APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DARLENE GRIFFITH,
Plaintiff -Appellant,

v.

EL PASO COUNTY, COLORADO; BILL ELDER, in his individual and official capacities; CY GILLESPIE, in his individual capacity; ELIZABETH O'NEAL, in her individual capacity; ANDREW MUSTAPICK, in his individual capacity; DAWNE ELLISS, in her individual capacity; TIFFANY NOE, in her individual capacity; BRANDE FORD, in her individual capacity,
Defendants - Appellees.

No. 23-1135

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; THE ARC OF THE UNITED

STATES; AUTISTIC SELF ADVOCACY NETWORK; AUTISTIC WOMEN AND NONBINARY NETWORK; THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW; THE COELHO CENTER FOR DISABILITY LAW POLICY AND INNOVATION; CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER; DISABILITY LAW COLORADO; DISABILITY RIGHTS ADVOCATES; DISABILITY RIGHTS BAR ASSOCIATION; IMPACT FUND; NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY; NATIONAL DISABILITY RIGHTS NETWORK; TRANSGENDER LEGAL DEFENSE & EDUCATION FUND; UNITED STATES OF AMERICA; AMERICAN CIVIL LIBERTIES

UNION; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; JEREMIAH HO; M. DRU LEVASSEUR; NANCY C. MARCUS; DARA E. PURVIS; ELIOT T. TRACZ; ANN E. TWEEDY; KYLE COURTENAY VELTE; EZRA ISHMAEL YOUNG,
Amici Curiae.

FILED February 19, 2025

[129 F.4th 790]

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:21-CV-00387-CMA-NRN)

Devi M. Rao of Roderick & Solange, Washington, DC (Meghan Palmer and Wynne Muscatine Graham of Roderick & Solange, Washington, DC and Andrew McNulty and Mari Newman of Newman|McNulty, Denver, Colorado with her on the briefs), for Plaintiff-Appellant.

Christopher Michael Strider of El Paso County Attorney's Office, Colorado Springs, Colorado (Nathan J. Whitney and Steven W. Martyn, El Paso

County Attorney's Office of Colorado Springs, Colorado, on the brief), for Defendant-Appellees.

Matthew Drecun of U.S. Department of Justice Civil Rights Division, Washington, DC (Kristen Clarke, Assistant Attorney General, Tovah R. Calderon and Jonathan L. Backer of U.S. Department of Justice Civil Rights Division, Washington, DC, with him on the brief), for the United States.

Cynthia L. Rice of Civil Rights Education and Enforcement Center, Denver, Colorado and Maria Michelle Uzeta of Disability Rights Education & Defense Fund of Berkeley, California filed an amici curiae brief for Disability Rights Education and Defense Fund, The Arc of the United States, Autistic Self Advocacy Network, Autistic Women and Nonbinary Network, The Judge David L. Bazelon Center for Mental Health Law, The Coelho Center for Disability Law, Policy and Innovation, Civil Rights Education and Enforcement Center, Disability Law Colorado, Disability Rights Advocates, Disability Rights Bar Association, Impact Fund, National Association for Rights Protection and Advocacy, National Disability Rights Network, and Transgender Legal Defense & Education Fund.

Anna I. Kurtz and Timothy R. MacDonald of ACLU of Colorado, Denver, Colorado and Harper S. Seldin of American Civil Liberties Union Foundation, New York, New York filed amici curiae brief for American Civil Liberties Union and the American Civil Liberties Union of Colorado.

Kyle C. Velte of University of Kansas School of Law, Lawrence, Kansas and Ezra Ishmael Young of Law Office of Ezra Young, Ithaca, New York filed amici curiae brief for Legal Scholars of Sex and Gender.

Before TYMKOVICH, EBEL, and **ROSSMAN**, Circuit Judges.

ROSSMAN, Circuit Judge.

Plaintiff-Appellant Darlene Griffith, a transgender woman, filed a civil rights lawsuit concerning her pretrial confinement at the El Paso County Jail in Colorado. The district court dismissed Ms. Griffith's complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Ms. Griffith now seeks reversal. She specifically appeals the dismissal of her constitutional claims under 42 U.S.C. § 1983 and her claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act.

Exercising jurisdiction under 28 U.S.C. § 1291, we conclude remand is required, but only on some of Ms. Griffith's claims.

As we will explain, we reverse and remand for further proceedings on Ms. Griffith's Fourteenth Amendment Equal Protection claim against Sheriff Elder in his official capacity, Fourth and Fourteenth Amendment cross-gender search claims against Sheriff Elder in his official capacity, and Fourth Amendment abusive search claim against Deputy Mustapick. We vacate the district court's order dismissing Ms. Griffith's ADA and Rehabilitation Act

claims under Federal Rule of Civil Procedure 12(b)(6) because those claims were dismissed without prejudice for lack of subject matter jurisdiction under Rule 12(b)(1) and that ruling is unchallenged on appeal. We otherwise affirm.

I[1]

The legal issues before us require discussing fundamental aspects of a person's identity. We thus begin with an overview of the complaint's allegations about sex and gender.[2] We then describe the factual and procedural background underlying this appeal and consider Ms. Griffith's appellate challenges.

A

Sex is, generally speaking, assigned at birth by reference to one's anatomy. Gender identity is an "innate, internal sense of one's sex." R.31 ¶ 21. According to Ms. Griffith, "[m]ost people's gender identity is consistent with the sex they were assigned at birth." R.31 ¶ 21. People whose gender identity

[1] We take the facts from the well-pleaded allegations in the operative complaint.

[2] The dissent rejects these allegations because "Ms. Griffith defines 'sex' ... without citation, and avoids defining gender." Dissent at 837. The dissent proffers its own explanations of those terms, rooted in sources other than the complaint. *See* Dissent at 837-38. At this procedural stage, as is consistent with our typical practice, we rely only on "the allegations within the four corners of the complaint" and "tak[e] those allegations as true." *Issa* v. *Comp USA*, 354 F.3d 1174, 1177 (10th Cir. 2003) (quoting *Mobley* v. *McCormick*, 40 F.3d 337, 340 (10th Cir. 1994)).

conforms to their biological sex are cisgender. Transgender people "have a gender identity that is different from their assigned sex." R.31 ¶ 21. The gender identity of a transgender person "is a basic part of [their] core identity." R.31 ¶ 21.

Some transgender people experience gender dysphoria. The American Psychiatric Association recognizes gender dysphoria as a medical condition characterized by the "significant distress that may accompany the incongruence between a transgender person's gender identity and assigned sex." R.31 ¶ 22. "The accepted course of medical treatment to alleviate the symptoms of gender dysphoria often involves allowing the individual to live as his or her chosen gender." R.31 ¶ 24. This can include changes to the way one dresses, grooms, or otherwise presents to be consistent with their gender identity. Gender dysphoria can be treated with hormone therapy, psychotherapy, or surgery to change "primary and/or secondary sex characteristics." R.31 ¶ 24. When gender dysphoria is left untreated, or is inadequately treated, it produces "intense emotional suffering, anxiety and depression, suicidality, and thoughts or acts of self-harm." R.33–34 ¶ 37.

B

Ms. Griffith is transgender and has been living openly as a woman for over twenty years. She has been diagnosed with gender dysphoria. "As part of her medically supervised treatment," Ms. Griffith "changed her name and altered her physical appearance to conform to her female gender identity." R.32 ¶ 25. She dresses in feminine attire and takes feminizing hormones, which have caused her to develop "female secondary sex characteristics such as

breasts, soft skin, a lack of facial hair, and other characteristics typically associated with women." R.32 ¶ 25.

Ms. Griffith entered El Paso County Jail (Jail) as a pretrial detainee in the summer of 2020. She asked to be housed in a female unit. Ms. Griffith explained she was a transgender woman and, as her medical records confirmed, had gender dysphoria. Ms. Griffith feared "being constantly searched by male guards" and "being considered a man." R.37 ¶ 48. She also "feared being sexually abused and assaulted in male facilities by both guards and inmates." R.37 ¶ 48.[3]

According to Ms. Griffith, the Jail maintains an "official policy"—"promulgat[ed] and carr[ied] out" by "Defendants Elder and Gillespie"—of making custodial housing assignments "on the basis of the individual's genitalia" (Housing Policy). R.35 ¶ 42. The Jail thus "refuses to house transgender women in female housing facilities" and instead places "transgender women ... in male units within the El Paso County Jail." R.37 ¶ 51. Appellee Deputy Tiffany Noe was involved in Ms. Griffith's intake screening. Deputy Noe assigned Ms. Griffith to male housing, pursuant to the Jail's Housing Policy.

Ms. Griffith also underwent a visual body cavity examination—also known as a strip search—during the intake process. Ms. Griffith contends "official policy" at the Jail dictates "transgender women (including those with Gender Dysphoria) are searched, including strip searched, by male staff and not by female staff" (Search Policy). R.41 ¶ 71. Appellee Deputy Dawne Elliss, a female, and Appellee

[3] Ms. Griffith is also legally blind.

Deputy Andrew Mustapick, a male, searched Ms. Griffith. Before the search started, Ms. Griffith asked several times for Deputy Mustapick to leave the room. Deputy Elliss told Ms. Griffith a male deputy would have to search her "pursuant to El Paso County policy and procedure" because "she was 'still a male' in El Paso County's 'system.' " R.41–42 ¶ 74.

With Deputy Mustapick present, Deputy Elliss told Ms. Griffith to remove her shirt. She examined Ms. Griffith's bare breasts. Deputy Elliss then left Ms. Griffith alone with Deputy Mustapick. Deputy Mustapick "ordered Ms. Griffith to take off her socks, pants, and panties" and place her hands on the wall. R.42 ¶ 77. He told Ms. Griffith to "step back, bend over, and 'spread [her] sexy cheeks.' " R.42 ¶ 77. Deputy Mustapick said he was " 'going to go balls deep in that ass' while grabbing his own penis." R.42 ¶ 78. He was "extremely aggressive while searching Ms. Griffith's genitals." R.42 ¶ 78. Deputy Mustapick "warned [Ms. Griffith] that she had better not tell anyone about what he did and said to her" during the strip search—otherwise, "he would make sure that she was brutalized by the guards at El Paso County Jail." R.42 ¶ 79.

A few days after intake, Ms. Griffith asked Appellee Deputy Brande Ford to transfer her out of the male housing unit and into female housing. Deputy Ford refused. Ms. Griffith alleges "housing her in an all-male unit subjected her to a risk of sexual harassment, sexual assault, and extreme emotional distress from being treated as a man." R.53 ¶ 146. In her complaint, Ms. Griffith describes experiencing mistreatment by Jail staff and fellow inmates during her pretrial confinement. Following "official El Paso County policy" male deputies "continuous[ly]"

subjected Ms. Griffith to cross-gender pat-down searches. R.44 ¶ 89. Ms. Griffith claims male deputies regularly touched "her breast[s] and groin when patting her down." R.44 ¶ 90. And the Jail allowed male deputies to search Ms. Griffith without a female deputy present. R.45 ¶ 94. Ms. Griffith experienced anxiety and exacerbated symptoms of gender dysphoria.

Ms. Griffith claims she was sexually assaulted by a fellow inmate in the male housing unit. While "lying in her bunk in the all-male unit," Ms. Griffith alleged, another inmate "groped her right breast" and told her "you know you want this dick." R.43 ¶ 85. Ms. Griffith was "so distressed that she asked to see a mental health provider." R.43 ¶ 86. A witness "told El Paso County officials that he witnessed at least three to four other similar assaults of Ms. Griffith." R.44 ¶ 87.[4]

Ms. Griffith also claims the Jail would not allow her to have a sports bra and women's underwear—products provided to cisgender women at the Jail. Several months after intake, Ms. Griffith wrote a grievance requesting the items. In response to her grievance, the Jail provided Ms. Griffith with a sports bra but continued to deny her request for female underwear because "she did not need to 'hold female

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[4] Ms. Griffith alleged Jail staff intentionally made the situation worse. A few months into her detention, Ms. Griffith informed a deputy at the Jail she was uncomfortable that the other inmates in her unit were not wearing shirts. The deputy then walked over to the male inmates and yelled, "the blind faggot said you need to put your shirts on." R.46 ¶ 100. According to Ms. Griffith, this statement was "designed to create an antagonistic relationship between her and other inmates, placing her at an even greater risk of assault." R.46 ¶ 100.

products down there.' " R.48 ¶ 111. Appellee Cy Gillespie, a commander at the Jail, told Ms. Griffith she would "never get panties in the El Paso County Jail." R.49 ¶ 114. Ms. Griffith further alleges "[c]isgender women [were] allowed to purchase lipstick at the commissary," but Commander Gillespie told her she could not, "per El Paso County Jail policy" (Commissary Policy). R.49 ¶ 117.[5] She alleges this Commissary Policy is, in turn, a result of "Defendant Elder's policy of housing Ms. Griffith in a male unit," as well as "customs and practices ... that condone discriminatory treatment of transgender prisoners." R.49 ¶ 118.

Ms. Griffith regularly complained to officials at the Jail about her alleged mistreatment. She also submitted at least six grievances, which she believed would be transmitted to Commander Gillespie. The grievances described Ms. Griffith's gender dysphoria, her extreme anxiety, and the hardship she experienced in the men's housing unit. She explicitly requested to be housed with other women.[6] Ms. Griffith also filed grievances concerning the cross-gender searches and the Jail's refusal to allow her to

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[5] We use the term Commissary Policy to refer to the allegations in Ms. Griffith's complaint about both the Jail's policy of refusing to issue transgender female inmates products available to cisgender female inmates and the Jail's policy of prohibiting transgender women from buying those products at the commissary.

[6] At least one of Ms. Griffith's grievances informed the Jail she "had previously been housed in female units in other correctional facilities." R.38 ¶ 58. The response informed Ms. Griffith "she would continue to be housed in a male unit based on El Paso County's policies and procedures." R.38 ¶ 58.

"dress in accordance with her gender identity." R.48 ¶¶ 110–112.

Due to the pervasive mistreatment stemming from the Jail's policies, Ms. Griffith told jail staff she planned to "remove her penis herself once she could figure out how to do it." R.47 ¶ 104. Ms. Griffith has a long history of self-harm, including "self-castration behavior," when her gender dysphoria is not "accommodated and treated." R.34 ¶ 38. During her pretrial confinement at the Jail, Ms. Griffith wrapped "a rubber band around her genitalia extremely tightly with the purpose of self-castration." R.41 ¶ 69.

C

Ms. Griffith alleged sixteen claims under federal and state law, and named as defendants El Paso County, Sheriff Elder, Commander Gillespie, and Deputies O'Neal, Mustapick, Elliss, Noe, and Ford.[7] Ms. Griffith did not plead every claim against every defendant. We identify the relevant defendants and the claims against them when discussing the issues on appeal.

As relevant to this appeal, Ms. Griffith alleged four constitutional claims under 42 U.S.C. § 1983: (1) a claim under the Equal Protection Clause of the Fourteenth Amendment against all defendants challenging the Jail's policies that required housing her in an all-male unit and denying her clothing and products available to cisgender female inmates; (2) a Fourteenth Amendment substantive due process

[7] Ms. Griffith first filed a *pro se* lawsuit in February 2021. Counsel was soon appointed. The Third Amended Complaint is the operative pleading before us.

claim against Sheriff Elder and Deputies Noe and Ford alleging unconstitutional conditions of confinement at the Jail; (3) a Fourth Amendment claim against Sheriff Elder and Deputies Mustapick and Elliss challenging the abusive cross-gender strip search; and (4) a Fourteenth Amendment claim against Sheriff Elder, Commander Gillespie, and Deputies Mustapick and Elliss alleging the strip search violated Ms. Griffith's rights to privacy and bodily integrity. Ms. Griffith also alleged El Paso County violated the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et. seq*., and the Rehabilitation Act, 29 U.S.C. § 701, *et. seq*., because the Jail refused to accommodate her gender dysphoria.

