No. 25-____

In the Supreme Court of the United States

JOSEPH J. ROYBAL, in his official capacity; and ANDREW MUSTAPICK, in his individual capacity,
Petitioners,

v.

DARLENE GRIFFITH,
Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL FRANCISCO
FIRST & FOURTEENTH, PLLC
800 Connecticut Avenue
NW, Suite 300
Washington, DC 20006
(202) 998-1978

JULIAN R. ELLIS, JR.
Counsel of Record
CHRISTOPHER O. MURRAY
LAURA J. ELLIS
FIRST & FOURTEENTH, PLLC
2 N. Cascade Avenue,
Suite 1430
Colorado Springs, CO 80903
(719) 428-4937
julian@first-fourteenth.com

Attorneys for Petitioners

(additional counsel listed on inside cover)

NATHAN J. WHITNEY
First Asst. County Attorney
STEVEN W. MARTYN
Senior County Attorney
EL PASO COUNTY
ATTORNEY'S OFFICE
200 S. Cascade Avenue
Colorado Springs, CO 80903
(719) 520-6485

HEIDI K. WILLIAMS
Senior County Attorney/
Sheriff's Legal Advisor
EL PASO COUNTY
SHERIFF'S OFFICE
27 East Vermijo Avenue
Colorado Springs, CO 80903
(719) 520-7264

QUESTIONS PRESENTED

1. Whether a transgender inmate's challenge to sex-based prison policies is subject to heightened scrutiny under *United States v. Virginia*, 518 U.S. 515 (1996), as the Eighth, Ninth, and Tenth Circuits hold, or subject to the deferential standard of "reasonable relationship to legitimate penological interests" under *Turner v. Safley*, 482 U.S. 78 (1987), as the Second, Fourth, and D.C. Circuits hold.

2. Whether a rule prohibiting cross-identified-gender strip searches in prisons is contrary to the flexible and deferential rule adopted in *Bell v. Wolfish*, 441 U.S. 520 (1979), and reaffirmed in *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318 (2012).

PARTIES TO THE PROCEEDINGS

Petitioners are Joseph J. Roybal, in his official capacity as the Sheriff of El Paso County, Colorado, and Andrew Mustapick, in his individual capacity. Petitioners were defendants in the district court and the defendant-appellees in the Tenth Circuit.

Respondent is Darlene Griffith who was the plaintiff in the district court and the plaintiff-appellant in the Tenth Circuit.

LIST OF ALL PROCEEDINGS

This case arises from the following proceedings:

1. *Griffith v. El Paso Cnty., Colo.*, No. 23-1135 (10th Cir.), order denying petition for rehearing en banc issued June 10, 2025.

2. *Griffith v. El Paso Cnty., Colo.*, No. 23-1135 (10th Cir.), opinion and judgment reversing in part, vacating in part, and remanding with instructions issued February 19, 2025.

3. *Griffith v. El Paso Cnty., Colo.*, No. 21-cv-00387 (D. Colo.), order affirming and adopting the recommendation of the magistrate judge issued March 27, 2023.

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The district court's order affirming and adopting the recommendation of the magistrate judge, and the magistrate judge's report and recommendation, are unreported and printed at Pet. App. 243a–65a and Pet. App. 196a–242a, respectively. The Tenth Circuit's opinion (Pet. App. 1a–107a), is reported at 129 F.4th 790. The en banc Tenth Circuit's order denying review, and the opinions concurring and dissenting from that order (Pet. App. 112a–24a), are reported at 139 F.4th 1183.

JURISDICTION

The Tenth Circuit entered judgment on February 19, 2025. (Pet. App. 110a–11a.) A petition for rehearing en banc was denied on June 10, 2025. (Pet. App. 114a–15a.) On July 31, 2025, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including October 7, 2025.

The lower courts had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides, "The right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. amend. IV.

The Fourteenth Amendment's Equal Protection Clause says no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

INTRODUCTION

For over two centuries, American prisons and jails have classified and housed inmates and detainees based on biological sex. This long-standing practice advances institutional security, prevents sexual violence, and preserves the privacy and dignity of those in custody and of staff. The decision below threatens this foundational practice by holding that it is constitutionally suspect under the Equal Protection Clause to house a biologically male inmate with unaltered male anatomy alongside male inmates if the inmate expresses a female identity. By transforming an inmate's subjective gender identity—of which there are over 70—into a sex-based constitutional classification triggering heightened scrutiny, the Tenth Circuit has subordinated prison security and the privacy interests of *all* to the preference of *one* in contravention of this Court's prison-administration precedents.

As a result of the quest to reconstitute sex-based distinctions under the Equal Protection Clause to include "gender identity," courts are floundering on the meaning of "sex." This issue appeared in *United States v. Skrmetti*, and now again in *Little v. Hecox* and *West Virginia v. B.P.J.* It was also key to the Tenth Circuit's decision here, with the majority unabashedly holding that a distinction based on "transgender status" is a distinction based on "sex." (Pet. App. 26a–27a.)

In addition, lower courts are hopelessly divided on how to analyze sex-based classifications in a carceral setting. The Eighth, Ninth, and Tenth Circuits apply heightened scrutiny under *United States v. Virginia* (*VMI*), treating sex-based classifications as presumptively unconstitutional. The Second, Fourth, and D.C. Circuits apply *Turner v. Safley*'s deferential

reasonableness standard, recognizing that courts must defer to legitimate penological interests, including in cases challenging sex-based classifications. The present circuit split leaves prison administrators—from federal penitentiaries to rural county jails—subject to inconsistent mandates on how to classify and house transgender inmates while maintaining safety and security in their facilities.

