No. 24-6072

In the United States Court of Appeals for the Tenth Circuit

ANDREW BRIDGE, ET AL.,

Plaintiffs-Appellants,

v.

OKLAHOMA STATE DEPARTMENT OF EDUCATION, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Oklahoma
No. 5:22-cv-787-JD

Brief of States of Utah and 22 Other States As Amici Curae in Support of Oklahoma and Affirmance

SEAN D. REYES
ATTORNEY GENERAL OF UTAH

JOSEPH S. ST. JOHN
Special Asst. Solicitor General

UTAH ATTORNEY
GENERAL'S OFFICE
160 East 300 South, 5th Floor
Salt Lake City, UT 84111
(801) 366-0100
scottstjohn@agutah.gov
scott@stjohnlaw.com

September 18, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Secondary Sources

INTEREST OF AMICI CURIAE AND INTRODUCTION

The States of Utah, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Texas, Virginia, West Virginia, and Wyoming respectfully submit this brief as amici curiae in support of the Oklahoma Appellees and affirmance. Amici are authorized to file this brief without leave of court pursuant to Fed. R. App. Proc. 29(a)(2).

All Amici are recipients of funding subject to Title IX, and all are subject to the Equal Protection Clause of the Fourteenth Amendment. Amici accordingly have an interest in ensuring the correct interpretation of those provisions, including the correct application of relevant legal tests. Additionally, cognizant of students' privacy interests and the risks posed by mixed-sex restrooms, some amici have enacted laws similar to the Oklahoma law at issue here. *E.g.* Utah Code § 63G-31-301. Amici have a strong interest in ensuring those laws are not undermined.

The Plaintiffs in this case disagree with those laws. That is their prerogative. They and the many organizations supporting them can seek to persuade their elected representatives to repeal or amend the laws

they don't like. What they cannot do, however, is have a court change the law via the artifice of redefining long-understood words. Such rule of men—or Humpty Dumpty—has no place in our system:

> "When I use a word" Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

LEWIS CARROLL, THROUGH THE LOOKING GLASS 124 (1872). Rather, in our system, the people—through their elected representatives—are master.

In attacking a law the people of Oklahoma have adopted to govern themselves and their children, Plaintiffs and their amici proffer a heavy dose of policy wrapped in a thin fig leaf of law. Just this May, however, the Supreme Court admonished the judiciary to "be wary of [those] who seek to transform federal courts into 'weapons of political warfare' that will deliver victories that eluded them 'in the political arena.'" *Alexander v. S.C. Conf. of the NAACP*, 144 S. Ct. 1221, 1236 (2024). That's because "[n]ot every choice is for judges to make." *See L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 421 (6th Cir. 2023)). So it is here.

ARGUMENT

I. The Supreme Court has long-treated sex as an immutable characteristic that is based on biological differences.

Start with first principles. The Supreme Court's equal protection cases universally regard "sex, like race and national origin [as] an immutable characteristic," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), defined by "our most basic biological differences," *Nguyen v. INS*, 533 U.S. 53, 73 (2001). "The difference between men and women . . . is a real one." *Id.* "The two sexes are not fungible," *United States v. Virginia*, 518 U.S. 515, 533 (1996), and a class "made up exclusively of one is different from a [class] composed of both." *Ballard v. United States*, 329 U.S. 187, 193 (1946).

II. The requirement for an unambiguous, clear statement of a Spending Clause condition prevents redefining "sex" in Title IX.

Regardless of whether Plaintiffs agree with those principles, the Supreme Court's decades of statements about the two sexes make resolution of Plaintiffs' Title IX claim straight-forward. That's because Title IX was passed under Congress's Spending Clause power. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). So lack of ambiguity is the key, not statutory (re)construction decades after the statute was passed.

Unlike normal federal laws, "Spending Clause legislation operates based on consent: in return for federal funds, the recipients agree to comply with federally imposed conditions." *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 219 (2022) (cleaned up). "For that reason, the legitimacy of Congress' power to enact Spending Clause legislation rests . . . on whether the recipient voluntarily and knowingly accepts the terms of that contract." *Id.* "Recipients cannot 'knowingly accept' the deal with the Federal Government unless they 'would clearly understand . . . the obligations' that would come along with doing so." *Id.* (quoting *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U. S. 291, 296 (2006)). The Supreme Court "thus 'insist[s] that Congress speak with a clear voice,' recognizing that 'there can . . . be no knowing acceptance of the terms of the putative contract if a State is unaware of the conditions imposed by the legislation or is unable to ascertain what is expected of it.'" *Davis*, 526 U.S. at 640 (quoting *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981) (cleaned up)). Put differently, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Cummings*, 596 U.S. at 219 (quoting *Pennhurst*, 451 U. S. at 17).

