semester short of graduation before he had to withdraw in 2019 because of needed surgery for a serious heart condition. That heart condition has also affected Mr. Hall's ability to work.

91. Mr. Hall is transgender. He was assigned the sex of female at birth, but he knew from early on that his gender identity was male. However, he lacked even the vocabulary to describe who he was until he was 14 years old.

92. Mr. Hall grew up in a community that felt unaccepting of transgender people, and he lived a mostly "closeted" existence until he was 20 years old. After he moved away for college, and had greater distance from the community in which he had grown up, Mr. Hall began to live more openly as male.

93. Since beginning his transition, Mr. Hall has taken steps to bring his body and his gender expression into alignment with his male gender identity, including through clinically appropriate treatment undertaken in consultation with health care professionals. Mr. Hall has received a diagnosis of gender dysphoria, the treatment for which has included hormone therapy and social transition to living openly as male. As a result of hormone therapy, Mr. Hall has a more typically masculine appearance, including visible facial hair.

94. On August 24, 2021, the District Court for Tulsa County granted Mr. Hall's Petition for Name Change and Other Relief. Mr. Hall changed his first and middle names, which were more typically feminine, to names that were more consistent with his male gender identity.

95. In addition to changing his name, the August 24, 2021 court order granting Mr. Hall's petition also ordered, adjudged, and decreed that Mr. Hall is male; that any designation by Oklahoma agencies of Mr. Hall being anything other than male is incorrect; and that he shall be designated as male on official documents generated, issued, or maintained in the State of Oklahoma.

96. Mr. Hall has taken steps to update his name and gender marker on his Oklahoma driver's license to match his male gender identity. Mr. Hall has also updated his name and gender in his records with the Social Security Administration.

97. As a result of the Birth Certificate Policy, however, Mr. Hall's birth certificate fails to reflect his gender identity, which is male. The very next day after receiving the August 24, 2021 court order, Mr. Hall applied to update his birth certificate to match his gender identity and paid the requisite OSDH fee. On January 11, 2022, however, Mr. Hall received an email from Defendant Baker denying his request to update his gender marker, which invoked the Governor's Executive Order in the denial.

98. Defendants' refusal to issue Mr. Hall a birth certificate consistent with his gender identity is a persistent and stigmatizing reminder that the State of Oklahoma refuses to recognize him as a man. That

refusal also imposes a barrier on his ability to function successfully as a man in all aspects of his life, including any time when he needs to present his birth certificate to others. Presenting an identity document that identifies him as female is not only humiliating but also dangerous, putting him at risk of violence.

99. Mr. Hall is aware of the high incidence of discrimination, harassment, and violence directed at transgender people. When Mr. Hall has traveled to places that are more likely to be hostile to transgender people, he has felt nervous and scared that he could be the subject of a hate crime because he is transgender. On multiple occasions, Mr. Hall has also had strangers follow him around in public, causing him to fear for his safety as a transgender person.

100. Possessing a birth certificate that is incongruent with Mr. Hall's gender identity and expression increases his exposure to harassment, discrimination, and violence. He has experienced first-hand the hostility that transgender people often experience when presenting identification that conflicts with their lived gender.

101. For example, there were occasions before Mr. Hall's driver's license was updated to reflect his gender identity when he needed to present it to others, such as a bartender, and he encountered hostility when the person inspecting it realized that he was transgender. In those instances, Mr. Hall feared that he might be asked to leave or that others who were nearby might attack him because he is transgender. These experiences also deprived Mr. Hall of control over the disclosure of private information concerning his transgender status.

102. Defendants' actions in barring Mr. Hall from correcting his birth certificate to match his gender identity has also impeded his ability to correct other identity documents to match his gender identity. As a member of the Choctaw Nation of Oklahoma, Mr. Hall possesses a tribal membership card that identifies him by name and gender. However, when he sought to update that membership card to match his gender identity, he was informed that he would need to present a corrected birth certificate. Trial membership cards are used in accessing a number of tribal services, including health services.