The Tenth Circuit also announced an unprecedented strip-search rule: absent emergencies, male officers cannot search biologically male inmates who self-identify as female. In doing so, the Tenth Circuit holds that the Constitution requires a female officer to examine the naked body and genitals of a biological male based solely on that inmate's subjective self-identification and without reference to other factors. Such a rule is constitutionally absurd. And it disregards administrative expertise, creates dignity and safety concerns, and ignores the operational realities of running detention facilities like county jails.

The consequences are severe. Hundreds of cases now flood federal courts, with prison officials facing litigation from all sides: transgender inmates demanding classification by gender identity; female inmates challenging housing decisions that require them to sleep, live, and bathe with biological males who identify as female; inmates objecting to searches by certain officers; and staff asserting dignity concerns about cross-sex searches. Courts admit "there is little uniformity to be found among their decisions." *Gilliam v. Dep't of Pub. Safety & Corr. Servs.*, 2024 WL 5186706, at *20 n.14 (D. Md. Dec. 20, 2024).

The present confusion is of the lower courts' own making. This Court has been steadfast in concluding

that judges lack the operational expertise to micromanage prisons, *see Turner*, 482 U.S. at 84–85, and should not constitutionalize fiercely debated social and scientific issues, *see United States v. Skrmetti*, 145 S. Ct. 1816, 1837 (2025). Yet lower courts have continued to disregard both mandates, using *Bostock v. Clayton County, Ga.*—a Title VII case—to *sub silentio* elevate transgender identity to a protected constitutional status in prisons, thereby doing precisely what the Court has warned against.

This Court should clarify that the Fourteenth Amendment does not require treating the fluid, subjective concept of transgender identity as a sex-based or stand-alone constitutional class. And heightened scrutiny under *VMI* does not create class-based protections for transgender inmates in prisons. "Sex" refers to immutable biological characteristics—male or female—defined by chromosomes and reproductive anatomy. Gender identity is subjective and fluid. Conflating these concepts creates unworkable standards, elevating individual preference over legitimate privacy, safety, and security interests.

Finally, the Tenth Circuit's decision cannot be reconciled with *Skrmetti*. This Court already granted review, vacated, and remanded *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024), the case on which the Tenth Circuit's equal-protection holding rests. At a minimum, similar treatment is required here. But the carceral context of this case presents more urgent issues, requiring an immediate reminder that "*Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights," *Washington v. Harper*, 494 U.S. 210, 224 (1990), with only one exception for racial segregation.

Officials must be able to respond to legitimate penological concerns, such as security and privacy interests, in this country's vastly different detention settings. The Court should grant the petition and reaffirm that the deferential standards in *Turner* and *Bell* apply to sex-based prison classifications and cross-identified-gender searches, ensuring prison administrators and policymakers have the discretion necessary to maintain safe, secure, and humane facilities.

STATEMENT OF THE CASE

In July 2020, Darlene Griffith entered the jail system in El Paso County, Colorado, as a pretrial detainee. (Pet. App. 8a.) At the time, Griffith identified as a "transgender female"; she had changed her name, altered her physical appearance to appear female, and taken feminizing hormones, which caused Griffith to develop breasts. (*Id.* at 7a–8a.) Griffith, however, still had unaltered biologically male reproductive anatomy, including a penis and scrotum. (*Id.* at 12a.)

Despite this, Griffith asked deputies to be housed in a female unit based on her female identity. (*Id.* at 8a.) The deputies declined Griffith's request because the County generally makes custodial assignments based on an inmate's or detainee's genitals. (*See id.*) Griffith was therefore assigned to a male housing unit during her detention. (*Id.*)

As a result of Griffith's male housing assignment, she alleges she did not have access to feminine products from the jail's commissary, including lipstick, women's underwear, and a sports bra. (*Id.* at 10a.) Griffith further alleges she needed access to these products, including "panties and lipstick," to "conform[] with her [female] gender identity." (*Id.* at 126a–

27a.) Permitting vulnerable biologically male detainees, who identify as female, to have articles that make them appear more "feminine" increases the risk of violence and harassment. (*See id.* at 103a–04a n.47.)

As with all pretrial detainees, Griffith underwent a visual body-cavity inspection when booked during the intake process. (*See id.* at 8a.) Griffith insisted that a female officer perform the strip search, including searching her male genitals. (*See id.* at 9a.)

Two deputies performed the search. (*Id.*) Consistent with the County's policy, a female deputy searched Griffith above the waist by asking Griffith to remove her shirt so the deputy could inspect under Griffith's clothing, including the breasts Griffith had developed from taking feminizing hormones. (*See id.*) The female deputy then left the examination room. A male deputy conducted the remainder of the search, including searching Griffith's penis and scrotum and visually inspecting Griffith's body cavities below the waist. (*See id.*) Griffith alleges the male deputy made inappropriate comments to her during the examination. (*Id.*) She further alleges that, after booking, she was subjected to pat-down searches by male deputies while in the jail's male housing ward. (*Id.* at 10a.)

District court proceedings. Griffith filed a 16-count complaint against the County, the sheriff, and six commanders and deputies. (*See generally id.* at 125a–95a.) Relevant here, Griffith claimed (1) the County's housing and commissary policies violated her rights under the Equal Protection Clause of the Fourteenth Amendment by denying her housing in a female unit and denying her access to products available to biologically female inmates; and (2) the County's strip-search policy violated her Fourth and

Fourteenth Amendment rights by subjecting her to cross-identified-gender searches (i.e., searches by male deputies).[1] (*Id.* at 12a–13a.)