Here, Title IX and related regulations are clearly based on two biological sexes—male and female. In relevant part, the Act does not "prohibit any educational institution . . . from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. In furtherance of this statute, Department of Education regulations affirmatively stated—since at least 1980—that "[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33; 45 Fed. Reg. 30,955, 30,960 (May 9, 1980). That regulation recognizes only two distinct sexes, and it affirmatively authorizes separate bathrooms for each.

Other parts of Title IX confirm that the statute contemplates only two distinct, biologically-based sexes. *See* 20 U.S.C. §§ 1681(a)(2) (referring to "one sex" and "both sexes"); 1681(a)(8) (referring to "father-son or mother-daughter activities," "one sex," and "the other sex"). Title IX even lists sexual orientation and gender identity as a "status" separate from one's sex, so discrimination on the basis of those statuses cannot be synonymous with discrimination on the basis of sex. *See id.* § 1689(a)(6)

("lesbian, gay, bisexual, or transgender (commonly referred to as 'LGBT') status").

Title IX's clear recognition of two distinct sexes determined by biology is buttressed by decades of Supreme Court cases quoted above, including the Court's statements that there are "two sexes," *Virginia*, 518 U.S. at 533, with sex being "immutable," *Frontiero*, 411 U.S. at 686, and defined by "our most basic biological differences," *Nguyen*, 533 U.S. at 73. Where, as here, the Supreme Court has repeatedly used the term "sex" in ways that are contrary to Plaintiffs' attempted redefinition, "we do not see how it can be said [the statute] gives a State unambiguous notice," *Arlington*, 548 U.S. at 300-01, that "sex" means anything other than biological sex.[1]

---

[1] Plaintiffs and their amici repeatedly intone *Bostock v. Clayton County*, 590 U.S. 644 (2020), a case applying a non-Spending Clause statute. *See, e.g.*, Br. of New York et al at 21-28; Br. of United States at 12-16. But crediting those arguments would—at most—prove the Supreme Court has made varying points about the meaning of the word "sex" and related forms of discrimination. If that's true—the Supreme Court can't even agree—the provision Plaintiffs rely on is the opposite of the "unambiguous[]" "clear voice" required of Spending Clause conditions.

The United States' arguments ring especially hollow given its prior position that Title IX is ambiguous with respect to transgender individuals. In *Franciscan Alliance v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex.

Amici States and other funding recipients have operated under this commonsense understanding of Title IX for decades. Plaintiffs can't get around that fact by redefining the term "sex" as used in the statute. Humpty Dumpty's ipse dixit approach has no place in construing Spending Clause conditions. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 816 (11th Cir. 2022) (en banc) ("The notion that the School Board could or should have been on notice that its policy of separating male and female bathrooms violates Title IX and its precepts is untenable.").

2016), the United States "assert[ed] that Section 1557's definition of sex discrimination [which cross-references Title IX] is ambiguous because it fails to explicitly address transgender individuals," such that *Chevron* deference was warranted. *Id.* at 686-87. The United States took that position in attempting to defend a rule construing "discrimination . . . on the basis of sex" as prohibiting "discrimination on the basis of . . . sex stereotyping[] and gender identity." 81 Fed. Reg. 31,376, 31,387 (May 18, 2016). Suffice it to say, if the United States believes Title IX is sufficiently ambiguous to warrant *Chevron* deference vis-à-vis coverage of transgender individuals, then Title IX inherently lacks the clarity required of Spending Clause conditions.

III. Plaintiffs' Equal Protection claim is subject only to rational basis review.

A. Heightened review is tied to immutable characteristics.

It is precisely because sex is fixed that the Supreme Court subjects sex classifications to intermediate scrutiny. *See, e.g.*, *Michael M. v. Sup. Ct.*, 450 U.S. 464 (1981). Making sex subjective negates the rationale for giving it that higher scrutiny. More to the point, the Supreme Court's objective understanding of sex is controlling for equal-protection claims. It dooms any equal-protection analysis founded on the modern construct of gender identity.

B. Plaintiffs actually present an underinclusiveness claim.

Notwithstanding clear Supreme Court authority about what "sex" means, courts are split over how to apply the Equal Protection Clause when confronted with allegations that a policy discriminates on the basis of gender identity. Plaintiffs rely on one side of that split, without disclosing—never mind engaging with—the other.