103. Mr. Hall will continue to need his birth certificate in the future, including to prove his identity to others, and to update other identity documents such as his tribal membership card.

Plaintiff Carter Ray

104. Plaintiff Carter Ray is a 24-year-old man who was born in Tulsa, Oklahoma and who has resided within Creek County, Oklahoma.

105. Mr. Ray is a health care worker. He assists in providing patient care and is also a licensed Emergency Medical Technician (EMT). Mr. Ray sought out a career in the health care field in order to be able to help other people, and he has provided care to Oklahomans during the COVID-19 epidemic. He is also currently working towards becoming a paramedic.

106. Mr. Ray is transgender. He was assigned the sex of female at birth, but he realized in high school that his gender identity was male. For example, when he saw his male peers, he felt that he should be among them. However, Mr. Ray grew up in an area of Okla-

homa that did not feel accepting of transgender people, which made it more difficult for him to come to terms with his identity.

107. Mr. Ray began his transition to live openly as male when he was 21 years old.

108. Since beginning his transition, Mr. Ray has taken steps to bring his body and his gender expression into alignment with his male gender identity, including through clinically appropriate treatment undertaken in consultation with health care professionals. Mr. Ray has received a diagnosis of gender dysphoria, the treatment for which has included hormone therapy and social transition to living openly as male. As a result of hormone therapy, Mr. Ray has a more typically masculine expression, including a typically male voice.

109. On June 24, 2021, the District Court for Creek County granted Mr. Ray's Petition for Change of Name and Gender Marker. Mr. Ray changed his first name, which was traditionally female, to a name that was consistent with his male gender identity.

110. In addition to changing his name, the June 24, 2021 court order granting Mr. Ray's petition also ordered, adjudged, and decreed that the gender marker on Mr. Ray's birth certificate be changed to male and that OSDH issue a new birth certificate consistent with the changes ordered.

111. Mr. Ray has taken steps to update his name and gender marker on his Oklahoma driver's license to match his male gender identity. In doing so, however, Mr. Ray encountered difficulty because staff initially indicated that he needed his birth certificate to update his driver's license, although they subsequently processed his request after a period of delay. Mr.

Ray has also taken steps to update his name and gender in his records with the Social Security Administration, the bodies that license and maintain a registry of EMTs, his health insurance provider, and the school where he has taken coursework.

112. As a result of the Birth Certificate Policy, however, Mr. Ray's birth certificate fails to reflect his gender identity, which is male. In July 2021, Mr. Ray applied to correct his birth certificate to match his gender identity and paid the requisite OSDH fee. On March 2, 2022, however, he received an email from Defendant Baker denying his request to update his gender marker, which invoked the Governor's Executive Order in the denial.

113. Defendants' refusal to issue Mr. Ray a birth certificate consistent with his gender identity is a persistent and stigmatizing reminder that the State of Oklahoma refuses to recognize him as a man. That refusal also imposes a barrier on his ability to function successfully as a man in all aspects of his life, including any time when he needs to present his birth certificate to others. Presenting an identity document that identifies him as female is not only humiliating but also dangerous, putting him at risk of violence.

114. Mr. Ray is aware of the high incidence of discrimination, harassment, and violence directed at transgender people. Particularly during the time immediately after Mr. Ray began his transition and started hormone therapy, there were circumstances in public when others would give him strange looks and he would fear for his physical safety.

115. Possessing a birth certificate that is inconsistent with Mr. Ray's gender identity and expression

increases his exposure to harassment, discrimination, and violence. He has experienced first-hand the hostility that transgender people often experience when presenting identification that conflicts with their lived gender.

116. There were occasions before Mr. Ray's driver's license was updated to reflect his gender identity when he needed to present it to others, but he encountered significant resistance in using the license. These third parties did not believe that Mr. Ray, whom they correctly perceived as male, was the actual license holder, who was designated as female on the license.