The defendants moved to dismiss Griffith's complaint in its entirety under Federal Rule of Civil Procedure 12(b)(1) and (b)(6). At the start, the district court accepted Griffith's framing of the case, characterizing it as a case, "at its core," "about governmental validation of the existence and experiences of transgender people." (Pet. App. 252a (quoting Griffith's operative complaint).) While the court was "sympathetic to [Griffith]," it nonetheless found "that existing Tenth Circuit precedent binds the Court's hands" and dismissed the entire case. (*Id.*)

First, as to the equal-protection claims, the district court held rational-basis review applied. In *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995), the Tenth Circuit concluded "that 'transsexuals are not a protected class' for purposes of the Fourteenth Amendment." (Pet. App. 259a (quoting *Brown*, 63 F.3d at 971).) While Griffith challenged whether *Brown* was still good law after *Bostock v. Clayton County, Ga.*, 590 U.S. 644 (2020), the court said, "[r]egretfully," it was "unable to engage in that analysis or arrive at th[at] conclusion[]" because of binding circuit precedent. (Pet. App. 262a.) The court added, "If the Court were to consider the issue untethered by *Brown*, the Court would not hesitate to find that heightened scrutiny is warranted for [Griffith's] equal

[1] In her complaint, Griffith alleged other claims against the defendants, only one of which was sustained by the Tenth Circuit. That claim is an individual-capacity claim against the male deputy for "abusive cross-gender strip search" under the Fourth Amendment. (*Id.* at 12a–13a, 61a–71a.)

protection claim because transgender-based discrimination constitutes sex-based discrimination[.]" (*Id.* at 261a.) But, as is, the court agreed that the County had "a rational basis for housing [Griffith] in an all-male unit and declining to give her feminine clothing and grooming products." (*Id.* at 262a.)

Second, as to the cross-identified-gender search claim, the district court agreed with the magistrate judge's "careful[] balanc[ing] [of Griffith's] right to bodily privacy and right to be free from unreasonable searches against the requirements of prison administration." (*Id.* at 262a.) This is consistent with the rule in *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318 (2012). The court continued by holding that, even if Griffith had alleged a constitutional violation, the claim would fail under "the 'clearly established' prong of qualified immunity because [Griffith] offer[ed] no binding precedent clearly establishing that a visual strip search by a male and female deputy of a transgender inmate … violates the inmate's constitutional rights." (Pet App. 256a.)

Tenth Circuit majority opinion. Griffith appealed. Chief among Griffith's contentions was that heightened scrutiny applied to her equal-protection claims. In a 2-1 decision, the majority agreed, holding that a distinction based on transgender *identity* is necessarily a classification or discrimination based on *sex*. "Specifically, the [County] lets only cisgender females (who were assigned a female sex at birth based on their genitalia)—but not transgender females (who were assigned a male sex at birth based on their genitalia)—live in female housing and receive the products at issue." (*Id.* at 17a.) That, the majority

reasoned, amounts to "discriminat[ion] on the basis of sex." (*Id.* (quoting *Fowler v. Stitt*, 104 F.4th 770, 794 (10th Cir. 2024)).) And "'all' sex-based classifications 'warrant heightened scrutiny.'" (*Id.* (quoting *VMI*, 518 U.S. at 555).)

The majority also reversed the dismissal of Griffith's cross-identified-gender strip-search claim. In an unprecedented ruling, the majority held "a male deputy's participation in the strip search of a transgender female detainee ha[s] no 'reasonable relationship' to a 'legitimate governmental objective.'" (*Id.* at 59a–60a (quoting *Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019).) In other words, it is unconstitutional for a male officer to strip search a biologically male inmate or detainee who identifies as female, even if the inmate or detainee still has male genitals.

Judge Tymkovich's dissenting opinion. Judge Tymkovich recognized "the case pits profoundly personal convictions against jail policies aimed at maintaining institutional security while balancing the dignitary concerns of officers and inmates." (*Id.* at 107a.) But he disagreed that Griffith's interests, as alleged, should "transcend the [County's]" legitimate penological interests. (*Id.*) Rather, because Griffith challenged policies in a jail, Judge Tymkovich would have applied the Court's mandate in *Turner v. Safley*, 482 U.S. 78 (1987): "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." (Pet. App. 80a (quoting *Turner*, 482 U.S. at 89).) And, applying the correct level of scrutiny, Judge Tymkovich, like the district court, would have found Griffith's constitutional claims foreclosed.

Denial of en banc review. Because the majority decision, at best, raised novel first-impression issues, and, at worst, was against circuit precedent, the County petitioned for en banc review. (*Id.* at 114a–15a.) Six days before the Court issued its decision in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), the Tenth Circuit denied review. Judge Rossman, the author of the majority decision, concurred in the denial. (Pet. App. 116a–17a.) Judge Tymkovich (joined by Judges Eid and Carson) dissented from the denial:

> Holding that sex-discrimination is an exception to *Turner* puts us out of step with the Supreme Court and other circuits. And it is simply incorrect. We remain bound by two facially contradictory Supreme Court cases. … But only the Supreme Court can truly solve this conflict.

(*Id.* at 124a.)

Because the majority's decision undermines security, privacy, and administrative interests at detention facilities, including some of the country's most critical and secure federal facilities (which are located in the Tenth Circuit), and because the Court has and will provide material guidance in cases like *Skrmetti*, *Little v. Hecox*, and *West Virginia v. B.P.J.*, petitioners seek this Court's immediate review.