Appellees moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court referred the motion to a magistrate judge. After briefing and oral argument, the magistrate judge recommended granting the motion to dismiss. Ms. Griffith objected to the magistrate judge's recommendation under Federal Rule of Civil Procedure 72(b). The district court fully adopted the recommendation and dismissed Ms. Griffith's complaint. This timely appeal followed.

II

Appellees first insist "the firm waiver rule forecloses this appeal." Resp. Br. at 14. We are not persuaded.

Federal Rule of Civil Procedure 72(b)(2) permits a party to "serve and file specific written objections" to a magistrate judge's recommendation. The district court must then "determine de novo any part of the

magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). We have "adopted a firm waiver rule" that "provides that the failure to make timely objection ... waives appellate review of both factual and legal questions." *Casanova* v. *Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010) (alteration in original) (quoting *Wirsching* v. *Colorado*, 360 F.3d 1191, 1197 (10th Cir. 2004)). A "district court's decision to review [a recommendation] *de novo*, despite the lack of an appropriate objection, does not, standing alone, preclude application of the [firm] waiver rule" on appeal. *Vega* v. *Suthers*, 195 F.3d 573, 580 (10th Cir. 1999).

Appellees contend Ms. Griffith "failed to make *specific* objections to the Recommendation below," so appellate review in this court is foreclosed. Resp. Br. at 14 (emphasis added). We disagree. To preserve an issue for appellate review, a party's objections to the magistrate judge's report and recommendation need only be "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *United States* v. *2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996) (citing *Thomas* v. *Arn*, 474 U.S. 140, 147, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985)); *see Silva* v. *United States*, 45 F.4th 1134, 1136 n.2 (10th Cir. 2022) (firm waiver rule applied where plaintiff "only offered a single sentence about *Bivens* and cited authority addressing claims under 42 U.S.C. § 1983"); *Ayala* v. *United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (firm waiver rule applied where plaintiff wholly failed to object to magistrate judge's recommendation). Ms. Griffith's objection satisfied this standard.

Ms. Griffith filed a timely objection to the magistrate judge's recommendation. Her objection

spanned 30 pages, with each section identifying the magistrate judge's alleged errors and advancing arguments to support reversal. It is true the arguments in Ms. Griffith's objection could have been better developed. As the district court correctly observed, Ms. Griffith at times "merely reargue[d] her positions and ask[ed] the Court to interpret the facts and authorities differently in order to arrive at a more favorable result." R.140. But the firm waiver rule does not bar this appeal. We will discuss specific preservation problems in connection with our substantive analysis.

III

We now proceed to Ms. Griffith's Equal Protection claim. Ms. Griffith alleged the Jail's Housing Policy assigns inmates to housing units "solely on the basis of [their] genitalia." R.35 ¶ 42. When Ms. Griffith arrived at the Jail, Deputy Noe "classified Ms. Griffith" as a man and, pursuant to the Housing Policy, "placed her into an all-male unit despite knowing that Ms. Griffith is a transgender woman." R.37 ¶ 54. Ms. Griffith further alleged the Jail's Commissary Policy prohibited her from obtaining female underwear or lipstick because of her sex. R.48–50 ¶¶ 111–19. Specifically, she claims the Jail suggested she could receive female underwear only if she "need[ed] to 'hold female products down there,' " an allusion to her lack of female anatomy. R.48 ¶ 111. And she alleges she was denied "the ability to purchase lipstick because she is a transgender woman," whereas "[c]isgender women are allowed to purchase lipstick." R.49 ¶ 117. The Housing and Commissary Policies are sex classifications, Ms. Griffith explained, because "discrimination against

transgender people is a form of sex discrimination." R.50 ¶ 125; *see also* Aplt. June 20, 2024, Rule 28(j) Ltr. at 1 ("[T]he County's policy of housing transgender women solely on the basis of their biological sex discriminates on the basis of sex, and is subject to intermediate scrutiny."). These policies are thus subject to heightened scrutiny under the Equal Protection Clause. The district court—applying rational-basis review—dismissed the Equal Protection claim under Rule 12(b)(6).

We review *de novo* a dismissal for failure to state a claim. *Clinton* v. *Sec. Benefit Life Ins. Co.*, 63 F.4th 1264, 1274 (10th Cir. 2023). When reviewing a Rule 12(b)(6) dismissal, we "accept a complaint's well-pleaded allegations as true, viewing all reasonable inferences in favor of the nonmoving party, and liberally construe the pleadings." *Lucas* v. *Turn Key Health Clinics, LLC*, 58 F.4th 1127, 1136 (10th Cir. 2023). With these standards in mind, we consider whether Ms. Griffith stated a plausible Equal Protection claim. As we explain, she has.

The Housing Policy and the Commissary Policy are sex classifications.[8] As alleged, the Jail uses an inmate's biological sex to determine where they will be housed during pre-trial detention and whether they will receive, or be allowed to purchase, certain products from the commissary. In *Fowler* v. *Stitt*, this court explained "in *Bostock* .... the [Supreme] Court

[8] We describe the Jail's policies according to the allegations in Ms. Griffith's complaint. *Waller* v. *City & Cnty. of Denver*, 932 F.3d 1277, 1286 n.1 (10th Cir. 2019) (" '[A] Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true,' and we will not consider evidence or allegations outside the four corners of the complaint ...." (quoting *Mobley*, 40 F.3d at 340)).

held, '[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." 104 F.4th 770, 789 (10th Cir. 2024) (quoting *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 660, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020)). Here, as in *Fowler*, the challenged "[p]olic[ies] intentionally treat[ ] [detainees] differently because of their sex assigned at birth." *Id.* at 789. Specifically, the Jail 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. "Accordingly, [Ms. Griffith] ha[s] plausibly alleged the [Housing and Commissary] Polic[ies] ... discriminate[ ] on the basis of sex." *Id.* at 794.

The Supreme Court has made clear "all" sex-based classifications "warrant heightened scrutiny." *United States* v. *Virginia* (*VMI*), 518 U.S. 515, 555, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (quoting *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 136, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)). And under that standard, Ms. Griffith has plausibly alleged the Housing and Commissary Policies impermissibly perpetuate sex-based stereotypes and harms. The Policies might ultimately survive heightened scrutiny, but that issue is not before us. This appeal presents only the antecedent questions relevant at the motion to dismiss stage: does a sex classification exist, and has Ms. Griffith plausibly stated an Equal Protection claim? We answer yes to both. While we find Ms. Griffith plausibly alleged an Equal Protection violation, we must affirm as to all but one defendant—Sheriff Elder, sued in his official

capacity—because the individual defendants are entitled to qualified immunity on this claim.

A

The Equal Protection Clause of the Fourteenth Amendment provides "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Government action triggers the Equal Protection Clause when it "affect[s] some groups of citizens differently than others." *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 601, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008) (quoting *McGowan* v. *Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)). "At a minimum," the Equal Protection Clause requires that any government classification or differentiation between classes of people "must be rationally related to a legitimate governmental purpose." *Clark* v. *Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). This standard is termed rational-basis review, and it applies when government action implicates neither "a fundamental right nor classif[ies] along suspect lines." *Burlington N. R. Co.* v. *Ford*, 504 U.S. 648, 651, 112 S.Ct. 2184, 119 L.Ed.2d 432 (1992).

Ms. Griffith challenges government action that classifies based on sex. Until the 1970s, the Supreme Court reviewed sex-based classifications deferentially. *See VMI*, 518 U.S. at 531–32, 116 S.Ct. 2264. But it is now firmly established the Equal Protection Clause requires courts to apply "a heightened standard of review" to government classifications "based on gender." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S.Ct.

3249, 87 L.Ed.2d 313 (1985).[9] Heightened scrutiny is warranted because sex "generally provides no sensible ground for differential treatment," *id.*, and because sex-based reasoning all too often reflects stereotypes or "overbroad generalizations about the different talents, capacities, or preferences of males and females," *VMI*, 518 U.S. at 533, 116 S.Ct. 2264. Sex classifications are thus only constitutional if they serve "important governmental objectives" through means "substantially related to" achieving those objectives. *Id.* (quoting *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)). This standard is stated unambiguously in our circuit's precedents. *See Doe ex rel. Doe* v. *Rocky Mountain Classical Acad.*, 99 F.4th 1256, 1258 (10th Cir. 2024) ("For the last forty-seven years, the Supreme Court has recognized only one test for determining whether a sex-based classification violates the right to equal protection under the Fourteenth Amendment."); *Free the Nipple-Fort*

[9] We note courts, including the Supreme Court, at times refer to sex and gender interchangeably in the Equal Protection context. *See, e.g.*, *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 728, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."); *VMI*, 518 U.S. at 532–34, 116 S.Ct. 2264 (using "sex" and "gender" interchangeably). Absent argument from the parties, we "treat this line of cases on perhaps its narrower terms—that is, as referring to classifications based on biological sex." *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 n.8 (4th Cir. 2020), *as amended* (Aug. 28, 2020). According to our reasoning in *Fowler* v. *Stitt*, "intend[ing] to discriminate based on transgender status ... necessarily [entails] intend[ing] to discriminate based in part on sex," understood as biological sex assigned at birth. 104 F.4th 770, 793 (10th Cir. 2024).

Collins v. *City of Fort Collins, Colo.*, 916 F.3d 792, 799 (10th Cir. 2019) ("[G]ender-based classifications 'call for a heightened standard of review,' ... a standard dubbed 'intermediate scrutiny' ...." (first quoting *City of Cleburne*, 473 U.S. at 440, 105 S.Ct. 3249; and then quoting *Clark*, 486 U.S. at 461, 108 S.Ct. 1910)).

Ms. Griffith separately alleged Appellees violated the Equal Protection Clause because transgender status is a quasi-suspect class. When government action classifies based on membership in a quasi-suspect class, heightened scrutiny applies. *City of Cleburne*, 473 U.S. at 442–43, 105 S.Ct. 3249. The Supreme Court has articulated four factors to guide the protected-class analysis: (1) whether the class has historically been subject to discrimination, *Bowen* v. *Gilliard*, 483 U.S. 587, 602, 107 S.Ct. 3008, 97 L.Ed.2d 485 (1987); (2) whether the class has a defining characteristic that bears a relation to its ability to perform or contribute to society, *City of Cleburne*, 473 U.S. at 440–41, 105 S.Ct. 3249; (3) whether the class can be defined as a discrete group by obvious, immutable, or distinguishing characteristics, *Bowen*, 483 U.S. at 602, 107 S.Ct. 3008; and (4) whether the class is a minority lacking political power, *id*. However, we need not consider the quasi-suspect-class issue to resolve this appeal.

B

Appellees moved to dismiss Ms. Griffith's Equal Protection claim under *Brown* v. *Zavaras,* 63 F.3d 967, 971 (10th Cir. 1995). In *Brown*, a *pro se* transgender plaintiff brought an Equal Protection challenge to a prison's refusal to provide hormone therapy. 63 F.3d at 968–69, 972. The plaintiff argued he was discriminated against based on transgender

status. *Id.* at 970–71. The district court determined transgender people were not a protected class and therefore analyzed the claim using rational-basis review. *Id. Brown* recognized the Ninth Circuit had previously held a transgender plaintiff was not part of a protected class. *Id.* at 971 (citing *Holloway* v. *Arthur Anderson & Co.*, 566 F.2d 659, 663 (9th Cir. 1977)). But the panel observed "research concluding sexual identity may be biological" called that decision into question. *Id.* Still, following the Ninth Circuit's approach, we held "Mr. Brown is not a member of a protected class in this case." *Id.*

Relying centrally on *Brown*, Appellees contended the Jail's policies are subject to rational-basis review because "[t]ransgender is not a suspect or quasi-suspect class." SR.25. In response, Ms. Griffith maintained the Jail's Housing and Commissary policies are sex classifications, which warrant the application of heightened scrutiny. And, separately, Ms. Griffith contended that, notwithstanding the outcome in *Brown*, transgender people are members of at least a quasi-suspect class.

The magistrate judge recommended dismissing Ms. Griffith's Equal Protection claim under Federal Rule of Civil Procedure 12(b)(6). *Brown* compelled the conclusion, the magistrate judge reasoned, that a transgender person is "not a member of a protected class" and thus rational-basis review applied to Ms. Griffith's Equal Protection claim.[10] R.100–04. Under

[10] The magistrate judge urged this court to "revisit its holding" in *Brown*. R.102. And according to the magistrate judge, if he "were to apply the four-factor test used to determine whether a group constitutes a suspect or quasi-suspect class ... transgender people easily check all the boxes." R.103. He explained transgender people have "historically been subject to

that standard, the magistrate judge found Ms. Griffith had "not adequately alleged that there is no rational reason for Defendants to house transgender women in all-male units and not provide them with feminine products." R.106. The magistrate judge did not address the portion of Ms. Griffith's Equal Protection claim challenging the Housing and Commissary Policies as *sex classifications*.

Ms. Griffith objected to the magistrate judge's recommendation. She argued the magistrate judge failed to consider whether the Jail's Housing and Commissary Policies classified based on sex. *Brown* could not control the disposition of the sex-classification component of her claim, Ms. Griffith contended, because *Brown* never "addressed whether discrimination against transgender individuals constitutes sex- or gender-based discrimination." SR.143. Separately, Ms. Griffith challenged the magistrate judge's conclusion that transgender people are not members of a quasi-suspect class. In reply, Appellees again argued only that *Brown* controlled and did not address the sex-classification aspect of the Equal Protection claim.

The district court agreed *Brown* compelled the application of rational-basis review to Ms. Griffith's Equal Protection claim.[11] The district court did not

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discrimination," have a "defining characteristic that bears" no relation to their "ability to perform or contribute to society," may be "defined as a discrete group by obvious, immutable, or distinguishing characteristics," and "lack[ ] political power." R.103. The district court agreed.

[11] When analyzing *Brown*'s applicability, the district court considered whether *Brown* was overruled by *Bostock* v. *Clayton County*, 590 U.S. 644, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020). R.141–42. The district court believed "*Brown* should be

consider Ms. Griffith's contention that *Brown* was simply *irrelevant* to the portion of her Equal Protection claim addressing sex classifications.

On appeal, Ms. Griffith challenges the dismissal of her Equal Protection claim on two grounds. *First*, she contends the district court did not consider whether the Housing and Commissary Policies classify based on sex—separate and apart from her claim that the Policies discriminate based on transgender status. "Even if *Brown* dictated that Ms. Griffith is not a member of a suspect class on the basis of her transgender *status*," she contends, "the challenged policies still trigger heightened scrutiny for the independent reason that they are sex-based *classifications*." Op. Br. at 24. *Second*, Ms. Griffith

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reconsidered" because, under applicable law, "transgender persons constitute a quasi-suspect class." R.143 (quoting *Grimm*, 972 F.3d at 611). "Untethered by *Brown*," the district court reasoned, it "would not hesitate to find that heightened scrutiny is warranted for Plaintiff's equal protection claim because transgender-based discrimination constitutes sex-based discrimination triggering intermediate scrutiny." R.143. But ultimately, the district court concluded *Brown* was dispositive, notwithstanding *Bostock*. We make two observations on this line of reasoning. First, as we will explain, *Brown* does not control the disposition of Ms. Griffith's Equal Protection claim. The Housing and Commissary Policies classify based on sex, and sex classifications "call for a heightened standard of review." *City of Cleburne*, 473 U.S. at 440, 105 S.Ct. 3249. Second, the district court correctly queried the import of *Bostock*, a Title VII case, on Equal Protection law. As we recently held in *Fowler*, 104 F.4th at 790, nothing about the Title VII context prevents "*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." And, as we will discuss, *Fowler*'s logic translates to this case.

continues to argue transgender status is at least a quasi-suspect class, and the district court mistakenly held otherwise.

We agree with Ms. Griffith's first argument, so we need not reach her second.