117. For example, Mr. Ray patronized a bowling alley with a friend in 2021, but when Mr. Ray ordered a drink and presented his license upon request, the manager did not believe that Mr. Ray was the license holder. The manager escalated the situation by bringing over a second manager, and then brought over a third employee, all in order to discuss Mr. Ray and deliberate about what to do with him. One of them said he believed that Mr. Ray must be using a sibling's license. Having a routine trip to a bowling alley with a friend turn into a public dispute over his identity was insulting, angering, and demoralizing.

118. On another occasion in 2021 before Mr. Ray's driver's license had been updated to reflect his gender identity, an Oklahoma patrol officer pulled Mr. Ray over for potentially exceeding the speed limit when driving home from work. When Mr. Ray presented his license, the officer did not believe that it was Mr. Ray's license. Mr. Ray has family who were in law enforcement, and he understood that law enforcement would generally ask a driver to step out of the vehicle in order to question them, which could require Mr. Ray

to explain his transgender status to the law enforcement officer. Fortunately, the officer let the issue go after running Mr. Ray's information, but the experience left Mr. Ray fearful and unnerved.

119. After repeated instances of having his identity interrogated, debated, and doubted by third parties because of the mismatch between his identity documents and his gender identity, Mr. Ray fell into a depressive state and began to self-isolate. He declined invitations from friends or families when they wanted to go out, and he stayed at home alone instead.

120. Mr. Ray has also experienced hostility in the workplace because he is transgender. Mr. Ray has had coworkers who have refused to use male pronouns and insisted on using female pronouns when referring to him. One coworker also told Mr. Ray that the coworker would not use male pronouns until the point when Mr. Ray had corrected his driver's license. In Mr. Ray's current primary place of employment, he is not generally open about the fact that he is transgender, because he is concerned that he may be subjected to discrimination as a result.

121. Not having a birth certificate that matches Mr. Ray's gender identity has presented other practical obstacles in his life. For example, after he bought his house from his mother, Mr. Ray sought to obtain services under his own name, and he was informed that he needed two forms of identification, one of which could be his birth certificate. He encountered similar issues when seeking to update his information with a credit card company and with the body handling EMT licensing or registration, which initially requested Mr. Ray's birth certificate and then required Mr. Ray to

determine if there were alternate ways of proving his identity.

122. Mr. Ray will continue to need his birth certificate in the future, including to prove his identity to others.

CLAIMS FOR RELIEF

Count I – Deprivation of Equal Protection in Violation of the Fourteenth Amendment of the United States Constitution

123. Plaintiffs hereby incorporate by reference and reallege all of the preceding paragraphs of this Complaint as though fully set forth herein.

124. The Fourteenth Amendment to the United States Constitution, enforceable against Defendants pursuant to 42 U.S.C. § 1983, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

125. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on sex as well as discrimination based on transgender status is presumptively unconstitutional and subject to heightened scrutiny.

126. The Birth Certificate Policy facially and intentionally discriminates against transgender people based on sex-related considerations. The sex that the government lists on an individual's birth certificate is an express governmental classification of an individual's sex. In the case of transgender people, however, this classification reflects a sex contrary to their gender identity and causes harm. Discrimination based

on sex-related considerations includes, but is not limited to, discrimination based on gender, gender identity, transgender status, gender transition, and nonconformity with sex stereotypes.

127. The Birth Certificate Policy facially and intentionally discriminates on the basis of transgender status by depriving transgender people who were born in Oklahoma of birth certificates that accurately reflect their gender identity. Others born in Oklahoma, who are not transgender, are not deprived of birth certificates that accurately reflect their gender identity.

128. Discrimination because a person is transgender constitutes (a) discrimination based on sex, which requires courts to apply heightened scrutiny when evaluating the constitutionality of the government's discrimination, and (b) discrimination based on transgender status, which also requires courts to apply heightened scrutiny to such discrimination.