REASONS FOR GRANTING THE PETITION

I. Sex Classifications in Prisons Are Necessary and the Constitutional Norm

1. State and local governments have operated jails and prisons since the post-Revolutionary War period. They have been segregated by sex just as long. *See generally* Nicole H. Rafter, *Prisons for Women, 1790-1980*, 5 CRIME & JUSTICE 129–81 (1983). While early segregation was an administrative necessity because the incarcerated-female population was exceedingly small and prison facilities were open and communal, this necessity led to significant differences in how facilities house men and women inmates and detainees today. *Id.* at 131–32. Thus, in the United States, the historical norm has been segregation and classification based on biological sex in prison[2] settings.

As a result of expanded research on women in prison in the last 50 years, special attention has been dedicated to "the distinctiveness of female prisoners' needs, disadvantages, and ways of adapting or responding to imprisonment." Candace Kruttschnitt & Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUSTICE 1, 1 (2003). This was critical because earlier criminal-justice processes and facilities investment focused predominately on male inmates, which make up a far greater portion of the incarcerated population. COUNCIL ON CRIMINAL JUSTICE, *Women's Justice: A*

[2] At times in this petition, petitioners refer to carceral detentions facilities colloquially as "prisons." This ease-of-reference should not minimize the meaningful physical-, human-, and financial-resource differences between jails, prisons, and institutional correctional facilities.

Preliminary Assessment of Women in the Criminal Justice System (July 2024), http://bit.ly/4mwyRlo.

Incarcerated women, however, face "a unique set of obstacles." *Id.* "Most have experienced poverty and trauma," and they are "more likely" to be victims of abuse and sexual violence by a partner, to be diagnosed with mental health and substance-use disorders, and to have experienced homelessness. *Id.* Many incarcerated women are "entangled in other [government] systems" (e.g., child welfare, housing, etc.) and, as the primary caretakers of their children, "their incarceration is more likely than men's incarceration to destabilize families and create ripple effects throughout communities." *Id.*; *see also Klinger v. Dep't of Corr.*, 31 F.3d 727, 731–32 (8th Cir. 1994) ("[F]emale inmates as a class have special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims[.]"). These factors and characteristics, and the needs flowing from them, influence the programs and policy choices of prison administrators.

Incarcerating women also presents unique safety and privacy concerns. "Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another," *Farmer v. Brennan*, 511 U.S. 825, 858 (1994) (Thomas, J., concurring), and there is little doubt that male inmates are more antisocial and more violent than female inmates, *see, e.g.*, *Veney v. Wyche*, 293 F.3d 726, 734 (4th Cir. 2002) ("At Riverside, females and males are housed separately, and each gender faces unique safety and security concerns of various degrees.

Indeed, it is a well-documented reality that institutions for females generally are much less violent than those for males."); *Klinger*, 31 F.3d at 732 ("Male inmates, in contrast, are more likely to be violent and predatory than female inmates.").

Further, the Court's Eighth Amendment caselaw requires prison officials "to protect prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833 (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)). "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Id.* (citations omitted). For this reason, detention settings are not intended to mirror general life or the outside world, where men and women freely intermix—indeed, constitutionally, they cannot. Administrators would face immeasurable risk of liability for failure to protect if it were otherwise.

To balance female inmates' safety and privacy concerns, the structure and operation of women's prisons have long differed from their male counterparts. They are often physically separate from facilities housing male inmates and there are fewer of them (because there are far fewer incarcerated females); they operate at lower security levels and the general population spaces tend to be more communal, dormitory style; bathroom facilities (showers, toilets, etc.) are generally more private, including partitions and private bathing facilities; and the prison staff, particularly those in charge of administration and those who

have direct contact with female inmates, typically are female themselves. *See* Rafter, *supra*, at 131–33, 137, 142–44, 146–47, 156–60, 165–72. The safety and privacy considerations motivating these differences are obvious and have been credited by courts. *See, e.g.*, *Veney*, 293 F.3d at 734; *Klinger*, 31 F.3d at 732.

Considering this history and reality, courts have uniformly concluded that "the segregation of inmates by sex is unquestionably constitutional." *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996).

2. But this raises a question: what does it mean for officials in prisons to segregate—or adopt classifications—based on "sex"? The Tenth Circuit majority held that treating a preoperative, biologically male inmate who identifies as female as a "male" for purposes of sex-based classifications in prison is *sex* discrimination. (Pet. App. 26a–27a.) It relied predominantly on the circuit's decision in *Fowler v. Stitt*, which earlier held that when a defendant "intends to discriminate based on transgender status [it] necessarily intends to discriminate based in part on sex." 104 F.4th 770, 789 (10th Cir. 2024) (citing *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 665 (2020)), *cert. granted, judgment vacated*, 145 S. Ct. 2840 (2025). The majority's ill-fated reliance on *Fowler*, which this Court vacated and reversed after *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), is reason enough to grant review, vacate, and reverse in this case. But, as argued below, there are additional issues unique to a carceral setting that desperately need final resolution by the Court.

More fundamentally, while the Equal Protection Clause does not mention the word "sex," the Court has long held that sex is a constitutionally protected

characteristic. *VMI*, 518 U.S. at 532–33 (collecting cases). Science and precedent—and, in a prison setting, necessity—confirm that this characteristic refers to fixed, objective, biological features: the state of being either male or female.