1

As alleged in Ms. Griffith's complaint, the Housing and Commissary Policies classify inmates according to biological sex, regardless of gender identity. R.40 ¶ 67 (arguing, by "hous[ing] transgender women in facilities that do not correspond with their gender identity, El Paso County is routinely discriminating against these women, including Ms. Griffith, based on their sex"); R.50 ¶ 119 ("El Paso County officials' actions in denying Ms. Griffith access to female undergarments and lipstick was a discriminatory action ...."). If an inmate has male genitalia, the inmate is assigned to the male housing unit and denied access to certain commissary products. If an inmate has female genitalia, the inmate is assigned to the female housing unit and allowed to receive or purchase those commissary products.

This policy operates regardless of whether an inmate is transgender or cisgender. In other words, all biological males—both cisgender men and transgender women—are classified as "male," with the attendant restrictions outlined above. So too with all biological females—both cisgender women and transgender men. As Ms. Griffith summarized in the context of the Housing Policy, the Jail makes these classifications "on the basis of the individual's genitalia" alone. R.35 ¶ 42. Thus, Ms. Griffith has

adequately alleged the Jail treats transgender women differently from cisgender women, which—as we will explain—means they treat individuals differently on the basis of sex.

Our decision in *Fowler* confirms the Housing and Commissary Policies are sex classifications subject to heightened scrutiny. In *Fowler*, plaintiffs challenged an Oklahoma policy "of refusing to provide transgender people with birth certificates that match their gender identity." 104 F.4th at 777. As the *Fowler* panel summarized,

> [b]efore the [birth certificate] 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.

Id. at 786. Based on the "totality of relevant facts," including that disparate impact, *id.*, this court then found "Plaintiffs have sufficiently alleged the Policy was motivated by an intent to treat transgender people differently" and "have thus adequately alleged the Policy purposefully discriminates against transgender people," *id.* at 788.

The *Fowler* panel next found this allegation to be sufficient to allege *sex* discrimination for purposes of "equal protection claims." *Id.* It adhered to the logic of *Bostock* that suggests a defendant "who intends to discriminate based on transgender status necessarily

intends to discriminate based in part on sex." *Id.* at 789. To illustrate, the panel looked at the situation of Ms. Fowler, a transgender woman who was barred from changing the sex on her birth certificate to match her gender identity: "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." *Id.* "So too," the panel continued, "for Mr. Hall and Mr. Ray," two transgender men in analogous situations: "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." *Id.* Because of this different treatment, this court concluded "Plaintiffs have plausibly alleged the Policy purposefully discriminates on the basis of sex." *Id.* at 794. The Equal Protection claim therefore survived a motion to dismiss, *id.* at 797—the same procedural stage at issue here.

Fowler's logic—grounded in *Bostock*—readily applies to Ms. Griffith's claim. "If her sex were different (i.e., if she had been assigned female at birth), then the [Housing and Commissary] Polic[ies] would not deny her a [housing arrangement and purchasable products] that accurately reflect[ ] her identity." *Id.* at 789. So, like the plaintiffs in *Fowler*, Ms. Griffith "ha[s] plausibly alleged the Polic[ies] purposefully discriminate[ ] on the basis of sex." *Id.* at 794.[12]

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[12] To clarify, "[a]n equal protection claim must allege that the challenged state action *purposefully* discriminates based on class membership." *Fowler*, 104 F.4th at 784 (emphasis added). But "[w]hen a distinction is facially apparent, purposeful discrimination is presumed and no further examination of intent is required." *Id.* The "distinction" in treatment between

Under these circumstances, heightened scrutiny applies.[13] *Free the Nipple-Fort Collins*, 916 F.3d at 801 ("Today, heightened scrutiny 'attends "all gender-based classifications." ' " (quoting *Sessions* v. *Morales-Santana*, 582 U.S. 47, 57, 137 S.Ct. 1678, 198 L.Ed.2d 150 (2017))); *see also Fowler*, 104 F.4th at 794 ("[T]he Policy discriminates based on sex, so intermediate scrutiny applies ....").[14] The district court was bound

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transgender and cisgender women—and thus between biological males and biological females—"is facially apparent" from Ms. Griffith's allegations about the Jail's policies at issue. When a transgender woman who is deemed biologically male reports to the Jail, she is denied female housing and certain commissary products; not so for women deemed biologically female. In other words, an inmate is treated differently precisely based on a determination of her biological sex. For that reason, discriminating between transgender and cisgender women is necessarily discriminating on the basis of sex.

[13] The dissent says "the implication of [our] reasoning is that housing inmates based on their biological sex is presumptively unconstitutional." Dissent at 836-37. Not so. For one, our holding is limited to the specific housing policy in this case. Ms. Griffith does not challenge *that* the Jail separates people based on sex; she challenges *how* it does so. Because the Jail treats transgender women differently from cisgender women, as we have explained, intermediate scrutiny applies. We need not decide whether any other policies trigger heightened scrutiny. Moreover, we have not considered at this procedural stage whether the challenged policies before us *withstand* heightened scrutiny. That is, we do not opine on whether they are constitutional whatsoever.

[14] And many of our sister circuits have similarly suggested when a policy makes decisions by reference to biological sex—including by treating transgender and cisgender people differently—that may constitute a sex classification subject to heightened scrutiny. *See Grimm*, 972 F.3d at 608 ("[W]hen a 'School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate,' the policy necessarily rests on a sex classification." (quoting *Whitaker ex*

to apply heightened scrutiny to analyze whether, based on the allegations in Ms. Griffith's complaint, the Housing and Commissary Policies serve "important governmental objectives" through means "substantially related to" achieving those objectives. *VMI*, 518 U.S. at 533, 116 S.Ct. 2264 (quoting *Miss. Univ. for Women*, 458 U.S. at 724, 102 S.Ct. 3331).

2

Why, then, did the district court rely on *Brown* to apply rational-basis review, asking only whether the Housing and Commissary Policies were rationally

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rel. Whitaker v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017))); *Hecox* v. *Little*, 104 F.4th 1061, 1074 (9th Cir. 2024), *as amended* (June 14, 2024) (affirming application of heightened scrutiny to policy "categorically excluding [transgender women] from female sports"); *Brandt ex rel. Brandt* v. *Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) ("The biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not. The Act is therefore subject to heightened scrutiny."). Others appear to have recognized this principle in at least some cases. *See Whitaker*, 858 F.3d at 1051 (like *Grimm*, holding when a "School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate," such a policy "is inherently based upon a sex-classification"); *Adams* v. *Sch. Bd.*, 57 F.4th 791, 801 (11th Cir. 2022) (*en banc*) (recognizing the same, but finding the policy at issue passed intermediate scrutiny). *But see K.C.* v. *Individual Members of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 617 (7th Cir. 2024) (holding "*Whitaker* did not hold that a state draws a sex-based classification each time it must reference sex to enforce the law," and declining to extend *Whitaker*'s heightened-scrutiny rule to a law restricting gender-transition procedures); *Eknes-Tucker* v. *Governor of Ala.*, 80 F.4th 1205, 1227–30 (11th Cir. 2023) (similarly declining to extend *Adams* to that context).

related to any legitimate government objective? Because, as Ms. Griffith correctly argues, it seems the district court considered only the portion of her Equal Protection Claim alleging transgender status is itself a protected class. *Brown* implicates, at most, that aspect of her claim. The district court did not pass on the separate component challenging sex classifications, over which *Brown* holds no sway.

Our decision in *Brown* was not about sex classifications. It addressed whether transgender status was a protected class under the Equal Protection Clause. When asked at oral argument to identify where in *Brown* we addressed sex classifications, Appellees' counsel directed us back to *Brown*'s protected class holding. Oral Arg. at 29:25–29:49 (Appellees' counsel stating *Brown* stands for a "fairly one-line holding that says transgender people are not a protected class under the Fourteenth Amendment"). *But see* Oral Arg. at 29:57–30:10 (Appellees' counsel stating *Brown* did not address the plaintiff's Equal Protection challenge as "gender classification").

Having concluded intermediate scrutiny applies, we need not also decide in this case whether transgender status is itself a protected class. *Burton* v. *United States*, 196 U.S. 283, 295, 25 S.Ct. 243, 49 L.Ed. 482 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."); *see also People for the Ethical Treatment of Prop. Owners* v. *U.S. Fish and Wildlife Serv.*, 852 F.3d 990, 1008 (10th Cir. 2017) ("If it is not necessary to decide more, it is necessary not to decide more." (quoting *PDK Labs., Inc.* v. *DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part)); *Griffin* v. *Davies*,

929 F.2d 550, 554 (10th Cir. 1991) ("We will not undertake to decide issues that do not affect the outcome of a dispute.").[15]

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[15] We recently took a similar approach in *Fowler*, where we declined to decide whether transgender status is a quasi-suspect class" because intermediate scrutiny applied regardless. 104 F.4th at 794. Still, Ms. Griffith urges us to "affirmatively address *Brown*, to avoid future confusion, as courts both within and outside this Circuit ... have continued to construe *Brown* as mandating rational-basis review of Equal Protection claims by transgender plaintiffs." Aplt. June 20, 2024, Rule 28(j) Ltr. at 1. We decline the invitation because answering that question is not necessary to resolving this appeal.

But there is good reason to think *Brown* would not control the protected-class issue. First, *Brown*'s holding was expressly limited to the situation and arguments then before us. *Brown*, 63 F.3d at 971 ("[W]e decline to make such an evaluation *in this case* because Mr. Brown's allegations are too conclusory to allow proper analysis of this legal question. We therefore ... hold that Mr. Brown is not a member of a protected class *in this case*." (emphasis added)).

Second, the *Brown* panel explicitly "decline[d]" to decide conclusively whether transgender people belonged to a protected class because the *pro se* plaintiff's "allegations [were] too conclusory to allow proper analysis of this legal question." *Id.*; *see Lowe* v. *Raemisch*, 864 F.3d 1205, 1209 (10th Cir. 2017) ("If an issue is ... reserved [in a decision of this court], the decision does not constitute a precedent to be followed." (quoting *United Food & Commercial Workers Union, Local 1564* v. *Albertson's, Inc.*, 207 F.3d 1193, 1199 (10th Cir. 2000))). Critical developments in legal precedent and societal understanding further reinforce that deciding whether transgender people are members of a protected class will require proper analysis in the appropriate case. *See generally Obergefell* v. *Hodges*, 576 U.S. 644, 673, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) ("[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."); Legal Scholar Br. at 16 ("A growing body of

C

With the level of scrutiny settled, we now look to the allegations in Ms. Griffith's complaint using the appropriate standard. "The heightened review standard our precedent establishes does not make sex a proscribed classification." *VMI*, 518 U.S. at 533, 116 S.Ct. 2264. But to "survive intermediate scrutiny, the Government must provide 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." *Rocky Mountain Classical Acad.*, 99 F.4th at 1260 (quoting *VMI*, 518 U.S. at 524, 116 S.Ct. 2264). Intermediate scrutiny requires Appellees, not Ms. Griffith, to prove the classifications meet this

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evidence point to a biologic underpinning of gender identity programmed from birth."); *see also Bostock*, 590 U.S. at 660, 140 S.Ct. 1731 ("[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.").Finally, the persuasive authority that animated the rational-basis review holding in *Brown* was overruled by the Ninth Circuit decades ago. *See Schwenk* v. *Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (overruling *Holloway* because of intervening Supreme Court precedent recognizing discrimination based on a failure "to conform to socially-constructed gender expectations" is actionable sex discrimination); *see also Hecox*, 104 F.4th at 1079 (finding heightened scrutiny applies because plaintiff challenged classification based on transgender status and "gender identity is at least a 'quasi-suspect class.' " (quoting *Karnoski* v. *Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019))). Since then, at least another of our sister circuits has held transgender status is a protected class. *See Grimm*, 972 F.3d at 611 ("Engaging with the suspect class test, it is apparent that transgender persons constitute a quasi-suspect class.").

standard. *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1109 (10th Cir. 2008) (explaining when intermediate scrutiny applies "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.' " (quoting *Concrete Works of Colo., Inc.* v. *City & Cnty. of Denver*, 321 F.3d 950, 959 (10th Cir. 2003) (emphasis added))).

Ms. Griffith's complaint plausibly alleged the Housing and Commissary policies perpetuated sex-based stereotypes and affirmatively harmed her. R.48 ¶ 108 (alleging Ms. Griffith's placement in male housing "exacerbated symptoms of her Gender Dysphoria leading her to suffer significant emotional distress, become depressed, [and] have increased ideation of self-harm"); R.50 ¶ 121 (alleging the Commissary Policy "exacerbated symptoms of [Ms. Griffith's] Gender Dysphoria" by denying her the ability to "dress in accordance with her gender identity"); *see also* R.45, 47, 48 (describing Ms. Griffith's extreme anxiety and ideas of self-harm attendant to her treatment at the Jail).[16] Appellees have not yet attempted to identify a government interest justifying the Housing and Commissary policies. The absence of a developed record on the

[16] The dissent concludes "Ms. Griffith's complaint also facially fails heightened scrutiny" as to the Commissary Policy, chiefly because of an "inference ... that panties and lipstick make her appear more feminine, which will also place her at a heightened risk of sexual victimization" given they would exacerbate "her 'discern[a]ble feminine characteristics.' " Dissent at 848 n.14 (quoting R.51 ¶ 129). But, at this early stage, we will not assume this policy is, in fact, in Ms. Griffith's best interests, especially given the harms she describes stemming from the Policy.

justification for the policies makes sense at the motion-to-dismiss stage.

We do not speculate about the ultimate outcome of Ms. Griffith's Equal Protection claim. But there is a "low bar for surviving a [Rule 12(b)(6)] motion to dismiss," *Quintana* v. *Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022, 1034 (10th Cir. 2020), and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely,' " *Dias* v. *City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *see also Clinton*, 63 F.4th at 1276 ("[G]ranting [a] motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." (alterations in original) (quoting *Dias*, 567 F.3d at 1178)).

At this early stage of the litigation, where we must accept Ms. Griffith's allegations as true and draw all reasonable inferences in her favor, we cannot say the particular sex-based classifications at issue in this case serve important government objectives through means substantially related to those objectives. Accordingly, we conclude Ms. Griffith has stated a plausible Equal Protection claim under 42 U.S.C. § 1983.

D

The dissent insists Ms. Griffith's Equal Protection claim fails. The dissent first argues Ms. Griffith is not similarly situated to those enjoying the benefits she seeks. Our colleague then avers rational-basis review

must apply to the Jail's policies. But, as we will explain, neither position is correct.[17]

1

According to the dissent, Ms. Griffith was not "'similarly situated' to inmates receiving differential treatment." Dissent at 838 (quoting *Fogle* v. *Pierson*, 435 F.3d 1252, 1261 (10th Cir. 2006)). Indeed, our colleague maintains "[s]he cannot" establish she was similarly situated "because she is biologically male and the prisoners she claims to be 'similarly situated' to are biologically female." Dissent at 839. Of course, if two people cannot be "similarly situated" because they have a different biological sex, then no sex discrimination claim would ever succeed. And Ms. Griffith has alleged the Jail treats her (and other transgender women) differently than cisgender women, who are similarly situated in all ways other than biological sex. Even the dissent seems to recognize the Jail discriminates against her on the basis of sex. *See* Dissent at 839 ("The Jail's policies classify inmates based on sex ...."). That is the relevant comparator. *Fowler*, again, is instructive. There, under Oklahoma's birth certificate policy, all biological males were treated alike, as were all biological females, because they were unable to change their birth certificates reflecting their biological sex. *See* 104 F.4th at 776–78 (explaining the Policy). But what triggered intermediate scrutiny was the fact that transgender males and cisgender males were treated differently—as were transgender

[17] The dissent concludes affirmance in full is required, and to that end, disagrees only with the claims on which we reverse.

females and cisgender females. *Id.* at 788–94. So too here.