Part of the reason for confusion is that these novel claims are presented in the garb of—and have been misconstrued as—traditional equal protection challenges subject to heightened review. They're not. When the United States sued on behalf of high-school girls seeking admission

to VMI, the government argued that the institution's "exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment," *United States v. Virginia*, 518 U.S. 515, 523 (1996), not that female applicants were in fact males who should be able to avail themselves of an otherwise salutary sex-segregated admissions process. And Oliver Brown was not trying to take advantage of separate-but-equal schooling on the theory that the Board of Education of Topeka should have classified him as white. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). When black students were "denied admission to schools attended by white children under laws requiring or permitting segregation according to race," *id.* at 487-88, the problem was not that the Board had separated Topeka's races too finely; the problem was that the Board had separated races at all.

In canonical equal protection cases, segregation provides the cause of action. But no one here is challenging the separation of bathrooms by sex. And even if Oklahoma's decision to separate bathrooms by sex in the first instance warrants heightened scrutiny, *see, e.g., Virginia*, 518 U.S. at 532-33, the scope of the sex classification does not.

Examples may help. Underinclusiveness claims like the Plaintiffs' have often been raised in the racial-affirmative-action context, and their dispositions underscore why challenges to classification—rather than to the discrimination itself—warrant only rational-basis review. When asked "to examine the parameters of the beneficiary class" but not "to pass on the constitutionality of [an affirmative-action] program or of the racial preference itself," courts engage in "a traditional 'rational basis' inquiry as applied to social welfare legislation." *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1159 (D. Haw. 1986). So where, as here, plaintiffs seek to avail themselves of a sex-separated benefit by broadening the "parameters of the beneficiary class," *id.*, the government's decision not to calibrate the class to the plaintiffs' preferences does not warrant heightened scrutiny. *See id.* at 1160-61 (rejecting equal protection claim because government's "definition of 'Hawaiian' . . . ha[d] a rational basis").

The Second Circuit explained this principle *in Jana-Rock Construction, Inc. v. New York Department of Economic Development*, 438 F.3d 195 (2d Cir. 2006). The case involved "New York's 'affirmative action' statute for minority-owned businesses," which extended to "Hispanics" but did "not include in its definition of 'Hispanic' people of Spanish or

Portuguese descent." *Id.* Plaintiff Rocco Luiere owned a construction company and was "the son of a Spanish mother whose parents were born in Spain," but he was not considered Hispanic for purposes of the New York program. *Id.* at 199. (This despite Luiere's sworn affidavit stating, "I am a Hispanic from Spain." *Id.* at 203.) Luiere did not "challenge the constitutional propriety of New York's race-based affirmative action program," but only the State's decision not to classify him as Hispanic for purposes of the program. *Id.* at 200, 205. On its way to rejecting Luiere's claim, the Second Circuit confirmed that "[t]he purpose of [heightened scrutiny] is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.* at 210. Because "[i]t [was] uncontested by the parties" that New York's affirmative-action program satisfied strict scrutiny—just as it is uncontested here that sex-separated bathrooms would satisfy heightened scrutiny—a heightened level of review retained "little utility in supervising the government's definition of its chosen categories." *Id.* The Second Circuit thus "evaluate[d] the plaintiff's underinclusiveness claim using rational basis review." *Id.* at 212.

Consider also the case of Ralph Taylor. In 2010, Taylor "received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African." *Orion Ins. Grp. v. Wash. State Off. of Minority & Women's Bus. Enters.*, No. 16-5582-RJB, 2017 WL 3387344, at *2 (W.D. Wash. Aug. 7, 2017), *aff'd sub nom. Orion Ins. Grp. v. Wash.'s Off. of Minority & Women's Bus. Enters.*, 754 F. App'x 556 (9th Cir. 2018). He took these results to mean that "he had Black ancestry," *id.*, and he undoubtedly had a scientific and biologically-based reason for that conclusion. Taylor thus classified himself as "Black" and applied for special benefits under state and federal affirmative-action programs—and then filed suit when his applications were denied, arguing that the state and federal governments' restrictive definition of "Black" violated his constitutional and statutory rights. *Id.* at *2-4. He advocated an expansive definition of "Black," asserting that he fit into the category because "Black Americans are defined to include persons with 'origins' in the Black racial groups in Africa," and his genetic testing revealed he had African ancestry. *Id.* at *11. The court summarily dispatched with Taylor's claim. *Id.* Rather than apply heightened scrutiny and force the State to justify its definition of "Black," the court

applied rational-basis review and rejected Taylor's claim accordingly. *Id.* at *13 ("Both the State and Federal Defendants offered rational explanations for the denial of the application.").