"Sex" is immutable and represents the "inherent" and "enduring" "[p]hysical differences between men and women." *Id.* at 533. Sex is binary, objective, and defined by inherent and unalterable characteristics in male and female genetics. Advocates on both sides of the issue agree. *E.g.*, Aditi Bhargava, et al., *Considering Sex As a Biological Variable in Basic & Clinical Studies: An Endocrine Society Scientific Statement*, 42 ENDOCRINE REV. 219, 221 (2021) ("Sex is a biological concept … . [A]ll mammals have 2 distinct sexes … . Sex is dichotomous, with sex determination in the fertilized zygote stemming from unequal expression of sex chromosomal genes."). On the other hand, gender identity is necessarily subjective, "refer[ing] to a person's deeply felt, internal and individual experience of gender, which may or may not correspond to the person's physiology or designated sex at birth." *Gender & Health*, WORLD HEALTH ORG., https://bit.ly/4nOzVSV. Studies have catalogued more than 70 gender identities—far from a binary construct. Shaziya Allarakha, *What Are the 72 Other Genders?*, MED. NET (medically reviewed Feb. 9, 2024), http://bit.ly/48zdmgz.

Following science, the Court has recognized that "sex" is an objective characteristic distinct from an individual's gender identity and resulting "transgender status." *Bostock*, 590 U.S. at 669; *see Skrmetti*, 145 S. Ct. at 1824 (to identify as "transgender" means that one's "gender identity does not align with their biological sex"). Whereas sex is binary, *see, e.g.*, *Ballard v.*

United States, 329 U.S. 187, 193–94 (1946), gender identity involves "a huge variety," *L.W. v. Skrmetti*, 83 F.4th 460, 487 (6th Cir. 2023).

Based on the enduring differences between men and women, and the long history of sex-based segregation in prisons, jail administrators have logically separated inmates by "sex" and adopted other sex-based policies for over 200 years.

II. Housing Transgender Inmates in a Sex-Segregated Correctional System Presents Operational Difficulties That Require Administrative Flexibility and Deference

Prisoners are increasingly using transgender status to raise constitutional challenges to long-standing sex-based classifications and policies in detention facilities. The targets of these challenges are prison officials who must balance institutional safety and security for *all* with requests for exceptions and accommodations for *one* in a sex-based detention system. They do this while contending with vastly different incarcerated populations and disparate facilities, infrastructure, staffing, and financial resources.

Central to this Court's prison-administration caselaw is the recognition that "the problems of prisons in America are complex and intractable" and "they are not readily susceptible of resolution by decree." *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974). Running prisons, in their vastly different forms, "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 85 (1987). Although individuals

do not lose all constitutional rights when they are incarcerated, the Court has been consistent in how to weigh these reduced rights against penological interests: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. This "standard is necessary if 'prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Id.* (quoting *Jones v. N.C. Prisoners Lab. Union*, 433 U.S. 119, 128 (1977)). Fidelity to this deferential standard ensures prison officials—not federal judges—are the decision-makers "of what constitutes the best solution to every administrative problem." *Id.*

As the Tenth Circuit did here, courts are increasingly disregarding long-standing deference to legitimate penological interests in favor of levels of constitutional scrutiny never applied in a carceral setting. This is against the Court's clear mandate: "[W]e held that the proper standard … is to ask whether the regulation is 'reasonably related to legitimate penological interests.' This is true even when the constitutional right claimed to have been infringed is fundamental" and "a more rigorous standard of review" might apply outside of prison. *Washington v. Harper*, 494 U.S. 210, 223 (1990) (quoting *Turner*, 482 U.S. at 89). The *only* exception to this rule is for race-based classifications in jails and prisons, as the Court held in *Johnson v. California*, 543 U.S. 499 (2005).[3]

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[3] Of course, the *Turner* standard does not address liability for actions under the Eighth Amendment. But Eighth Amendment liability requires the inmate to show (1) a sufficiently serious constitutional deprivation that resulted in the denial of "the minimal civilized measure of life's necessities," and (2) that the

The result of straying from *Turner*'s clear rule is a dizzying array of constitutional litigation by transgender inmates and, at times, reactionary litigation by other inmates (sometimes targeting transgender inmates) against officials managing facilities with transgender populations. These cases exist because of the recent quest to rewrite the Court's prison-administration constitutional standards—which, again, defer to legitimate penological interests and give officials substantial flexibility to solve pressing problems—to treat the fluid and subjective concept of transgender identity as a sex-based or standalone constitutional class in prisons.

Take a few examples:

- In *Carter-el v. Boyer*, a transgender female (a biological male who identified as a female) inmate alleged a male officer violated the Fourth Amendment after the officer strip searched the inmate. 2020 WL 939289, at *2 (E.D. Va. Feb. 25, 2020).

- In *Gale v. Terra*, a male prisoner alleged a transgender male (a biological female who identified as male) officer violated the inmate's constitutional right to privacy after the officer strip searched him. 2025 WL 662806, at *9 (E.D. Penn. Feb. 27, 2025); *see also West v. Radtke*, 48 F.4th 836, 853 (7th Cir. 2022) (reviving Fourth Amendment claim for strip search of a Muslim, male inmate by transgender male officer).

- In *Jones v. Union County Sheriff's Office*, a partially preoperative transgender female filed an equal-protection challenge because officers "treated [her] as

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official was "deliberately indifferent" to the inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

a male," even though the plaintiff was temporarily detained with neither male nor female detainees. 2019 WL 5692753, at *3 (W.D.N.C. Nov. 4, 2019), *aff'd sub nom. Jones v. Cathey*, 854 F. App'x 543 (4th Cir. 2021).