Likewise, that Ms. Griffith "does not allege the Jail treats her differently than other transgender inmates" is irrelevant. Dissent at 839; *see Fowler*, 104 F.4th at 791 (adopting the Supreme Court's reasoning "that an employer discriminates based on sex even if it is 'equally happy to fire male *and* female employees who are homosexual and transgender' " (quoting *Bostock*, 590 U.S. at 662, 140 S.Ct. 1731)). Ms. Griffith was denied the housing and products to which she would have been entitled were she biologically female. Put simply, were Ms. Griffith's biological sex different, she would have been treated differently.

2

Next, the dissent says "Ms. Griffith's Equal Protection claim independently fails because" *Turner* v. *Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), compels rational-basis review—a low bar the Appellees can clear easily. Dissent at 839. In *Turner*, detainees challenged two prison policies on constitutional grounds: one that limited inter-institutional correspondence with other detainees and one that limited their ability to marry. 482 U.S. at 81–82, 107 S.Ct. 2254. The Supreme Court held, to protect prisons' discretion in setting policies, "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, 107 S.Ct. 2254. That lax standard, the dissent argues, applies to sex classifications and thus resolves Ms. Griffith's Equal Protection claim in favor of the Appellees. Dissent at 836-37.

But Appellees never made the argument advanced by the dissent. And that failure of party presentation is decisive *in this case* because whether *Turner* controls is, at best, unclear.

a

The Appellees' brief mentions *Turner*—the case on which the dissent's Equal Protection analysis centrally turns, *see* Dissent at 839-46—exactly once, *see* Resp. Br. at 20. And that single mention is *only* in the context of Ms. Griffith's challenges to the strip search. *Compare* Resp. Br. at 19–23, *with* Resp. Br. at 17–19. The Appellees' central Equal Protection theory on appeal is that *Brown*—a case about whether transgender people constitute a quasi-suspect class—mandates rational-basis review.[18] *See* Resp. Br. at 17–19.

At most, the Appellees invoke one of the policy rationales underlying *Turner*, as articulated in one of its predecessor cases. "To subject [the Jail's policies] to unnecessarily heightened scrutiny," Appellees insist, "would stand in stark opposition to well-established precedent affording deference to the decisions of jail administrators." Resp. Br. at 18

[18] The Appellees' paramount focus on *Brown* is consistent with their litigation strategy below. Their motion to dismiss mentioned *Turner* only as to the strip search, SR.34–35, and it did not mention *any* cases relying on *Turner*'s policy rationales in the Equal Protection discussion, *see* SR.25–27. In their reply in support of the motion to dismiss, the Appellees mention *Turner* only in passing in arguing that applying *strict* (not intermediate) scrutiny would not fall within the clearly established law needed to overcome a qualified-immunity defense. SR.116. Not surprisingly, then, the district court never analyzed or even mentioned *Turner*.

(citing *Bell* v. *Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). But that stray assertion is a far cry from reliance on *Turner*'s holding, which permeates the dissent's entire Equal Protection discussion. Besides, the case Appellees cite is easily distinguishable from this one; it "is not an equal protection case." *Bell*, 441 U.S. at 579, 99 S.Ct. 1861 (Stevens, J., dissenting).

Thus, the dissent raises and resolves for Appellees an argument they never made—that "we remain bound to apply *Turner*" and affirm the dismissal of Ms. Griffith's Equal Protection claim under rational-basis review. Dissent at 845. In fact, Appellees seem to have the *opposite understanding*: they concede, after *Fowler*, "intermediate scrutiny ... appl[ies] to their classification decisions made with respect [to Ms. Griffith]." Aplee. July 3, 2024, Rule 28(j) Resp. at 2.

"[O]urs is a party-directed adversarial system and we normally limit ourselves to the arguments the parties before us choose to present." *Animal Legal Def. Fund* v. *Kelly*, 9 F.4th 1219, 1240–41 (10th Cir. 2021) (alteration in original) (quoting *United States* v. *Ackerman*, 831 F.3d 1292, 1299 (10th Cir. 2016)). In this system, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375, 140 S.Ct. 1575, 206 L.Ed.2d 866 (2020) (quoting *Greenlaw* v. *United States*, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008)). Thus, "[w]e will not make arguments for [a party] that it did not make in its briefs." *O'Neal* v. *Ferguson Constr. Co.*, 237 F.3d 1248, 1257 n.1 (10th Cir. 2001); *see also Rodriguez* v. *IBP, Inc.*, 243 F.3d 1221, 1227 (10th Cir. 2001) ("This court will not make

arguments for Rodriguez that he did not make himself."). Relatedly, our "discretion to raise and decide issues sua sponte" "should be exercised only sparingly." *Animal Legal Def. Fund*, 9 F.4th at 1241 n.20 (quoting *Margheim* v. *Buljko*, 855 F.3d 1077, 1088 (10th Cir. 2017)). I see no reason to deviate from these sound principles here. *Id.* ("The dissent does not explain why we should act sua sponte here, and we decline to do so.").

b

We now show why the Appellees' briefing failure is decisive in this case. We may have had a good basis to overlook that failure if the applicable law were certain. But it is not—as the dissent itself recognizes.

According to the dissent, *Turner* "compels our application of rational basis review to sex-based classifications in prisons and jails." Dissent at 839. That is because *Turner* dictates "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Dissent at 840 (quoting 482 U.S. at 89, 107 S.Ct. 2254). Because the Supreme Court "has only narrowed *Turner* once, when it held that racial classifications in prison are subject to strict scrutiny," the dissent reasons, *Turner must* apply to Ms. Griffith's Equal Protection claim based on sex. Dissent at 840 (citing *Johnson* v. *California*, 543 U.S. 499, 510, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005)).

But the dissent itself shows why this conclusion is far from certain. Our colleague appropriately "acknowledge[s] some doctrinal inconsistency between" the holding in *Washington* v. *Harper*, 494

U.S. 210, 224, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), "that '*Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights,' and the Court's holding in *VMI*." Dissent at 845; *see VMI*, 518 U.S. at 555, 116 S.Ct. 2264 (clarifying "all" sex-based classifications "warrant heightened scrutiny" (quoting *J.E.B.*, 511 U.S. at 136, 114 S.Ct. 1419)). Given those incompatible holdings, the dissent explains, "one principle must cede to another," and "the best reading of the Court's precedent is that *Turner* applies to a prison's sex-based classifications when those classifications do not result in distinctions in funding or programming available to members of each sex." Dissent at 845.

That *Turner* controls is not so obvious that we should overlook the parties' contrary understanding. After all, as Ms. Griffith has observed, "deference [to prison and jail policies] is not limitless," and the Court has carved out at least some "prison and jail policies that discriminate on the basis of protected classes" from *Turner*'s ambit. Reply Br. at 8 (citing *Johnson*, 543 U.S. at 502, 506–07, 512, 125 S.Ct. 1141). Specifically, the *Johnson* Court held, despite *Turner*'s general command, "strict scrutiny" applies "to *all* racial classifications," including those stemming from jail policies. 543 U.S. at 506, 512, 125 S.Ct. 1141. Of course, as the dissent points out, race "is different" from sex. Dissent at 843 n.8. But it may not be "different" in the relevant respects. Instead, *Johnson*'s logic *may* extend to at least *some* sex classifications:

> • As with race, the Court has made clear that "all" sex classifications trigger heightened scrutiny, *see VMI*, 518 U.S. at

555, 116 S.Ct. 2264 (quoting *J.E.B.*, 511 U.S. at 136, 114 S.Ct. 1419);

• Some sex "classifications 'threaten to stigmatize individuals by reason of their membership in a [sex],' " *Johnson*, 543 U.S. at 507, 125 S.Ct. 1141 (quoting *Shaw* v. *Reno*, 509 U.S. 630, 643, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993));

• "The right not to be discriminated against based on one's [sex]" may not be "a right that need necessarily be compromised for the sake of proper prison administration," *id.* at 510, 125 S.Ct. 1141; and

• "In the prison context, when the government's power is at its apex," "searching judicial review of [sex] classifications" may be "necessary to guard against invidious discrimination," *id.* at 511, 125 S.Ct. 1141.[19]

To reiterate, these arguments may not carry the day. And we recognize the discretion generally

[19] The dissent argues *Johnson* clearly does not extend to sex because it "does not mention *VMI*," and "the Court would have mentioned [that *VMI* overrode *Turner*] in creating *another*, ostensibly similar, carve out [for race] in *Johnson*." Dissent at 843 n.8. Put differently, "[i]t would be odd for the Court to acknowledge the *Turner* 'carve[ ] out[s]' "—including racial discrimination and cruel and unusual punishment—"while ignoring a massive one" created by *VMI*. Dissent at 843 n.9 (second and third alterations in original) (quoting *Johnson*, 543 U.S. at 546, 125 S.Ct. 1141). We see *Johnson*'s silence on *VMI* as much less odd. Unlike racial discrimination and cruel and unusual punishment, the Court has never considered whether *Turner* or *VMI* controls the level of scrutiny that applies to sex discrimination.

afforded to corrections officials managing the day-to-day operations of prisons and jails. *See Rhodes* v. *Chapman,* 452 U.S. 337, 351 n.16, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981) ("[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." (quoting *Procunier* v. *Martinez*, 416 U.S. 396, 404–05, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974))); *Pitts* v. *Thornburgh*, 866 F.2d 1450, 1455 (D.C. Cir. 1989) ("Heightened scrutiny does not eliminate appreciation of both the difficulties confronting prison administrators and the considerable limits of judicial competency, informed by basic principles of separation of powers."). The point is simply that, as the dissent acknowledges, there is tension between *VMI*'s categorical holding that *all* sex discrimination triggers heightened scrutiny and *Washington*'s categorical holding that *all* prison policies (except those for which a carve-out applies) undergo rational-basis scrutiny, particularly when *Johnson* recognized heightened scrutiny applied for the Equal Protection category most like sex. 543 U.S. at 506, 512, 125 S.Ct. 1141 (finding the Supreme Court's standard of "apply[ing] strict scrutiny to *all* racial classifications" trumps *Turner*'s contrary standard).

And this tension is not obviously resolvable in favor of applying *Turner* to foreclose heightened scrutiny in this case. Indeed, "[s]ome commentators have noted that," "[s]ince the *Johnson* decision," "intermediate scrutiny might now be the required standard for" detainees' sex-based Equal Protection claims. Grace DiLaura, Comment, *"Not Susceptible to*

the Logic of Turner*":* Johnson v. California *and the Future of Gender Equal Protection Claims from Prisons*, 60 UCLA L. Rev. 506, 510 (2012); *id.* at 510 n.14 (citing such commentators); *id.* at 510 ("By creating a complete separation between prison deference doctrine and equal protection doctrine in the racial discrimination context, *Johnson* renders prison deference wholly inappropriate in the gender context as well."). And courts are split on whether intermediate scrutiny applies to such claims.[20] *Id.* at 517–18.

In sum, the conclusion that *Turner* governs Ms. Griffith's Equal Protection claim is far from certain.[21] No party has argued for this reading—and given all parties apparently have a contrary reading, we

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[20] According to the dissent, this court has already decided what side of this split it is on: "we applied *Turner* to an Equal Protection claim asserting sex-based discrimination in prison two years after *VMI*." Dissent at 842 (citing *Barney* v. *Pulsipher*, 143 F.3d 1299, 1313 n.17 (10th Cir. 1998)). But the footnote in *Barney* is unhelpful. While *Barney* was decided two years after *VMI*, it also comes seven years before *Johnson*, the case that provides a basis (alongside *VMI*) for locating sex-based Equal Protection claims outside *Turner*'s ambit.

[21] And, even if that were not true, at this procedural stage, we would be less convinced than the dissent that Ms. Griffith's claim must fail. *Turner* itself demonstrates its standard is still *somewhat* searching, as the Court struck down a restriction on marriage as "an exaggerated response to ... security objectives," largely because "[t]here [we]re obvious, easy alternatives to the [marriage] regulation that accommodate the right to marry while imposing a *de minimis* burden on the pursuit of security objectives." *Turner* v. *Safley*, 482 U.S. 78, 97–98, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Without a district court ruling or *any* briefing on the matter, and bound by the complaint's allegations at this early procedural stage, we cannot conclude, as the dissent does, the same is not true here. *See* Dissent at 845-48.

decline to apply it *sua sponte*, especially in light of *Turner*'s unclear limits and its admitted tension with *VMI*.[22] Thus, intermediate scrutiny still applies.

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[22] The dissent's particular arguments for why *Turner* trumps *VMI* in this case do not change our view. "First," the dissent observes, "*Turner* remains good law." Dissent at 842. True, but so does *VMI*. And *Turner*'s *reach*, not its overall *validity*, is the relevant question.

The dissent continues: "Second, in *Washington v. Harper* the Court 'made quite clear that the standard of review we adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights.' " Dissent at 843 (emphasis added by dissent) (quoting 494 U.S. 210, 224, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)). But *VMI* was similarly categorical in applying "heightened scrutiny" to "*all* gender-based classifications." 518 U.S. 515, 555, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (emphasis added) (quoting *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 136, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)). The dissent avers (without citation), "To fall outside *Turner*'s ambit, the Court must explicitly recognize a carveout." Dissent at 843. The same could be said for falling outside *VMI*'s ambit. And the Court has never ruled one way or another regarding whether sex classifications are, in relevant part, like the racial classifications that *Johnson* carved out of *Turner*. While "[w]e cannot infer from *Johnson* or *VMI* that sex-based housing classifications warrant a categorical *Turner* carve out," Dissent at 843, we also would not infer the opposite, as the dissent does, at least without adversarial briefing.

"Third," the dissent says, "the policies here do not lend themselves to *VMI*'s logic because they do not favor one sex over the other." Dissent at 844. We cannot agree. For the reasons outlined above—particularly under *Fowler*'s logic—that is just what these policies do. They deny certain housing assignments and commissary products based on genitalia alone.

E

1

Based on the foregoing, we find Ms. Griffith has stated a plausible claim that the Housing and Commissary Policies violate the Equal Protection Clause. We now explain what our conclusion means for each defendant. Recall, on this claim, Ms. Griffith sued all defendants, including seven people in their individual capacities and Sheriff Elder also in his official capacity.[23]

We start with all defendants sued in their individual capacities. These defendants "raised the qualified immunity defense to Griffith's constitutional claims" and maintain it on appeal. Resp. Br. at 28. To overcome that defense, Ms. Griffith must show "(1) the officers' alleged conduct violated a constitutional right, and (2) it was clearly established at the time of the violation, such that 'every reasonable official would have understood,' that such conduct constituted a violation of that right." *Perea* v. *Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016) (quoting *Mullenix* v. *Luna,* 577 U.S. 7, 11, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015)).

Appellees argue both prongs of the defense. They first maintain "Griffith did not establish that a constitutional violation occurred." Resp. Br. at 29. For the reasons above, as to the Equal Protection claim, that is wrong.

They next allege Ms. Griffith could not "show a clearly established right." Resp. Br. at 29. On that, we are persuaded. Our analysis of the Equal Protection claim applies this court's decision in *Fowler*, a 2024

[23] We address defendant El Paso County below.

case. All actions pertinent to this appeal occurred well before that year. Appellees correctly observe, "Before *Fowler*, neither the Supreme Court nor this Court had imported *Bostock*'s Title VII reasoning to an equal protection claim brought under the Fourteenth Amendment." Aplee. July 3, 2024, Rule 28(j) Resp. at 2. While Appellees seem to agree intermediate scrutiny applies after *Fowler*, they are also correct that "they had not been given fair notice that intermediate scrutiny would apply to their classification decisions made with respect" to Ms. Griffith. Aplee. July 3, 2024, Rule 28(j) Resp. at 2.