129. Government discrimination against transgender people because of their transgender status bears indicia of a suspect classification requiring heightened scrutiny by the courts because:

a. Transgender people have suffered a long history of extreme discrimination and continue to suffer such discrimination to this day;

b. Transgender people are a politically vulnerable minority whose rights are not protected through the legislative process. Transgender people have largely been unable to secure explicit local, state, and federal protections to protect them against discrimination, and have been and continue to be regularly

targeted for discrimination by legislation, regulations, and other government action that harms them;

c. A person's gender identity or transgender status bears no relation to a person's ability to contribute to society; and

d. Gender identity is a core, defining trait that is so fundamental to a person's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment. Gender identity is also generally fixed at an early age and highly resistant to voluntary change.

130. The Birth Certificate Policy deprives transgender people born in Oklahoma like Plaintiffs of their right to equal dignity and stigmatizes them as second-class citizens in violation of the Equal Protection Clause.

Count II – Deprivation of Due Process in Violation of the Fourteenth Amendment of the United States Constitution

131. Plaintiffs hereby incorporate by reference and reallege all of the preceding paragraphs of this Complaint as though fully set forth herein.

132. The Fourteenth Amendment to the United States Constitution, enforceable against Defendants pursuant to 42 U.S.C. § 1983, provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

133. The substantive protections of the Due Process Clause, as well as other constitutional provisions, give

rise to a right to privacy, protecting information that is highly personal and intimate, which includes information that could lead to bodily harm upon disclosure. Government infringement of these protections requires courts to apply strict scrutiny to such government action.

134. The involuntary disclosure of a person's transgender status violates that person's fundamental right to privacy. The fact that a person is transgender constitutes highly personal and intimate information. A reasonable person would find the involuntary disclosure of a person's transgender status to be deeply intrusive.

135. The involuntary disclosure of a person's transgender status can also cause significant harm, including by placing a person's personal safety and bodily integrity at risk. This harm burdens and interferes with the ability of transgender people to live in a manner consistent with their gender identity in all aspects of life, including where doing so is medically necessary and critical for mental health and well-being.

136. The Birth Certificate Policy violates transgender people's right to privacy by causing disclosures of their transgender status and depriving them of significant control over the circumstances around such disclosure.

137. There is no compelling, important, or even legitimate interest in the government causing transgender people to involuntarily disclose their transgender status any time third parties see their birth certificates.

138. The Birth Certificate Policy also burdens transgender people's liberty interests, including the right to define and express a person's gender identity and the right not to be treated in a manner contrary to a person's gender by the government. The constitutional protections that shelter a person's medical decisions, bodily autonomy, dignity, expression, and personhood prohibit the government from interfering with the right to live in accordance with a person's gender identity.

Count III – Abridgement of Free Speech in Violation of the First Amendment of the United States Constitution

139. Plaintiffs hereby incorporate by reference and reallege all of the preceding paragraphs of this Complaint as though fully set forth herein.

140. The First Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983 and applicable to the states through the Fourteenth Amendment, provides that a state "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

141. The First Amendment protects both the right to speak and the right to refrain from speaking.

142. The Birth Certificate Policy violates the First Amendment rights of transgender people to refrain from speaking by compelling them to disclose their transgender status and to identify with a gender that conflicts with who they are. It also prevents transgender people from accurately expressing their gender when they present their birth certificates to others.