- In *Crosby v. Reynolds*, a female detainee alleged a violation of her constitutional right to privacy after officers housed a preoperative transgender female with her in a cell block, which also required the detainees to share bathroom facilities. 763 F. Supp. 666, 670 (D. Me. 1991) (dismissing case on qualified-immunity grounds because "contours of [the] right [to privacy] are not clear when it comes to the determination of where to house transsexuals"); *Guy v. Espinoza*, 2020 WL 309525, at *5 (E.D. Cal. Jan. 21, 2020) (same); *see also Fleming v. Strong*, 2023 WL 2142670, at *2 (N.D. Fla. Jan. 25, 2023) (challenging federal prison transgender policy of housing, at times, biologically male inmates with male genitals in female prisons under the First, Eighth, and Fifth/Fourteenth Amendments, and under the Religious Freedom Restoration Act).

- In *Tates v. Blanas*, a preoperative transgender female challenged, among other policies, a prison's policy of segregating transgender detainees to avoid housing them in general population. 2003 WL 23864868, at *2–4 (E.D. Cal. Mar. 11, 2003).

- In *Gilliam v. Department of Public Safety & Correctional Services*, three transgender females (it is unclear whether they were pre- or post-operative) challenged Maryland's transgender housing policies, which, at times, included administrative separation for the protection of the inmate. 2024 WL 5186706, at *1–3 (D. Md. Dec. 20, 2024).

• And in *LeTray v. City of Watertown*, a transgender female detainee sued for injunctive relief ordering prison officials to "correct" all prison records identifying the plaintiff "as a woman, not a man," and to delete booking photographs showing her without her female wig because they incorrectly represent the plaintiff's gender identity. 718 F. Supp. 3d 192, 207–08 (N.D.N.Y. 2024) (citing complaint).

Just in the last five years, courts have contended with hundreds of cases raising transgender-inmate issues, with hundreds more to come. Lower courts have noted their struggle and that "there is little uniformity to be found among their decisions." *Gilliam*, 2024 WL 5186706, at *20 n.14. That struggle is not surprising—time and again, this Court has recognized the judiciary is "ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Turner*, 482 U.S. at 84 (quoting *Martinez*, 416 U.S. at 405). Failure to faithfully apply *Turner* has compounded the problem by creating uncertainty and risk for prison officials. Officials today face constitutional litigation from transgender inmates who want to be classified and housed according to their gender identity, even before attempting medical transition; biologically female inmates who do not want to be housed with inmates of the opposite sex (especially those with male genitals) because of safety and privacy concerns; and still others who desire unique treatment and accommodation.

III. This Case Cleanly Presents Two of the Most Pressing Transgender Issues in Prisons

The Tenth Circuit majority, and Judge Tymkovich's probing dissent, lay bare two prison-administration issues that have hopelessly confused courts

across the county. *First*, lower courts are split on the level of scrutiny that applies to transgender inmates' equal-protection claims challenging sex-based classifications in prisons. As Judge Tymkovich previewed, "only the Supreme Court can truly solve th[e] conflict" in the caselaw. (Pet. App. 124a.) *Second*, the Tenth Circuit majority endorsed a first-of-its-kind rule making it unconstitutional for a male officer to search a biological, preoperative male inmate if that inmate "identifies" as female. To the majority, there can be "*no* 'legitimate penological purpose'" for such cross-identified-gender searches. (*Id.* at 59a.) Both issues require the Court's immediate attention.

A. Lower courts are split on the constitutional scrutiny applicable to sex-based equal-protection claims in prisons

Judge Tymkovich said it best: "court[s are] between a rock and a hard place" in deciding equal-protection challenges to sex-based classifications in prisons. (*Id.* at 119a.) The Court in *Washington v. Harper* spoke in absolutes: the standard for prison policies infringing inmates' constitutional rights is "whether the regulation is 'reasonably related to legitimate penological interests.' This is true even when the constitutional right claimed to have been infringed is fundamental[.]" 494 U.S. 210, 223 (1990) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Yet, the Court in *VMI* emphasized that "all gender-based classifications today warrant heightened scrutiny." 518 U.S. at 555. So, where does that leave jail policies that classify by sex?

Lower courts have split at least three ways on the level of constitutional scrutiny applied to equal-protection claims in prisons. Firmly entrenched on the heightened-scrutiny side of the split are the Eighth,

Ninth, and Tenth Circuits. These circuits hypothesize that *VMI* announced a categorical rule that *all* classifications based on sex are subject to heightened scrutiny—no matter the circumstances. *Harrison v. Kernan*, 971 F.3d 1069, 1076 (9th Cir. 2020) ("We now hold that prison regulations …, which facially discriminate on the basis of gender, must receive intermediate scrutiny."); *Roubideaux v. N.D. Dep't of Corr. & Rehab.*, 570 F.3d 966, 974 (8th Cir. 2009) (applying *VMI* and adopting heightened scrutiny). (*See also* Pet. App. 18a ("[I]t is now firmly established the Equal Protection Clause requires courts to apply 'a heightened standard of review' to government classifications "based on gender."); *but see* Pet. App. 42a ("courts are split on whether intermediate scrutiny applies to [equal-protection] claims" in jails).)

The logic of these circuits is that *Turner*'s reasonableness test predates *VMI*, and the Court's later decision in *Johnson v. California*, 543 U.S. 499 (2005), carving out a narrow exception from *Turner* for race-based segregation, means that *Turner* and *Washington* must be subject to other exceptions. As the Ninth Circuit held, "although the Supreme Court has not yet so held," the justification for a higher level of scrutiny in *Johnson* applies to "the right not to be discriminated against in prison based on gender." *Harrison*, 971 F.3d at 1077. (*See also* Pet. App. 41a (noting "tension between *VMI*'s categorical holding that *all* sex discrimination triggers heightened scrutiny and *Washington*'s categorical holding that *all* prison policies … undergo rational-basis scrutiny," but nonetheless applying heightened scrutiny).)