2

We next turn to Sheriff Elder in his official capacity. The thrust of this claim is that the unconstitutional Jail policies "are set by Defendant ... Elder." R.52 ¶ 135. Ms. Griffith alleges he "discriminated against Plaintiff and other transgender women by adopting and applying these customs policies, and practices." R.52 ¶ 135. Claims pled against Sheriff Elder in his official capacity under 42 U.S.C. § 1983 are treated as municipal liability claims. *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) ("[O]fficial-capacity suits ... represent only another way of pleading an action against an entity of which an officer is an agent ...."). Qualified immunity "is available only in suits against officials sued in their personal capacities, not in suits against governmental entities or officials sued in their official capacities." *Starkey ex. rel. A.B.* v. *Boulder Cnty. Soc. Servs.,* 569 F.3d 1244, 1263 n.4 (10th Cir. 2009). So that defense is no bar to liability here.

The district court adopted the magistrate judge's recommendation to dismiss Ms. Griffith's official-capacity suit on one ground: she "has not alleged facts demonstrating that she suffered a constitutional injury." R.117; *see also* R.140, 144 (adopting that recommended conclusion). That premise is incorrect. We therefore reverse the district court's rejection of Ms. Griffith's Equal Protection claim against Sheriff Elder in his official capacity. In so doing, we do not opine on the ultimate merits of that claim. We conclude only that the district court's reason for dismissal was erroneous.

In conclusion, then, Ms. Griffith has adequately alleged the Housing and Commissary Policies violated her Equal Protection rights. We therefore reverse on that claim against Sheriff Elder in his official capacity. We must, however, affirm the dismissal of this claim as to all Appellees sued in their individual capacities because the law was not "clearly established at the time of the violation." *Perea*, 817 F.3d at 1202.

IV

Ms. Griffith next appeals the district court's dismissal of her Fourteenth Amendment conditions of confinement claim. According to Ms. Griffith, the Jail assigned "all detained transgender individuals to housing units based on their genitalia as the default or sole criterion, without any individualized assessment of the individual's safety or gender identity," which posed an excessive risk to Ms. Griffith's health and safety, in violation of the Fourteenth Amendment. R.53 ¶ 145. Each Appellee knew Ms. Griffith to be a "transgender woman and that housing her in an all-male unit subjected her to

a risk of sexual harassment, sexual assault, and extreme emotional distress from being treated as a man given her Gender Dysphoria." R.53 ¶ 146. Although this claim is pled against each Appellee, Ms. Griffith clarified at oral argument she appeals only the dismissal of her conditions of confinement claim against Deputies Noe and Ford and Sheriff Elder.[24] We thus focus only on these three defendants.

A

1

Appellees moved to dismiss Ms. Griffith's conditions of confinement claim under Rule 12(b)(6). They argued the Eighth Amendment's deliberate indifference framework applied, meaning "an official is only liable if he 'knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.' " SR.28 (quoting *Farmer* v. *Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). According to Appellees, Ms. Griffith failed to plausibly allege deliberate indifference under that standard by Deputy Noe or Deputy Ford. SR.29. The magistrate judge agreed, concluding the facts alleged did not show either Deputy Noe or Deputy Ford knew Ms. Griffith "would be at risk of substantial harm if placed in the

[24] Ms. Griffith does not suggest any *personal* mistreatment by Sheriff Elder, so we only consider this claim pled against him in his official capacity.

all-male facility [and] that they disregarded that risk." R.108.

In objecting to the recommendation, Ms. Griffith made general arguments about being subjected to "repeated cross-gender pat-down searches" in the male housing unit. SR.150. Ms. Griffith did not challenge the magistrate judge's ruling with respect to Deputies Noe and Ford. Appellees pointed this out in their response, contending Ms. Griffith failed to explain how Deputies Noe and Ford "had specific knowledge of a risk to [Ms. Griffith] and ignored it." SR.172. The district court adopted the magistrate judge's recommendation without further analysis.

Ms. Griffith now urges reversal, but we need not reach the merits of her appellate challenge as to Deputies Noe and Ford. We agree with Appellees that she has failed to properly preserve an argument that *those two deputies* violated the Fourteenth Amendment. It is well settled that a plaintiff must prove each defendant personally participated in a constitutional violation. *See, e.g.*, *Pahls* v. *Thomas*, 718 F.3d 1210, 1231 (10th Cir. 2013) ("Liability under § 1983 ... requires personal involvement."). The magistrate judge concluded Ms. Griffith did not allege "either [the] subjective or objective elements of deliberate indifference" with respect to Deputies Noe and Ford. R.108. Ms. Griffith failed to challenge this ruling in her objection.

Applying firm waiver principles, Ms. Griffith's objection to the dismissal of her conditions of confinement claim was not "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *2121 E. 30th St.*, 73 F.3d at 1060. It was not until her opening brief on appeal that Ms. Griffith explained how Deputies

Noe and Ford were involved in her unconstitutional conditions of confinement. This argument comes too late. *Davis* v. *Clifford*, 825 F.3d 1131, 1137 n.3 (10th Cir. 2016) (finding appellant waived arguments not made in objection to the magistrate judge's recommendation).

2

We also affirm as to Sheriff Elder in his official capacity. Recall, Ms. Griffith alleged the unconstitutional Jail policies "are set by Defendant ... Elder." R.52 ¶ 135. In her complaint, Ms. Griffith claims Sheriff Elder orchestrated the policies that led to her placement in male housing. R.37 ¶ 54; R.38 ¶ 57. She further alleged these policies caused extensive mistreatment—for instance, threatening her health and safety, exposing her to risks of sexual assault and harassment, and exacerbating her gender dysphoria. *See* R.37 ¶ 54; R.38 ¶ 57; R.53 ¶¶ 145–46.

The magistrate judge recommended dismissing this claim against Sheriff Elder for one reason: because Ms. Griffith "has not alleged facts demonstrating that she suffered a constitutional injury." R.117. According to the magistrate judge, Ms. Griffith could not proceed against Sheriff Elder in his official capacity because she had not adequately alleged *any of the named individual defendants*—including Deputies Noe, Ford, and others—personally caused unconstitutional conditions of confinement. R.108–11. The district court accepted the magistrate judge's recommendation on this issue without elaboration. R.140.

Unlike with Deputies Noe and Ford, Ms. Griffith's objection to the dismissal of her conditions-of-

confinement claim against Sheriff Elder is properly before us. She objected to the magistrate judge's recommendation to dismiss that claim and has maintained that position on appeal. *See* SR.137 (arguing promulgating or maintaining policies that cause constitutional rights violations suffices to impose liability on Sheriff Elder); Op. Br. at 50 (similar); Reply Br. at 21–24 (similar).

Ms. Griffith's claim is Sheriff Elder's policies caused unconstitutional conditions of confinement through a number of channels, none of which necessarily depends on particular subordinates' actions. *See, e.g.*, R.53 ¶¶ 145–46 (focusing on risks to "health and safety" and "a risk of sexual [harassment], sexual assault, and extreme emotional distress," without naming any specific perpetrators); SR.137 (contending Sheriff Elder's policies "caused the violation of Plaintiff's constitutional rights in numerous ways"—again not naming a particular perpetrator). The law permits this kind of *Monell* claim. *See Quintana*, 973 F.3d at 1033 (acknowledging our circuit precedent provides that "municipal liability under *Monell* may exist without individual liability"); *Crowson*, 983 F.3d at 1188 (reaffirming this principle); *id.* at 1184 (explaining, for municipal liability, a plaintiff "must allege facts showing: (1) an official policy or custom, (2) causation, and (3) deliberate indifference" (quoting *Quintana*, 973 F.3d at 1034)). We thus agree with Ms. Griffith that her claim against Sheriff Elder in his official capacity does not necessarily depend on unconstitutional conduct by a subordinate named in the same suit, as the magistrate judge seemed to conclude.

Still, affirmance is required because Ms. Griffith has not plausibly alleged deliberate indifference by

Sheriff Elder or stated facts to support that his policy was the legally relevant cause of the harassment, assaults, and other mistreatment—carried out by others—underlying this claim. *See Bd. of Cnty. Comm'rs of Bryan Cnty., Okla.* v. *Brown*, 520 U.S. 397, 405, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) ("Where a plaintiff claims that the municipality has not directly inflicted an injury, ... rigorous standards of culpability and causation must be applied ...."); *Barney* v. *Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998) (applying these rigorous standards when "the policy at issue is lawful on its face and the municipality therefore has not directly inflicted the injury through its own actions"). Under these circumstances, we affirm the district court's dismissal of Ms. Griffith's Fourteenth Amendment conditions of confinement claim. *See Fed. Trade Comm'n* v. *Elite IT Partners, Inc.*, 91 F.4th 1042, 1045 (10th Cir. 2024) ("[W]e can affirm on any ground adequately supported by the record.").

V

Ms. Griffith also appeals the dismissal of her Fourth and Fourteenth Amendment claims challenging the allegedly unlawful strip search conducted at intake. Recall, Ms. Griffith asked Deputy Elliss, a female, to "conduct the search because Ms. Griffith is a transgender woman." R.41–42 ¶¶ 74, 76. Deputy Elliss "refused and cited El Paso County's [Search] policy." R.42 ¶ 74. After Deputy Elliss searched Ms. Griffith's breasts, she left the room. Deputy Mustapick, alone in the room with Ms. Griffith, proceeded to "search Ms. Griffith's genitals." R.42 ¶ 78. Ms. Griffith claims the strip search was conducted pursuant to the Jail's "official policy" of

allowing "male deputies to search transgender women without any supervision." R.57 ¶ 172.

In the district court, Appellees raised a qualified immunity defense to Ms. Griffith's Fourth and Fourteenth Amendment claims. Appellees further maintained Commander Gillespie could not be liable because Ms. Griffith failed to allege his personal participation in the strip search. The magistrate judge agreed with Appellees and recommended dismissal. The district court adopted the magistrate judge's reasoning without further analysis.

On appeal, Ms. Griffith insists the strip search was unconstitutional, and the district court erroneously concluded otherwise. Ms. Griffith maintains the cross-gender nature of the search violated the Fourth and Fourteenth Amendments. She further contends Deputy Mustapick conducted an abusive search in violation of the Fourth Amendment. Reviewing *de novo*, we agree with Ms. Griffith—but only in part.

Commander Gillespie and Deputies Elliss and Mustapick are entitled to qualified immunity, as the district court properly determined. But, unlike the district court, we conclude Ms. Griffith has plausibly alleged Deputy Mustapick committed a constitutional violation by conducting a cross-gender strip search. For this reason, we must reinstate the Fourth and Fourteenth Amendment cross-gender search claims against Sheriff Elder in his official capacity. Those claims had previously been dismissed for lack of a constitutional violation by a subordinate. Finally, we reverse the grant of qualified immunity to Deputy Mustapick on Ms. Griffith's Fourth Amendment abusive search claim.

A

Ms. Griffith's Fourth Amendment claim implicates her right to be free from unreasonable searches. *Chapman* v. *Nichols*, 989 F.2d 393, 394 (10th Cir. 1993) (plaintiffs "brought this suit ... contending [the sheriff] violated their Fourth Amendment rights by promulgating the policy under which they were [strip] searched."). To analyze a Fourth Amendment claim based on an allegedly unlawful search, we "balance[ ] the need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559, 99 S.Ct. 1861. "[T]he greater the intrusion, the greater must be the reason for conducting a search." *Levoy* v. *Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986) (quoting *Blackburn* v. *Snow*, 771 F.2d 556, 565 (1st Cir. 1985)). In conducting this analysis, we "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* (quoting *Bell*, 441 U.S. at 559, 99 S.Ct. 1861).

Ms. Griffith's Fourteenth Amendment claim implicates her right to personal privacy. *Colbruno* v. *Kessler*, 928 F.3d 1155, 1163–64 (10th Cir. 2019) (analyzing a pretrial detainee's Fourteenth Amendment claim to vindicate his right to privacy after officers forced him to walk down a hospital hallway naked). Although "inmates' right to privacy must yield to the penal institution's need to maintain security, it does not vanish altogether." *Id.* at 1164 (quoting *Cumbey* v. *Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (*per curiam*)). The Constitution protects a prisoner from being forced to unnecessarily expose their naked body which, as we have held, "is a severe invasion of personal privacy." *Id.* And a plaintiff can

state a Fourteenth Amendment claim by alleging facts supporting the inference that "the exposure of [her] body was 'not rationally related to a legitimate governmental objective or [was] excessive in relation to that purpose.' " *Id.* at 1164 (finding a plaintiff plausibly alleged a Fourteenth Amendment violation by pleading facts from which the court could infer officers walked plaintiff down a hospital hallway naked without a "vital urgency" justifying their actions (quoting *Kingsley* v. *Hendrickson*, 576 U.S. 389, 398–99, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015))).

Whether analyzed under the Fourth or Fourteenth Amendments, we must balance the intrusiveness of the search against the government's reason for conducting it.[25] We therefore evaluate Ms. Griffith's Fourth and Fourteenth Amendment claims together.

B

To overcome the qualified immunity defense, Ms. Griffith must show "(1) the officers' alleged conduct violated a constitutional right, and (2) it was clearly established at the time of the violation, such that 'every reasonable official would have understood,' that such conduct constituted a violation of that right." *Perea*, 817 F.3d at 1202 (quoting *Mullenix,* 577 U.S. at 11, 136 S.Ct. 305).[26] At the Rule 12(b)(6) stage, we

[25] The magistrate judge recognized as much when analyzing Ms. Griffith's claims, and no party has identified a meaningful difference between these legal standards for purposes of this case.

[26] Again, qualified immunity "is available only in suits against officials sued in their personal capacities, not in suits against governmental entities or officials sued in their official

conduct the qualified immunity inquiry bound by the facts alleged in the operative complaint. *See Keith* v. *Koerner*, 707 F.3d 1185, 1188 (10th Cir. 2013).

With these legal principles in mind, we proceed to analyze Ms. Griffith's appellate challenges. We begin with the claims against Commander Gillespie and Deputy Elliss and then discuss Ms. Griffith's arguments as to Deputy Mustapick and Sheriff Elder.

C

Ms. Griffith has given us no reason to reverse the dismissal of her Fourteenth Amendment claim against Commander Gillespie. Ms. Griffith does not even mention Commander Gillespie in her appellate briefing when discussing the Fourteenth Amendment search claim. *State Farm Fire & Cas. Co.* v. *Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994) ("[A]ppellant failed to raise this issue in his opening brief and, hence, has waived the point."). Ms. Griffith has the burden of establishing Commander Gillespie had "personal involvement in the alleged constitutional violation." *Fogarty* v. *Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008) (quoting *Foote* v. *Spiegel,* 118 F.3d 1416, 1423 (10th Cir. 1997)). There are no allegations in the complaint that plausibly suggest Commander Gillespie participated in the strip search. Ms. Griffith alleged only "Gillespie's decision to house [her] in an all-male unit subjected her to have her privacy constantly invaded." R.57 ¶ 174. But this allegation is not about the strip search. And, like the district court,

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capacities." *Starkey ex. rel. A.B.* v. *Boulder Cnty. Soc. Servs.,* 569 F.3d 1244, 1263 n.4 (10th Cir. 2009). It therefore cannot protect Sheriff Elder from claims pled against him in his official capacity.

we find it conclusory. *Erikson* v. *Pawnee Cnty. Bd. of Cnty. Comm'rs*, 263 F.3d 1151, 1154 (10th Cir. 2001) (explaining a "conclusory allegation is insufficient to survive [a] motion[ ] to dismiss").

As to Deputy Ellis, Ms. Griffith likewise failed to develop an argument for reversal. In a footnote in her opening brief, Ms. Griffith contends Deputy "Elliss is liable for her failure to intervene" because she "left Ms. Griffith alone with Defendant Mustapick after Ms. Griffith begged for a woman to search her instead, and in doing so failed to prevent an unsupervised and wholly unnecessary cross-gender strip search." Op. Br. at 40–41 n.13. Ms. Griffith cites *Vondrak* v. *City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008), but she does not explain how that case, which is about excessive force, supports her appellate position. "Arguments raised in a perfunctory manner, *such as in a footnote*, are waived." *In re C.W. Min. Co.*, 740 F.3d 548, 564 (10th Cir. 2014) (quoting *United States* v. *Berry,* 717 F.3d 823, 834 n.7 (10th Cir. 2013)).