143. The Birth Certificate Policy further violates the First Amendment rights of transgender people by forcing them to endorse the government's position as to their own gender, through the birth certificates they must show to others. The gender marker listed on their birth certificates conveys the government's message that sex is determined solely by the appearance of external genitalia at birth—a message that is inconsistent with the medical and scientific understanding of sex and to which Plaintiffs strongly object.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter Judgment in their favor and against Defendants on all claims as follows:

A. Enter a declaratory judgment pursuant to 28 U.S.C. §§ 2201-02, declaring the actions of Defendants complained of herein, including the enforcement of the Birth Certificate Policy, violate the equal protection, due process, and free speech guarantees of the U.S. Constitution;

B. Permanently enjoin Defendants, their agents, employees, representatives, successors, and any other person acting directly or indirectly in concert with them from enforcing the Birth Certificate Policy, including from refusing to provide birth certificates to transgender people like Plaintiffs that accurately reflect their sex, consistent with their gender identity, and without the inclusion of information that would disclose an individual's transgender status on the face of the birth certificate;

C. Order Defendants to immediately issue corrected birth certificates to Plaintiffs Fowler, Hall, and Ray, accurately reflecting their sex, consistent with their gender identity, and without the inclusion of information that would disclose their transgender status on the face of their birth certificates;

D. Order Defendants to take any necessary and appropriate action to ensure that transgender people can correct their Oklahoma birth certificates to match their gender identity, without the inclusion of information that would disclose their transgender status on the face of their birth certificate, including through the adoption of any regulations to guarantee such access;

E. Order Defendants to maintain the confidentiality of information disclosing a person's transgender status, including their sex assigned at birth and previous names, as applicable;

F. Award Plaintiffs costs, expenses, and reasonable attorney's fees pursuant to 42 U.S.C. § 1988 and any other applicable laws; and

G. Grant any injunctive or other relief this Court deems just, equitable, and proper.

DATED: November 7, 2022

Respectfully submitted,

/s/ Shelly L. Skeen
Shelly L. Skeen*
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC
3500 Oak Lawn Ave, Ste. 500
Dallas, TX 75219
Telephone: (214) 219-8585
Fax: (214) 481-9140
sskeen@lambdalegal.org

Peter C. Renn*
Christina S. Paek*
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
800 S. Figueroa St., Ste. 1260
Los Angeles, CA 90017
Telephone: (213) 382-7600
Fax: (213) 402-2537
prenn@lambdalegal.org
cpaek@lambdalegal.org