On the *Turner* side of the split are the Second, Fourth, and D.C. Circuits. In *Veney v. Wyche*, the Fourth Circuit stated the rule plainly:

> [W]hen equal protection challenges arise in a prison context … courts must adjust the level of scrutiny to ensure that prison officials are afforded the necessary discretion to operate their facilities in a safe and secure manner. In a prison context, therefore, we must determine whether the disparate treatment is "reasonably related to [any] legitimate penological interests."

293 F.3d 726, 732 (4th Cir. 2002). The Second and D.C. Circuits are in accord. *See Benjamin v. Coughlin*, 905 F.2d 571, 575 (2d Cir. 1990); *Williamson v. Maciol*, 839 F. App'x 633, 636 n.2 (2d Cir. 2021) (quoting *Benjamin* and stating "our cases apply this *Turner* standard 'to the assessment of equal protection claims in the prison setting'"); *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 931–32 (D.C. Cir. 1996) (addressing equal-protection claim and citing *Turner* and stating "[b]ecause courts have little experience in the 'inordinately difficult' task of running a prison, they should give deference to prison officials where possible"); *Doe v. McHenry*, 763 F. Supp. 3d 81, 88 (D.D.C. 2025) (noting *Johnson* did not change the level of scrutiny applicable to sex-based equal-protection claims against prison policies). Like Judge Tymkovich, these circuits recognize that "*Turner*—and the caselaw applying it—prescribe deferential rational basis review for jail policies impacting constitutional rights other than race," and the later *VMI* and *Johnson* decisions did nothing to change that mandate. (Pet. App. 91a.)

For claims by transgender inmates specifically, yet another vein of the split has developed focusing on whether a transgender female inmate, for example, is similarly situated to a biologically female inmate. The Equal Protection Clause "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). Thus, in the first instance, a transgender inmate must "show that [he or] she was 'similarly situated' to inmates receiving differential treatment." (Pet. App. 84a (Tymkovich, J., dissenting).) But a biologically male inmate (even if the inmate identifies as female) is not similarly situated to biologically female inmates. (*Id.*) This was the holding in *Armstrong v. Mid-Level Prac. John B. Connally Unit*, 2020 WL 230887, at *8 (W.D. Tex. Jan. 15, 2020). There, a transgender female inmate compared herself to biologically female inmates who qualified for vaginoplasty surgery. The court rejected the comparison: "Armstrong is … attempting to equate himself as a transgender [fe]male to a cisgender female for purposes of an equal protection claim. However, Armstrong is not similarly situated." *Id.* The court in *Williams v. Kelly* held similarly: "because plaintiff [a transgender female] is not 'similarly situated' to the prisoners she uses as a basis of comparison, her equal protection claim necessarily fails." 2018 WL 4403381, at *12 (E.D. La. Aug. 27, 2018). In each of these cases, the prisoner-plaintiff failed to clear the threshold equal-protection inquiry, so the court did not have to apply *any* level of constitutional scrutiny.

Clarity on the level of scrutiny—if any—applicable to transgender inmates' sex-discrimination claims is exceedingly important. Under *Turner*, it is the plaintiff's burden to "show that any 'difference in

treatment was not reasonably related to' its 'legitimate penological interest[]' in institutional security." (Pet. App. 99a (Tymkovich, J., dissenting) (quoting *Fogle v. Pierson*, 435 F.3d 1252, 1261 (10th Cir. 2006)).) Such review is dispositive in cases like this one where the "obvious" reason "for the jail's sex-based classifications is that doing so is the best way to regulate institutional security in the dynamic jail environment," like a county jail. (*Id.* at 101a.)

Under heightened scrutiny, however, the prison official must prove "a justification for the sex-based classification that is 'exceedingly persuasive,' and that classification must serve 'important governmental objectives' through means 'substantially related to' achieving those objectives." (*Id.* at 31a (majority op.) (quoting *Doe through Doe v. Rocky Mountain Classical Acad.*, 99 F.4th 1256, 1260 (10th Cir. 2024), and *VMI*, 518 U.S. at 524).) This is antithetical to *Turner*'s core teaching of deference to legitimate penological interests and trusting (not disregarding) administrative expertise in the "inordinate[] difficult[y]" of running prisons and jails. (*Id.* at 90a (Tymkovich, J., dissenting) (collecting cases).) Throwing away *Turner* in transgender-inmate litigation also means these cases will increase the time and expense of litigation because, ultimately, the cases will turn on what the finder of fact "believes" in terms of science and the fierce social debate surrounding transgender identity. It is highly unlikely a factfinder is going to credit "important government objectives" of classifying based on biological sex if the factfinder doubts the existence of a binary sex dichotomy altogether. This is why *Turner* must apply. Prisons aren't reflective of society writ large—they are dynamic places that are often volatile and unpredictable, requiring prison officials to

manage the risk for all, including segregating inmates and detainees based on sex.[4]

At present, how courts approach equal-protection claims by transgender inmates, including the legal standards they apply, depends entirely on the jurisdiction in which inmates are housed. That is untenable. Only this Court can resolve who is right on the level of constitutional scrutiny.