We thus affirm the dismissal of Ms. Griffith's Fourth and Fourteenth Amendment claims against Deputy Elliss and Fourteenth Amendment claim against Commander Gillespie.

D

We next address Ms. Griffith's Fourth and Fourteenth Amendment claims against Deputy Mustapick based on the strip search. Ms. Griffith challenges two distinct aspects of the strip search: who conducted it and the way it was conducted. First, Ms. Griffith contends having a male deputy perform the strip search violated the Fourth and Fourteenth

Amendments. Second, and separately, Ms. Griffith maintains Deputy Mustapick conducted the search in an abusive manner, in violation of the Fourth Amendment. We consider each argument in turn.

1

We begin with Ms. Griffith's claim concerning the cross-gender nature of the strip search. Ms. Griffith alleged Deputy Mustapick's participation in the search was "objectively unreasonable in light of the circumstances" and "violated [Ms. Griffith's] right to be secure in her bodily integrity, a liberty right protected by ... the Fourteenth Amendment." R 55–56. The magistrate judge concluded Ms. Griffith could not overcome qualified immunity because she failed to plausibly allege a constitutional violation under clearly established law. R.115 (Fourth Amendment); *see also* R.110 (Fourteenth Amendment). The district court adopted the magistrate judge's recommendation.

On appeal, Ms. Griffith concedes the Jail could subject her to a strip search before she entered general population. She contends only that assigning a male deputy to perform that strip search had no "relationship to legitimate penological concerns" and thus violated the Constitution. Op. Br. at 40; *see also* R.55 ¶ 159 ("[T]here was no basis for [Deputy] Mustapick to perform a visual body-cavity search" of Ms. Griffith.). As we explain, the district court's qualified-immunity ruling must be affirmed. Though we conclude Ms. Griffith has plausibly alleged a constitutional violation, the law was not clearly established that Deputy Mustapick's participation as alleged violated the Constitution.

a

Our point of departure is straightforward: "it is axiomatic that a strip search represents a serious intrusion upon personal rights." *Shroff* v. *Spellman*, 604 F.3d 1179, 1191 (10th Cir. 2010) (quoting *Chapman*, 989 F.2d at 395)). Strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Levoy*, 788 F.2d at 1439 (quoting *Blackburn*, 771 F.2d at 564)). And there are serious privacy concerns when prison officials view, or search, undressed inmates of the opposite gender. *See Hayes* v. *Marriott*, 70 F.3d 1144, 1146 (10th Cir. 1995) (discussing privacy concerns stemming from a body cavity search of inmates in view of members of the opposite sex); *Cumbey*, 684 F.2d at 714 (finding plausible constitutional claim when plaintiff alleged naked male inmates were subjected to "a certain amount of viewing" by female officers); *Shroff*, 604 F.3d at 1191 (affirming denial of summary judgment to officer who required female in police custody to pump breast milk in view of another officer because he "failed to present any justification for requiring [plaintiff] to expose her breasts in the presence of another person"); *see also Canedy* v. *Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) ("[W]hile all forced observations or inspections of the naked body implicate a privacy concern, it is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex."); *Byrd* v. *Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1146 (9th Cir. 2011) ("This litany of cases over the last thirty years has a recurring theme: cross-gender strip searches in the absence of an emergency violate an inmate's right under the Fourth Amendment to be free from unreasonable searches."). As the district

court correctly recognized, strip searches are invasive, and cross-gender searches are "universally frowned upon ... in the absence of an emergency." R.114–15 (citing *Byrd*, 629 F.3d at 1143).

Evaluating the constitutionality of the search in this context requires "balancing the need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559, 99 S.Ct. 1861; *see also Blackmon* v. *Sutton*, 734 F.3d 1237, 1241 (10th Cir. 2013) (explaining Fourteenth Amendment violation occurs when "the restriction in question bears no reasonable relationship to any legitimate governmental objective."). The Fourth Amendment analysis of a strip search is "fact-specific, 'measured in objective terms by examining the totality of the circumstances.' " *Nelson* v. *McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000) (quoting *Ohio* v. *Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996)).

Ms. Griffith alleges there was *no* "legitimate penological purpose" for Deputy Mustapick to be involved in the strip search. R.43 ¶ 80. At this procedural stage, we agree. According to the allegations in Ms. Griffith's complaint, Deputy Mustapick knew Ms. Griffith is a transgender woman and that she lived with gender dysphoria. He also knew Ms. Griffith asked to be searched by a female deputy. And the complaint alleges a female deputy was available to conduct the search. Indeed, Deputy Elliss had *just* helped with the search. Nothing in the complaint suggests there was an emergency or other justification requiring Deputy Mustapick to participate. Ms. Griffith thus has plausibly alleged facts from which we can infer, in *this* case, that a male deputy's participation in the strip search of a

transgender female detainee had no "reasonable relationship" to a "legitimate governmental objective." *Colbruno*, 928 F.3d at 1163; *see also Turner*, 482 U.S. at 89–91, 107 S.Ct. 2254 ("[T]here must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." (quoting *Block* v. *Rutherford*, 468 U.S. 576, 586, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984))).

Resisting this conclusion, Appellees contend there is a strong interest in preventing "weapons or contraband" from entering jails. Resp. Br. at 21. We do not doubt this is so. But Appellees do not explain what this interest in contraband prevention has to with having a *male deputy* strip search Ms. Griffith—particularly when a female deputy was available. As the Supreme Court has explained, "a court may consider [alternative options] as evidence that the [prison] regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91, 107 S.Ct. 2254.[27] Subjecting Ms. Griffith to a strip search by a male officer is, at least on the face of the complaint, plausibly unrelated to the asserted governmental interest of preventing contraband in the Jail. *Farmer* v. *Perrill*, 288 F.3d 1254, 1260 (10th Cir. 2002) ("We [have] held that a strip search of a motorist detained for a minor traffic offense ... violated his constitutional rights because there was neither a sufficient security justification for the search, nor any justification for conducting the search in a public area."); *Byrd*, 629 F.3d at 1143 ("[A]lthough valid reasons to search the inmates existed generally, there was no justification given for conducting a cross-

[27] This requirement has teeth: *Turner* struck down a restriction on marriage largely on this ground. *Turner*, 482 U.S. at 97–98, 107 S.Ct. 2254.

gender strip search."); *Williams* v. *City of Cleveland*, 771 F.3d 945, 954 (6th Cir. 2014) (finding plaintiff plausibly pled a Fourth Amendment challenge to a strip search by alleging obvious less-invasive alternatives to the jail's procedure). We thus conclude Ms. Griffith plausibly alleged Deputy Mustapick violated her Fourth and Fourteenth Amendment rights by conducting a cross-gender strip search.[28]

Finally, Ms. Griffith alleged Sheriff Elder violated the Constitution by enforcing a policy "requir[ing] ... male deputies to search transgender women without any supervision." R.57 ¶ 172. The district court dismissed all claims against Sheriff Elder for failure to allege a constitutional violation by a subordinate. Because we conclude Ms. Griffith plausibly alleged a constitutional violation by Deputy

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[28] The dissent insists Ms. Griffith "offers no factual allegations which, taken as true, demonstrate that the Jail's same-sex strip search policy is unrelated to its legitimate interests in prison security and employee welfare" under *Turner*. Dissent at 849. We disagree. Her complaint clearly alleged Deputy Elliss defended having Deputy Mustapick conduct part of the strip search only "because she was 'still a male' in El Paso County's 'system,' " without referencing any other reasons for the cross-gender search. R.41 ¶ 74.On appeal, Ms. Griffith continues the same thread: "there was no justification—let alone an emergency—for having a male guard conduct her strip search and see her naked body" when "a female guard, Defendant Elliss, was initially in the room and available to do the search—indeed, she was the one who searched Ms. Griffith's breasts." Op. Br. at 38. If a female deputy was available to conduct *part* of the search, then it is reasonable to infer she would have also been able to conduct *the rest* of the search, as Ms. Griffith's complaint suggests. Recall, the existence of "obvious, easy alternatives ... that accommodate the" right asserted is key to the constitutional inquiry. *Turner*, 482 U.S. at 98, 107 S.Ct. 2254.

Mustapick, we must reverse the dismissal of the Fourth and Fourteenth Amendment claims against Sheriff Elder in his official capacity relating to the cross-gender strip search and remand for further proceedings. *Cox* v. *Glanz*, 800 F.3d 1231, 1256 (10th Cir. 2015) (explaining we "generally will allow 'a suit [against a county] to proceed when immunity [based on a lack of clearly established law] shields the individual defendants" (quoting *Lynch* v. *Barrett*, 703 F.3d 1153, 1164 (10th Cir. 2013))). As above, we take no position on the merits of Ms. Griffith's Fourth and Fourteenth Amendment claims against Sheriff Elder. We say no more than the district court's stated reasons for dismissal were erroneous.

b

We now consider the second prong of the familiar qualified immunity analysis. According to the district court, it was not " 'sufficiently clear' that every 'reasonable official would understand' " at the time of Ms. Griffith's strip search that a male deputy could not strip search a transgender female detainee. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). We agree with the district court.

The relevant question is whether "the law put officials on fair notice that the described conduct was unconstitutional." *Casey* v. *City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (quoting *Gomes* v. *Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006)). True, our law is clear that cross-gender strip searches must be motivated by some penological interest. *See, e.g.*, *Shroff*, 604 F.3d at 1191 (finding constitutional violation because officer viewed detainee's breasts

without "any justification"). But as Appellees persuasively point out, we have not previously applied this principle to searches of transgender inmates. *See Hayes*, 70 F.3d at 1146–47 (male inmate challenging female guards viewing male inmates naked); *Cumbey*, 684 F.2d at 714 (male inmate challenging female guards viewing the strip search of a male detainee). Only one case, *Farmer* v. *Perrill*, involved a transgender inmate. 288 F.3d at 1257. But the *Farmer* plaintiff challenged the overall justification for strip searches conducted in view of other inmates. *Id.* Unlike here, the constitutional challenge in *Farmer* did not concern whether the person who searched the transgender detainee was male or female. These cases therefore could not have provided guidance to a reasonable officer in Deputy Mustapick's position.

Ms. Griffith insists no factually analogous case is required to show the law was clearly established. According to Ms. Griffith, "common sense tells us conducting a cross-gender strip search of a psychologically vulnerable transgender detainee, over vociferous protestations ... violates the constitutional protections against punishment and unreasonable searches." Op. Br. at 45. Ms. Griffith relies on *Colbruno*, where we recognized an obvious violation of the Fourteenth Amendment when a pretrial detainee was paraded naked through a hospital. *Colbruno* acknowledged we "can occasionally rely on the general proposition that it would be 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted ... even though existing precedent does not address similar circumstances.' " *Colbruno*, 928 F.3d at 1165 (quoting *District of Columbia* v. *Wesby*, 583 U.S. 48, 64, 138 S.Ct. 577, 199 L.Ed.2d 453 (2018)).

Ms. Griffith is correct that "[e]ven when no precedent involves facts 'materially similar' to ours, [a] right can be clearly established if a precedent applies with 'obvious clarity.' " *Lowe* v. *Raemisch*, 864 F.3d 1205, 1210 (10th Cir. 2017); *see also Taylor* v. *Riojas*, 592 U.S. 7, 9, 141 S.Ct. 52, 208 L.Ed.2d 164 (2020) (discussing same). But that standard is not met on the facts before us. Accordingly, in the absence of clearly established law, we affirm the grant of qualified immunity to Deputy Mustapick on the Fourth and Fourteenth Amendment claims concerning the cross-gender nature of the strip search.

2

Ms. Griffith also contends Deputy Mustapick violated the Fourth Amendment by conducting the strip search in an abusive manner. The magistrate judge acknowledged Deputy Mustapick searched Ms. Griffith in a "sickening" and "reprehensible" way and made "abhorrent statements that accompanied the search." R.110, 115. But the magistrate judge nevertheless concluded Ms. Griffith could not overcome either prong of the qualified immunity defense. According to the magistrate judge, Deputy Mustapick's conduct, "reprehensible as it [was]," did not "rise to [the] level" of a constitutional violation. R.115. Even if Ms. Griffith could state a constitutional claim, the magistrate judge determined "it would necessarily fail based on the 'clearly established' prong of qualified immunity." R.116. The district court adopted the magistrate judge's reasoning without elaboration.

On appeal, Ms. Griffith maintains there "is no plausible justification for conducting a search in this [abusive] manner—rather, it appears calculated to

inflict psychological pain on a vulnerable individual," in violation of the Fourth Amendment. Op. Br. at 40. She contends the Supreme Court's decision in *Bell*, holding an abusive search "cannot be condoned," clearly established that Deputy Mustapick's "harassing, humiliating, [and] abusive search" violated the Constitution. Op. Br. at 43. Considering the totality of the circumstances as alleged by Ms. Griffith, we agree.

We start with the constitutional prong of Deputy Mustapick's qualified immunity defense. In determining whether a search is constitutional under the Fourth Amendment, we must consider the "manner in which [it] is conducted." *Bell*, 441 U.S. at 559, 99 S.Ct. 1861. And it is well established a "search [conducted] in an abusive fashion .... cannot be condoned." *Id.* at 560, 99 S.Ct. 1861; *see also Seltzer-Bey* v. *Delo*, 66 F.3d 961, 962–63 (8th Cir. 1995) (finding plaintiff plausibly alleged a Fourth Amendment violation where officer "made sexual comments about [inmate's] penis and buttocks" during one strip search and "rubbed [his] buttocks with a nightstick and asked him whether it reminded him of something" during another). For that reason, "not all strip search procedures will be reasonable; some could be excessive, vindictive, harassing, or unrelated to any legitimate penological interest." *Michenfelder* v. *Sumner*, 860 F.2d 328, 332 (9th Cir. 1988); *see also Joseph* v. *U.S. Fed. Bureau of Prisons*, 232 F.3d 901 (10th Cir. 2000) (unpublished table decision) (recognizing "the sexual harassment or abuse of an inmate by a corrections officer can never serve a legitimate penological purpose and may well result in severe physical and psychological harm"

(quoting *Freitas* v. *Ault*, 109 F.3d 1335, 1338 (8th Cir. 1997))).[29]

Ms. Griffith has alleged facts from which we can reasonably infer Deputy Mustapick conducted the strip search in an abusive fashion. Consider what Deputy Mustapick knew at the time of the strip search: Ms. Griffith is a legally blind transgender woman living with gender dysphoria; her gender dysphoria caused her anxiety and could lead to self-harm; and she made repeated requests for him to leave the room and asked for a female deputy to conduct the strip search. Taken together, it is reasonable to infer Deputy Mustapick knew Ms. Griffith was particularly vulnerable to searches by male deputies.

It is against this backdrop that we consider the reasonableness of Deputy Mustapick's actions. After Deputy Elliss left the room, Deputy Mustapick ordered Ms. Griffith to undress and stand bent over with her hands against the wall. With Ms. Griffith naked, in an exposed position, and alone in a closed room with only a male deputy, Deputy Mustapick proceeded to grab his penis and make sexually explicit and threatening comments. The complaint alleges he "was extremely aggressive while searching Ms. Griffith's genitals." R.42 ¶ 78. He then warned Ms. Griffith not to tell anyone "about what he did and said to her" during the strip search—otherwise, "he would make sure that she was brutalized by the guards."

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[29] *Joseph* was an unpublished Eighth Amendment case, but we rely on it for its commonsense pronouncement that sexual harassment serves no legitimate penological purpose. *See* 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value.").

R.42 ¶ 79. We conclude Ms. Griffith has stated a plausible violation of the Fourth Amendment. Our conclusion is compelled by "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Levoy*, 788 F.2d at 1439 (quoting *Bell*, 441 U.S. at 559, 99 S.Ct. 1861).