By challenging the lawfulness of a classification's definitional contours rather than the lawfulness of the classification itself, plaintiffs in cases like this one follow the same path as Rocco Luiere and Ralph Taylor. They acquiesce to or endorse sex-separated benefits and challenge only States' decisions to base their definitions of male and female, boy and girl, and men and women, on biological sex rather than gender identity. But because the "purpose" of heightened scrutiny "is to ensure that the government's choice to use [protected] classifications is justified," not to police the classifications' "contours," *Jana-Rock*, 438 F.3d at 210, the "contours" attendant to States' sex-separated restrooms warrant only rational basis review. *Cf. Hoohuli*, 631 F. Supp. at 1159 n.23 ("The mere mention of the term 'race' does not automatically invoke the 'strict scrutiny' standard."). [2]

[2] The United States' amicus stumbles out of the gate in asserting that because Oklahoma's law "classifies based on sex, it is subject to heightened scrutiny." United States Br. at 22.

C. Plaintiffs fail to rebut the presumption that the legislature acted in good faith.

Plaintiffs try to avoid that result by arguing, among other things, that the Oklahoma legislature acted in bad faith. But the "presumption [is] that the legislature acted in good faith," and district courts must "draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions." *Alexander v. S.C. Conf. of the NAACP*, 144 S. Ct. 1221, 1235-36 (2024). That presumption "reflects the Federal Judiciary's due respect for the judgment of state legislators, who are similarly bound by an oath to follow the Constitution," and the need to "be wary of plaintiffs who seek to transform federal courts into 'weapons of political warfare' that will deliver victories that eluded them 'in the political arena.'" *Id.* at 1236.

Scattered statements by individual legislators are not enough to rebut the presumption. *United States v. Amador-Bonilla*, 102 F. 4th 1110, 1118-19 (10th Cir. 2024). Yet that is all Plaintiffs allege. So Plaintiffs try to bolster their case with innuendo about the process by which the Oklahoma law was adopted. That innuendo notwithstanding, heavy amendments aren't a departure from ordinary procedure. Rather, "gut-and-amend" is a "commonplace procedure," *Sissel v. HHS*, 951 F. Supp. 2d

159, 170 (D.D.C. 2013), and "[a]mendments by substitution are a well known method of expediting legislation," *id.* at 170 n.13 (quoting *Hubbard v. Lowe*, 226 F. 135, 139-40 (S.D.N.Y. 1915)). Plaintiffs' allegations aren't enough to state a prima facie case for rebutting the presumption of good faith, so they were properly discarded in ruling on Oklahoma's motion to dismiss.

CONCLUSION

The Court should affirm.

Dated: September 18, 2024

Respectfully submitted,

SEAN D. REYES
ATTORNEY GENERAL OF UTAH

/s/ Joseph S. St. John
JOSEPH S. ST. JOHN
Special Assist. Solicitor General
UTAH ATTORNEY
GENERAL'S OFFICE
160 East 300 South, 5th Floor
Salt Lake City, UT 84111
(410) 212-3475
scottstjohn@agutah.gov
scott@stjohnlaw.com

Counsel for Amicus Curiae
State of Utah

ADDITIONAL COUNSEL

Counsel for Amici *States*

STEVE MARSHALL
Attorney General
State of Alabama

TREG R. TAYLOR
Attorney General
State of Alaska

TIM GRIFFIN
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

RAÚL LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

BRENNA BIRD
Attorney General
State of Iowa

KRIS KOBACH
Attorney General
State of Kansas

LIZ MURRILL
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ANDREW BAILEY
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DAVE YOST
Attorney General
State of Ohio

ALAN WILSON
Attorney General
State of South Carolina

MARTY J. JACKLEY
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

JASON S. MIYARES
Attorney General
State of Virginia

PATRICK MORRISEY
Attorney General
State of West Virginia

BRIDGET HILL
Attorney General
State of Wyoming

DREW WRIGLEY
Attorney General
State of North Dakota

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 2,949 words.

2. This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Joseph S. St. John

CERTIFICATE OF SERVICE

I certify that on September 18, 2024, I electronically filed this document with the Clerk of Court using the Court's CM/ECF system, which will send a notice of docketing activity to all parties who are registered through CM/ECF.

/s/ Joseph Scott St. John