B. The majority disregarded the Court's strip-search precedent by announcing there can be no "legitimate penological purpose" for cross-identified-gender searches

The "ultimate measure of the constitutionality of a governmental search is 'reasonableness,'" *Carpenter v. United States*, 585 U.S. 296, 316 (2018) (cleaned up). The reasonableness standard "is not capable of precise definition or mechanical application," but rather requires "balancing … the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The Court made plain in *Bell*—and reaffirmed in *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318 (2012)—that, "[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the

[4] Federal regulations acknowledge the inherent need for penological deference. *See* 28 C.F.R. § 115.42 (acknowledging prison and jail officials' discretion to consider many factors in making housing decisions for transgender inmates—including the health and safety of the inmate, the inmate's stated preference, and whether the placement would present safety and management concerns—and to ultimately choose a housing placement that differs from the inmate's stated preference).

inmates," visual body-cavity inspections in prisons are constitutionally permissible. *Id.* at 560.

Of course, this must be the case. "Maintaining safety and order at [federal, state, and local] institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face." *Florence*, 566 U.S. at 326. The Court has consistently "confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.'" *Id.* (quoting *Turner*, 482 U.S. at 89).

This Court has never said cross-sex—much less cross-identified-gender—searches are unconstitutional. To be sure, over the last thirty years inmates have regularly challenged cross-*sex* strip searches in prisons. *See Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1146 (9th Cir. 2011) (describing the "litany of cases" over the last thirty years). But even there, no circuit has ruled that such searches are categorically off limits. They universally recognize that "emergency or exigent circumstances" may require such searches, *id.* at 1143, and still other circuits have upheld policies that delegate the decision-making authority to use cross-sex searches to prison officials, *see Oliver v. Scott*, 276 F.3d 736, 743 (5th Cir. 2002).

Here, the Tenth Circuit held that, absent emergency circumstances, there can be "*no* 'legitimate penological purpose'" for a cross-identified-*gender* search and that prison officials must accept the gender by which the inmate identifies, even if the chosen identity is inconsistent with biological characteristics (e.g., a transgender female inmate with male genitals) and

even if the chosen identity changes over time (e.g., an inmate vacillates between identifying consistent with and inconsistent with biology), without regard to any other legitimate interests. (*See* Pet. App. 59a.)

This novel ruling is a watershed in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. Now officials in this six-state area—from the highly secure federal correctional facilities in Florence, Colorado, to the smallest local county and municipal jail in Kansas and Oklahoma—must eschew same-sex search policies in favor of recognizing a new constitutional right that "requires female deputies to strip search biologically male inmates who identify as women." (*Id.* at 105a (Tymkovich, J., dissenting).) The Tenth Circuit's new gender-identity rule is clearly wrong as against *Bell* and *Florence*.

"[I]t is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex." (*Id.* at 58a (majority op.).) But what about the female prison officers who must perform the search? As Judge Tymkovich recognized, under Griffith's view "female guards will now have to perform cross-sex strip searches. Dignitary interests run both ways." (*Id.* at 102a, n.45 (Tymkovich, J., dissenting).) To the majority, it is constitutionally required for a female deputy to search Griffith's naked body in private, including examining Griffith's penis and scrotum. But such a rule has it exactly backwards.

The Tenth Circuit's rule will also *remove* prison officials' discretion to shape search policies that promote compassion and understanding while maintaining security and privacy interests of the institution. Take the search policy at issue here. The County assigned a female deputy to search Griffith above the

waist because Griffith had developed female secondary sex characteristics, including breasts, from the feminizing hormones she was taking. (*Id.* at 7a–8a.) But, because Griffith still had male genitals, the County assigned a male deputy to search Griffith below the waist. (*Id.* at 8a–9a.) This was a commendable effort in keeping with *Turner* to apply administrative expertise to solve a present problem while affording Griffith as much dignity and respect as possible during the visual search process. Running prisons "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 85. The Tenth Circuit's decision, however, subordinates administrative expertise to an inmate's chosen gender and fundamentally upends the inmate-jailer power dynamic by forcing officers to defer to an inmate's stated preferences. It also ignores the ever-changing situations of a jail setting, including the availability of male and female officers in varying detention settings, the fact that one's chosen gender does not always correspond with one's reproductive anatomy, and the fact that an inmate's gender identity could easily change over the course of incarceration for both legitimate and illegitimate reasons.

The Tenth Circuit's new rule is unworkable and forces a lose-lose on prison officials and officers. It is also out of step with clear precedent from this Court, requiring immediate intervention.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court should decide the important prison-administration questions presented. If it does

not decide these questions now, the Court should at least grant, vacate, and reverse the Tenth Circuit's decision. The majority decision relied extensively on *Fowler v. Stitt*, 104 F.4th 770, 789 (10th Cir. 2024), to anchor its erroneous equal-protection analysis, and the Court has already reversed and vacated that decision in *Stitt v. Fowler*, 145 S. Ct. 2840 (2025). It should at a minimum do the same here.

Respectfully submitted,

MICHAEL FRANCISCO
FIRST & FOURTEENTH, PLLC
800 Connecticut Ave NW,
Suite 300
Washington, DC 20006
(202) 998-1978

NATHAN J. WHITNEY
First Asst. County Attorney
STEVEN W. MARTYN
Senior County Attorney
EL PASO COUNTY
ATTORNEY'S OFFICE
200 S. Cascade Avenue
Colorado Springs, CO 80903
(719) 520-6485

HEIDI K. WILLIAMS
Senior County Attorney/
Sheriff's Legal Advisor
EL PASO COUNTY
SHERIFF'S OFFICE
27 East Vermijo Avenue
Colorado Springs, CO 80903
(719) 520-7264

JULIAN R. ELLIS, JR.
Counsel of Record
CHRISTOPHER O. MURRAY
LAURA J. ELLIS
FIRST & FOURTEENTH, PLLC
2 N. Cascade Avenue,
Suite 1430
Colorado Springs, CO 80903
(719) 428-4937
julian@first-fourteenth.com

Attorneys for Petitioners

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