Appellees—appropriately—do not attempt to justify Deputy Mustapick's behavior. Instead, they contend "verbal statements made during a search are insufficient to establish a constitutional violation." Resp. Br. at 21. Appellees principally rely on *Adkins* v. *Rodriguez*, 59 F.3d 1034, 1037 (10th Cir. 1995), and *Hyberg* v. *Enslow*, 801 F. App'x 647, 650 (10th Cir. 2020). Neither case supports affirmance.

In *Adkins*, the inmate plaintiff challenged sexual harassment by a prison guard. 59 F.3d at 1036. She did so, however, under the Eighth Amendment deliberate indifference framework. *Id.* at 1036–37. And we specifically observed the plaintiff *did not challenge* "an unreasonable search or seizure under the Fourth Amendment or [that] she was denied substantive due process under the Fourteenth Amendment." *Id.* at 1037 n.4. These are precisely the claims advanced by Ms. Griffith. *Adkins* does not move the needle for Appellees.

Hyberg is neither precedential nor persuasive. The plaintiff there worked at a factory inside the jail and was strip searched before and after going to work. *Hyberg*, 801 F. App'x at 648. He challenged two searches, contending they were unreasonable under the Fourth Amendment. *Id.* But *Hyberg* did not involve an allegedly *abusive* search. There, we explicitly refused to credit the plaintiff's conclusory

allegation that a search was conducted "in a very demeaning and derogatory way." *Id.* at 650.

Accepting Ms. Griffith's allegations as true and drawing all inferences in her favor, she has "nudged" her abusive search claim "across the line from conceivable to plausible." *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955. At this early stage of the litigation, no more is required.

We turn next to the clearly established law prong. We may not "define clearly established law at too high a level of generality." *City of Tahlequah, Okla.* v. *Bond*, 595 U.S. 9, 12, 142 S.Ct. 9, 211 L.Ed.2d 170 (2021). "[E]xisting law must have placed the constitutionality of the officer's conduct 'beyond debate.' " *Wesby*, 583 U.S. at 63, 138 S.Ct. 577 (quoting *al-Kidd*, 563 U.S. at 741, 131 S.Ct. 2074). We therefore typically require a plaintiff to identify "an on-point Supreme Court or published Tenth Circuit decision; alternatively, 'the clearly established weight of authority from other courts must have found the law to be as [she] maintains.' " *A.M.* v. *Holmes*, 830 F.3d 1123, 1135 (10th Cir. 2016) (quoting *Quinn* v. *Young*, 780 F.3d 998, 1005 (10th Cir. 2015)).

The district court faulted Ms. Griffith for failing to identify a prior case involving the abusive search of a *transgender* detainee. Ms. Griffith urges reversal, relying "on the general proposition that it would be 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted ... even though existing precedent does not address similar circumstances.' " Op. Br. at 44 (quoting *Colbruno*, 928 F.3d at 1165). While this principle did not carry the day on Ms. Griffith's cross-gender search challenge, here, it is dispositive.

A "general constitutional rule already identified in the decisional law" can overcome qualified immunity when it "appl[ies] with obvious clarity to the specific conduct in question." *Hope* v. *Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (quoting *United States* v. *Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)); *see also Taylor*, 592 U.S. at 9, 141 S.Ct. 52 (applying *Hope* to conclude "any reasonable officer should have realized [the plaintiff's] conditions of confinement offended the Constitution"); *Rivas-Villegas* v. *Cortesluna*, 595 U.S. 1, 5, 142 S.Ct. 4, 211 L.Ed.2d 164 (2021) (recognizing "in an obvious case, [general constitutional] standards can 'clearly establish' the answer, even without a body of relevant case law" (quoting *Brosseau* v. *Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004))). [30] A "general rule can serve as clearly established law when it states 'the contours of [a] constitutional transgression' in a 'well[-]defined' or 'well-marked' manner without leaving a 'vaguely-defined legal border.' " *Ashaheed* v. *Currington*, 7 F.4th 1236, 1246 (10th Cir. 2021) (quoting *Janny* v. *Gamez*, 8 F.4th 883, 918 (10th Cir. 2021)).

Bell established abusive searches "cannot be condoned" under the Fourth Amendment and thus defined the constitutional boundaries for Deputy Mustapick. 441 U.S. at 560, 99 S.Ct. 1861. The constitutional prohibition against abusive searches obviously does not depend on the inmate's sex or gender identity. A reasonable officer in Deputy

[30] *Taylor* involved an inmate housed in "deplorably unsanitary" conditions, including in a cell covered "nearly floor to ceiling" in feces. *Taylor*, 592 U.S. at 8, 141 S.Ct. 52. *Taylor* is an extreme case, but the situation before Deputy Mustapick was no less obvious.

Mustapick's position did not need a body of case law involving abusive searches of *transgender* inmates to put him on notice that his search of Ms. Griffith was unlawful. *See Taylor*, 592 U.S. at 9, 141 S.Ct. 52. A contrary conclusion means "the words of the Constitution become little more than good advice." *Trop* v. *Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). We thus have no trouble concluding this is the "rare" case where "the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address" precisely these circumstances, *Wesby*, 583 U.S. at 64, 138 S.Ct. 577, and the "very action in question has [not] previously been held unlawful." *Hope*, 536 U.S. at 741, 122 S.Ct. 2508 (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034).[31] We reverse the grant of qualified immunity to Deputy Mustapick on Ms. Griffith's Fourth Amendment abusive-search claim and remand for further proceedings.

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[31] The dissent believes "Ms. Griffith has not identified caselaw clearly establishing that deplorable language makes an otherwise permissible search unconstitutional." Dissent at 849. Deputy Mustapick's language was deplorable largely *because*, as Ms. Griffith plausibly alleges, it was part of an abusive search—"conducted in a harassing manner intended to humiliate and inflict psychological pain." Op. Br. at 39 (quoting *Calhoun* v. *DeTella*, 319 F.3d 936, 940 (7th Cir. 2003)). And it bears emphasizing the allegations do not *only* concern Deputy Mustapick's language; he was also allegedly "extremely aggressive while searching Ms. Griffith's genitals." R.42 ¶ 78. The totality of well-pled facts thus plainly constitute abuse. And the Court has been clear that "abuse cannot be condoned." *Bell* v. *Wolfish*, 441 U.S. 520, 560, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

VI

Finally, we turn to Ms. Griffith's challenge to the dismissal of her disability discrimination claims under the ADA and Rehabilitation Act. These claims were pled only against one defendant—El Paso County. Ms. Griffith alleged El Paso County failed to reasonably accommodate her gender dysphoria in violation of both statutes.

In the district court, Appellees moved to dismiss all claims against El Paso County—including the ADA and Rehabilitation Act claims—under Rules 12(b)(1) and 12(b)(6). Under Rule 12(b)(1), Appellees contended the district court lacked subject matter jurisdiction over all claims against El Paso County because Ms. Griffith failed to follow Colo. Rev. Stat. 30-11-105. That statute requires, in "all suits or proceedings by or against a county, the name in which the county shall sue or be sued shall be, 'The board of county commissioners of the county of ....' " Colo. Rev. Stat. 30-11-105. Ms. Griffith named only "El Paso County" and not the board of county commissioners. Under Rule 12(b)(6), Appellees maintained Ms. Griffith failed to state plausible ADA and Rehabilitation Act claims because, among other things, gender dysphoria is not a "disability" under the statutes. The district court granted the motion under Rule 12(b)(1), thereby dismissing El Paso County from the case. The district court then proceeded to rule on the Rule 12(b)(6) arguments, concluding Ms. Griffith failed to allege plausibly that El Paso County violated the ADA and Rehabilitation Act claims.

On appeal, Ms. Griffith challenges only the Rule 12(b)(6) dismissal. But before we can address her arguments, we must decide what effect, if any, the

district court's unchallenged Rule 12(b)(1) ruling has on this appeal. The parties do not address this issue, but we must reach it because it implicates the scope of our authority. If a district court concludes it lacks subject matter jurisdiction but proceeds to the merits, we have jurisdiction only to correct "the error of the [district] court in entertaining the suit." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *Arizonans for Off. Eng.* v. *Arizona*, 520 U.S. 43, 73, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)). As relevant here, the district court held it lacked subject matter jurisdiction over the ADA and Rehabilitation Act claims. The district court nevertheless reached the merits of those claims. Ms. Griffith has not challenged the district court's Rule 12(b)(1) dismissal on appeal. Under these circumstances, we must conclude the district court erroneously reached the merits of claims already dismissed for lack of subject matter jurisdiction.

A

We first explain why, on this record, we must conclude the dismissal of the ADA and Rehabilitation Act claims was for lack of subject matter jurisdiction. We start with Appellees' motion to dismiss, which proceeded under Rule 12(b)(1)—the rule used to challenge a federal court's "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Appellees moved to dismiss all claims against El Paso County—including the ADA and Rehabilitation Act claims—because Ms. Griffith "fail[ed] to properly name El Paso County as a party" under Colo. Rev. Stat. 30-11-105. SR.22. Appellees emphasized that failure deprived the court of "jurisdiction over" El Paso County, and thus, "the claims asserted against El Paso County

must be dismissed under Fed. R. Civ. P. 12(b)(1)." SR.23.

The district court agreed Ms. Griffith failed to comply with Colo. Rev. Stat. 30-11-105 and accordingly granted the Rule 12(b)(1) motion to dismiss. The district court set out the familiar Rule 12(b)(1) standard, and the district court's order used the word "jurisdiction" only in connection with Ms. Griffith's failure to comply with Colo. Rev. Stat § 30-11-105. The district court explained all claims against El Paso County—including the ADA and Rehabilitation Act claims—"can be dismissed due to this jurisdictional defect alone." R.96.

B

On appeal, the district court's conclusion that it lacked subject matter jurisdiction over the ADA and Rehabilitation Act claims is unchallenged. Ms. Griffith stated in her opening brief that she does not appeal "the district court's ruling that the County was not properly named." Op. Br. at 6 n.2. She says no more about the Rule 12(b)(1) dismissal. She proceeds to challenge only the Rule 12(b)(6) ruling that she failed to state plausible ADA and Rehabilitation Act claims against El Paso County. But Ms. Griffith has never argued the district court *had* subject matter jurisdiction to reach the Rule 12(b)(6) arguments in the first place.[32] She thus has waived the issue.

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[32] It is not at all clear that Colo. Rev. Stat. 30-11-105 is about *subject matter* jurisdiction. In *Gonzales* v. *Martinez*, we explained Colo. Rev. Stat. 30-11-105 "provides the exclusive method by which jurisdiction over a county can be obtained," an "action attempted to be brought under any other designation is a nullity, and no valid judgment can enter in such a case." 403 F.3d

Subject matter jurisdiction refers to federal "courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89, 118 S.Ct. 1003. Challenges to the district court's improper *exercise* of "subject-matter jurisdiction may be raised by the defendant 'at any point in the litigation,' and courts must consider them *sua sponte*." *Fort Bend Cnty., Tex.* v. *Davis*, 587 U.S. 541, 548, 139 S.Ct. 1843, 204 L.Ed.2d 116 (2019) (quoting *Gonzalez* v. *Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012)). But the same is not true of challenges to a district court's conclusion that it *lacked* subject matter jurisdiction. "We have no duty under the general waiver rule" to consider "untimely raised legal theories which may support ... [subject matter] jurisdiction." *Daigle* v. *Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992). Said differently, a "federal court is not obliged 'to conjure up possible theories' to support subject-matter jurisdiction" when a plaintiff

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1179, 1182 n.7 (10th Cir. 2005) (quoting *Calahan* v. *Jefferson County*, 163 Colo. 212, 429 P.2d 301 (1967)). We described the failure to follow the statute as a "jurisdictional flaw." *Id.* But we have never explained what "jurisdictional" means in this context. "Jurisdiction ... is a word of many, too many, meanings." *Wilkins* v. *United States*, 598 U.S. 152, 156–57, 143 S.Ct. 870, 215 L.Ed.2d 116 (2023) (quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)). Ms. Griffith presumably could have argued it was incorrect for Appellees and the district court to understand the failure to comply with Colo. Rev. Stat. 30-11-105 as a problem of *subject matter* jurisdiction. But she did not do so, and it is not our role to make those arguments for her. *Rodriguez* v. *IBP, Inc.*, 243 F.3d 1221, 1227 (10th Cir. 2001) ("This court will not make arguments for Rodriguez that he did not make himself."); *O'Neal* v. *Ferguson Constr. Co.*, 237 F.3d 1248, 1257 (10th Cir. 2001) (declining to decide whether precedent was distinguishable when no party suggested it was).

has failed to do so. *Atlas Biologicals, Inc.* v. *Kutrubes*, 50 F.4th 1307, 1322 (10th Cir. 2022) (quoting *Raley* v. *Hyundai Motor Co., Ltd.*, 642 F.3d 1271, 1275 (10th Cir. 2011)). In circumstances where, as here, a district court concludes it lacks subject matter jurisdiction and an appellant does not argue otherwise on appeal, we enforce traditional waiver principles. *See United States ex rel. Ramseyer* v. *Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996) (acknowledging a potential argument for subject matter jurisdiction but finding it waived and refusing to consider it because plaintiff did not make it), *superseded by statute on other grounds*, False Claims Act, Pub. L. N. 111-203, 124 Stat. 1376, *as recognized in United States ex rel. Reed* v. *KeyPoint Gov't Sols.*, 923 F.3d 729, 764–65 (10th Cir. 2019).

C

In this unusual posture, we must conclude the district court had no authority to consider the ADA and Rehabilitation Act claims under Rule 12(b)(6). A district court must have subject matter jurisdiction "before it can rule on the merits" of a plaintiff's claims. *Trackwell* v. *U.S. Gov't*, 472 F.3d 1242, 1245 (10th Cir. 2007); *Steel Co.*, 523 U.S. at 88–89, 118 S.Ct. 1003 (a challenge to subject matter jurisdiction under Rule 12(b)(1) is "considered a threshold question that must be resolved in respondent's favor before proceeding to the merits."); *see also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* Civ. § 1350 (4th ed. 2024) ("[W]hen the motion [to dismiss] is based on more than one ground, the cases are legion stating that the district court should consider the Rule 12(b)(1) challenge first because if it must dismiss the complaint for lack of subject matter jurisdiction, the

accompanying defenses and objections become moot and do not need to be determined by the judge.").

The district court dismissed the ADA and Rehabilitation Act claims for lack of subject matter jurisdiction under Rule 12(b)(1). At that point, the district court was without authority to resolve those claims under Rule 12(b)(6). "Without jurisdiction the court cannot proceed at all" because "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94, 118 S.Ct. 1003 (quoting *Ex parte McCardle*, 74 U.S. 506, 514, 7 Wall. 506, 19 L.Ed. 264 (1868)).

Because the district court concluded it lacked subject matter jurisdiction over the ADA and Rehabilitation Act claims, and because Ms. Griffith does not challenge that conclusion on appeal, we must vacate the district court's Rule 12(b)(6) ruling with respect to those claims. *Rio Grande Silvery Minnow* v. *Bureau of Reclamation*, 601 F.3d 1096, 1128 & n.19 (10th Cir. 2010) ("Because the district court was without subject-matter jurisdiction, and thus without the power to enter [the] judgment, that judgment must be vacated.").[33]

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[33] We recognize this may be an unsatisfying result for the parties. But our disposition is compelled by the legal principles we have discussed and applied to the record as developed in the district court. At oral argument, Ms. Griffith could not explain how we had authority to reach the merits of her ADA and Rehabilitation Act claims where, as here, the district court dismissed those claims for lack of subject matter jurisdiction. Ms. Griffith suggested we should "fix the error" she has alleged and remand "back to the district court" where the parties "can work out ... who the defendants are for" the ADA and Rehabilitation

VII

For the reasons described above, we **REVERSE** the dismissal of Ms. Griffith's Fourteenth Amendment Equal Protection claim only as to Sheriff Elder in his official capacity. Though we ultimately **AFFIRM** the grant of qualified immunity on Ms. Griffith's Fourth and Fourteenth Amendment cross-gender search claims against Commander Gillespie and Deputies Elliss and Mustapick, we conclude Ms. Griffith has plausibly alleged a constitutional violation by Deputy Mustapick. For this reason, we must **REVERSE** the dismissal of Ms. Griffith's related Fourth and Fourteenth Amendment claims against Sheriff Elder in his official capacity. We **REVERSE** the dismissal of Ms. Griffith's Fourth Amendment abusive search claim against Deputy Mustapick. Finally, because the district court dismissed the ADA and Rehabilitation Act claims against El Paso County without prejudice under Rule 12(b)(1), and because that ruling is not challenged by Ms. Griffith on appeal, we **VACATE** the district court's order dismissing those claims under Rule 12(b)(6). We otherwise **AFFIRM**.