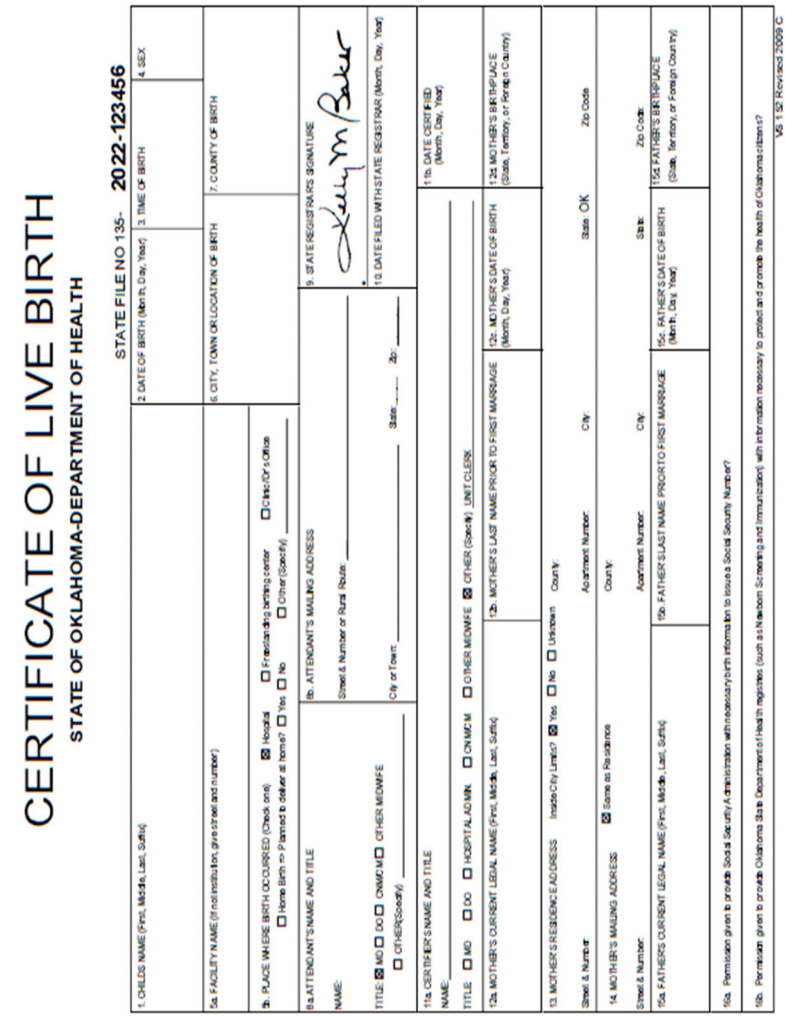
*Admitted *pro hac vice*

Karen Keith Wilkins
OBA# 21005
1515 S. Denver Ave.
Tulsa, OK 74119
Telephone: (918) 599-8118
Fax: (918) 599-8119
karen@wilkinslawtulsa.com

Attorneys for Plaintiffs

FORM: OKLAHOMA CERTIFICATE OF LIVE BIRTH

{ See transcription on next page }



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) ☒ Hospital ☐ Freestanding birthing center ☐ Clinic/Dr's Office ☐ Home Birth => Planned to deliver at home? ☐ Yes ☐ No ☐ Other (Specify) _____
8a. ATTENDANT'S NAME AND TITLE
NAME:
TITLE ☒ MD ☐ DO ☐ CNM/CM ☐ OTHER MIDWIFE ☐ OTHER (Specify) _____
8b. ATTENDANT'S MAILING ADDRESS
Street & Number or Rural Route: _____
City or Town: _____ State: ____ Zip: _____
9. STATE REGISTRAR'S SIGNATURE
Kelly M Baker
10. DATE FILED WITH STATE REGISTRAR (Month, Day, Year)
11a. CERTIFIER'S NAME AND TITLE
NAME:
TITLE ☐ MD ☐ DO ☐ HOSPITAL ADMIN ☐ CNM/CM ☐ OTHER MIDWIFE ☒ 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? ☒ Yes ☐ No ☐ Unknown
Street & Number
Apartment Number:
City:
State: OK
Zip Code
14. MOTHER'S MAILING ADDRESS ☒ Same as Residence
Street & Number
County:
Apartment Number:
City:
State:
Zip Code:
15a. FATHERS 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 1 52 Revised 2009 C

{Transcription}

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)

5b. PLACE WHERE BIRTH OCCURRED (Check one)

☒ Hospital

☐ Free Standing Birthing Center

☐ Clinic/Dr.'s Office

☐ Home Birth ⇒ Planned to deliver at home?
☐ Yes ☐ No

☐ Other (Specify) _____

6. CITY, TOWN OR LOCATION OF BIRTH

7. COUNTY OF BIRTH

8a. ATTENDANT'S NAME AND TITLE

NAME:

TITLE: ☒ MD ☐ DO ☐ CNM/CM

☐ Other Midwife ☐ Other (Specify) _____

8b. ATTENDANT'S MAILING ADDRESS

Street & Number or Rural Route:

City or Town: _____

State:_____ Zip: _____

9. STATE REGISTRAR'S SIGNATURE

/s/ Kelly M. Baker

10. DATE FILED WITH STATE REGISTRAR
(Month, Day, Year)

11a. CERTIFIER'S NAME AND TITLE

Name

TITLE: ☐ MD ☐ DO ☐ Hospital Admin.

☐ CNM/CM ☒ 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? ☒ Yes ☐ No ☐ Unknown

County:

Street and Number:

Apartment Number:

City:

State: OK

Zip Code:

14. MOTHER'S MAILING ADDRESS

☒ Same as Residence

County:

Street and 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?