Act claims. Oral Argument at 2:50–3:09. While it might be more expedient for the parties if we took Ms. Griffith's proposed course of action, "[s]ubject-matter jurisdiction ... does not entail an assessment of convenience." *Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 305, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006). And El Paso County—the only defendant against whom the ADA and Rehabilitation Act claims were pled—is no longer in the case. We have no power to affect the rights of the litigants not before us. *Princeton Univ.* v. *Schmid*, 455 U.S. 100, 102, 102 S.Ct. 867, 70 L.Ed.2d 855 (1982) (explaining federal courts "do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us").

23-1135, *Griffith v. El Paso County*
EBEL, Circuit Judge, concurring:

I concur.

This case presents some novel and difficult equal protection issues which require us ultimately to balance the parties' conflicting interests. As is often the case, the balancing decisions will be affected by how the parties' interests are defined and what level of scrutiny is applied to the government's policy being challenged.

Here, our task is made more difficult because of some arguably divergent language in several of the United States Supreme Court decisions and in the decisions of several of the lower courts, including the Tenth Circuit. Further, gender dysphoria is a relatively new diagnosis and it contains inherent ambiguities in its application.

To make matters worse, this case comes to us at the motion to dismiss stage, where we do not have a developed factual record.

With regard to appellant Griffith's equal protection arguments, my decision to concur in the majority ruling is influenced by the ambiguity of the current law and the high burden that must be met by a defendant who moves to dismiss at the pleading stage. Ultimately, I have determined that the plaintiff has the right, and justice will best be served by allowing her claims to continue at this pleading stage against the potentially liable parties.

The Fourth Amendment, ADA, and Rehabilitation Act claims are, by contrast, clearer for

me, and I concur with the majority opinion on those claims as well

I want to compliment both Judge Tymkovich and Judge Rossman for their careful and thorough analysis on these issues, and I am confident that their conflicting opinions will contribute to the further evolution of the law in this case.

I concur in the majority decision.

23-1135, *Griffith v. El Paso County*
TYMKOVICH, Circuit Judge, dissenting.

The El Paso County Jail classifies and houses inmates based on their biological sex. Darlene Griffith is a biological male who identifies as a transgender woman. The Jail's classification resulted in three consequences Ms. Griffith alleges are unconstitutional.

First, the Jail assigned Ms. Griffith to the male housing unit when she wanted to be housed with females. *Second*, male inmates are allegedly not permitted to wear female underwear or buy lipstick from the commissary—both things she wanted to do. *Third*, inmates are strip searched and patted down by guards of the same biological sex, and she wanted to be searched solely by female guards.

Ms. Griffith alleges these policies violate the Equal Protection Clause and the Fourth Amendment of the Constitution. The majority, largely based on its determination that "all" sex-based classifications trigger heightened scrutiny, concludes her claims are plausible. Though it avoids saying as much, the implication of the majority's reasoning is that housing inmates based on their biological sex is presumptively unconstitutional.

I disagree. In my view, binding Supreme Court precedent prescribes rational basis review to these sorts of correctional policies. In *Turner v. Safley*, the Supreme Court held "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Properly applied, *Turner* forecloses Ms. Griffith's Equal Protection claim and her Fourth Amendment claim directed at the Jail's allegedly unconstitutional search policy. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 339, 132 S.Ct. 1510, 182 L.Ed.2d 566 (2012) (holding

Turner applies to "[t]he Fourth and Fourteenth Amendments."). I would also dismiss her Fourth Amendment claim directed at Deputy Mustapick because she has failed to identify law clearly establishing that abusive language can transform an otherwise constitutional search into an unconstitutional one.

Because I would affirm dismissal of Ms. Griffith's complaint in its entirety, I respectfully dissent.

A. Background

The core of Ms. Griffith's complaint is that "[u]nder the Equal Protection Clause of the Fourteenth Amendment, discrimination against transgender people is a form of *sex* discrimination that is presumptively unconstitutional and subject to heightened scrutiny." Complaint ¶ 125. That allegation requires us to engage with terms like "sex," "gender," "male," "female," "man," and "woman." Central to Ms. Griffith's complaint is an alleged distinction between "sex" and "gender" since she concedes the Jail properly engages in some form of sex-segregated housing. Complaint ¶ 134 (Defendants "had no penological basis to deny Plaintiff a safe and appropriate place *in a female facility*.") (emphasis added).

While Ms. Griffith defines "sex"—"e.g., being male or female"—she does so without citation, and avoids defining gender. Complaint ¶ 21. In other places, however, she defines terms by reference to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM-5). Complaint ¶ 22 (citing the DSM-5's definition of "Gender Dysphoria").

Throughout this dissent, I use these terms as they are defined in the DSM-5.[34]

Historically, "gender" was used as a synonym, or at a least cultural proxy, for "sex." Indeed, as the majority observes, courts' Equal Protection decisions—including the Supreme Court's—use the terms "sex" and "gender" interchangeably, although the majority understands the terms to refer to biological sex.[35] Op. at 808 n.9. According to the DSM-5, these terms now have different meanings. The DSM-5 defines "sex" as the "[b]iological indication of male and female (understood in context of reproductive capacity), such as sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia." DSM-5 at 829. "Gender identity," in contrast, is a "category of social identity that refers to an individual's identification as male, female or, occasionally, some category other than male or female." *Id.* As I understand and use the terms, sex is a biological fact springing from chromosomal variations resulting in somatic differences (male or female) while gender identity reflects lived norms (man or woman).

This distinction is significant and ultimately fatal to Ms. Griffith's claims. That is because she functionally (and appropriately in my view) cedes to the constitutionality of *sex*-based segregation in jail—she merely alleges that she was on the wrong side of it. *See, e.g.*, Complaint ¶ 134 (alleging the Jail "had no penological basis to deny Plaintiff

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[34] The majority takes issue with my use of these definitions. Op. at 802 n.2 ("The dissent proffers his own explanations of those terms, rooted in sources other than the complaint."). I understand that the meaning of these words has been obscured and is subject to dispute, but the ordinary meaning of a word is not an allegation we are bound by.

[35] Like the majority, I read these cases as referring to biological sex. Op. at 808 n.9.

a safe and appropriate placement *in a female facility*, based on her sex, gender identity, characteristics, risk factors, and her history of sexual victimization in male facilities.") (emphasis added). But of course, Ms. Griffith could not claim constitutional entitlement to a "safe and appropriate placement in a female facility" if the Jail couldn't create "female facilities" in the first place.

In my view, the "segregation of inmates by sex is unquestionably constitutional." *Women Prisoners of D.C. Dep't of Corr. v. D.C.*, 93 F.3d 910, 926 (D.C. Cir. 1996). If detention facilities can constitutionally classify inmates based on their biological sex—an assumption baked into Ms. Griffith's complaint and one I agree is constitutional—then the question is not whether jails can classify based on sex, but how much deference federal courts should afford their classification methodology. Binding precedent obliges our deference to these sorts of policies in correctional institutions.

B. Equal Protection

Ms. Griffith alleges the Jail's sex-based classification policies violate the Constitution's Equal Protection Clause. U.S. Const. amend. XIV, § 1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws."). I disagree.

"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, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (emphasis added). *See also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (the Equal Protection clause is "essentially a

direction that all persons similarly situated should be treated alike.").

Put differently, the Equal Protection Clause requires states to "treat like cases alike." *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997). So long as that happens, state policies are "presumed to be valid" and will be upheld if they bear a rational relationship to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440, 105 S.Ct. 3249.

In my view, Ms. Griffith's Equal Protection claims fail both because she has not shown she is similarity situated to others who were treated differently and, independently, her claims fail rational basis review.

1. Similarly Situated

To state a plausible Equal Protection claim, Ms. Griffith must first show that she was "similarly situated" to inmates receiving differential treatment. *Fogle v. Pierson*, 435 F.3d 1252, 1261 (10th Cir. 2006) (considering whether inmate housed in administrative segregation after escaping was similarly situated to other inmates). *See also Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998) ("In order to assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them."). She cannot do so because she is biologically male and the prisoners she claims to be "similarly situated" to are biologically female.

Her complaint, moreover, does not allege the Jail treats her differently than other transgender inmates. *Fogle*, 435 F.3d at 1261 ("In order to succeed on his first equal protection claim, Fogle would have to show that he was 'similarly situated' to those general population inmates and that the difference in treatment was not

'reasonably related to legitimate penological interests.' ") (citing *Barney*, 143 F.3d at 1312 and quoting *Turner*, 482 U.S. at 89, 107 S.Ct. 2254). *See also Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996) ("Treatment of dissimilarly situated persons in a dissimilar manner by the government does not violate the Equal Protection Clause."). The Jail's policies classify inmates based on sex, *not* gender identity. According to the logic of Ms. Griffith's complaint, the "similarly situated" inmates are biologically female prisoners, whom the Jail housed separately and allowed certain personal items. But Ms. Griffith does not allege she is biologically female. Rather, she alleges she is biologically male (her sex) while psychologically she identifies as a woman (her "female gender identity"). *See, e.g.*, Complaint ¶ 2 ("Ms. Griffith is a transgender woman" who "lives in accordance with her female gender identity"). Nor does she suggest that she believes her biological *sex* to be female—just her gender identity. The consequence is that she has not shown that she is "in all relevant respects alike" to biologically female prisoners. *Nordlinger*, 505 U.S. at 10, 112 S.Ct. 2326. She is different in the relevant respect—her biological sex.

The way in which Ms. Griffith claims to be similarly situated (her gender identity) is not the relevant distinction the Jail permissibly draws (her biological sex).[36] Ms. Griffith was treated identically to those with whom she

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[36] Ms. Griffith's complaint concedes as a necessary predicate that jails can segregate based on some criteria, just not solely based on sex. It isn't clear from her complaint, however, why classifying based on gender identity would be any less constitutionally suspect then classifying based on sex. If the Jail can constitutionally segregate by gender *or* sex, caselaw compels our deference to a jail administrator's determination, which is discussed below.

is similarly situated, biological males. That identical treatment forecloses her Equal Protection claim.

2. Rational Basis Review Applies

Ms. Griffith's Equal Protection claim independently fails because she cannot satisfy *Turner*'s rational basis review. The majority interprets her complaint to allege *sex* discrimination and so concludes heightened scrutiny applies. Op. at 807-08 (citing *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (*VMI*)); Op. at 812 n.14 (Any government policy that "makes decisions by reference to biological sex [is] subject to heightened scrutiny.").

But the law is not so simple. The majority's formulation ignores the Court's decision in *Turner v. Safley* which compels our application of rational basis review to sex-based classifications in prisons and jails. 482 U.S. at 89, 107 S.Ct. 2254 ("[W]hen a prison regulation impinges on inmates' constitutional rights, *the regulation is valid if it is reasonably related to legitimate penological interests*.") (emphasis added).[37]

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[37] The majority refuses to apply *Turner*, in part, because no party raised *Turner* as controlling the standard of review. But the party presentation principle only "restricts courts from *raising* new issues." *United States v. Cortez-Nieto*, 43 F.4th 1034, 1052 (10th Cir. 2022) (emphasis in original). The standard of review is not a new claim, it is part and parcel of how we decide constitutional issues. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). Ms. Griffith's equal protection claim is properly before this court. Getting the law right means getting the standard of review right.

a. *Turner Compels Rational Basis Review*

In *Turner*, the Supreme Court reviewed prison policies restricting inmate marriage and correspondence. *Id.* at 84–85, 107 S.Ct. 2254.[38] Striking down the latter but not the former, it held that even "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89, 107 S.Ct. 2254. The Court has since "made quite clear that the standard of review we adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (emphasis added).

The Court has only narrowed *Turner* once, when it held that racial classifications in prison are subject to strict scrutiny.[39] *Johnson v. California*, 543 U.S. 499, 510, 125

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[38] While *Turner* specifically mentions "prison" the Court recently applied it to pretrial detainees in jail—meaning it applies in all detention contexts. *Florence*, 566 U.S. at 326, 132 S.Ct. 1510 ("The Court has 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.' ") (quoting *Turner*, 482 U.S. at 89, 107 S.Ct. 2254).

[39] *Turner* applies to regulations or policies—not to individual violations. For that reason, the Court "judge[s] violations of [the Eighth] Amendment under the 'deliberate indifference' standard, rather than *Turner*'s 'reasonably related' standard." *Id.* at 511, 125 S.Ct. 1141 (citations omitted). The same logic applies to individual searches under the Fourth Amendment. But when a search *policy* is challenged, the *Turner* framework applies. *Florence*, 566 U.S. at 330, 132 S.Ct. 1510 (considering a jail's policy of strip searching all incoming detainees and holding "[t]he current case is ... governed by the principles announced in *Turner*.").

S.Ct. 1141, 160 L.Ed.2d 949 (2005). *Johnson* held that racial classifications in prison are subject to strict scrutiny. *Id.* The Court reasoned "[t]he right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*" because "it is not a right that need necessarily be compromised for the sake of proper prison administration." *Id.* at 510–11, 125 S.Ct. 1141. In other words, constitutional rights that "must necessarily be limited in the prison context" are subject to rational basis review, while constitutional rights "that need [not] necessarily be compromised for the sake of proper prison administration" may be subject to greater scrutiny. *Id.*

"Maintaining safety and order" is at the heart of day-to-day prison administration. *Florence*, 566 U.S. at 326, 132 S.Ct. 1510. In fact, the "necessities of prison security and discipline are a *compelling* government interest." *Johnson*, 543 U.S. at 512, 125 S.Ct. 1141 (internal citation and quotation marks omitted). Maintaining prison security "necessarily makes unavailable many rights and privileges of the ordinary citizen, a retraction justified by the considerations underlying our penal system." *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (internal quotation marks omitted). Nothing in Ms. Griffith's complaint suggests that sex-based classifications are ones that "need [not] necessarily be compromised for the sake of proper prison administration." *Johnson*, 543 U.S. at 510, 125 S.Ct. 1141. To the contrary, the complaint alleges the opposite—that "female" specific facilities lead to "safe and appropriate" housing placements for transgender inmates. *See e.g.*, Complaint ¶ 134.

The conclusion that sex-segregation leads to safer institutions is bolstered by common experience evidencing that opposite sex housing "must necessarily be limited in the prison context." *Johnson*, 543 U.S. at 510, 125 S.Ct. 1141. Justice Ginsburg explained why: "[p]hysical

differences between men and women ... are enduring: 'the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.' " *VMI*, 518 U.S. at 533, 116 S.Ct. 2264 (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S.Ct. 261, 91 L.Ed. 181 (1946)).

These "male-female differences are a cause for concern in the prison context because increased rape, prostitution, and pregnancies, and the potential exploitation of outnumbered women in desegregated prisons are very real dangers." Jennifer Arnett Lee, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 Colum. Hum. Rts. L. Rev. 251, 259–60 (2000). Enduring *physical* differences mean that indiscriminate housing in prison could place females at increased risk from males—something Ms. Griffith's own complaint concedes. *See, e.g.*, Complaint ¶ 134 (recognizing the "safe[ty]" benefits inuring from "appropriate placement in a female facility"). If this were not so, Ms. Griffith's allegation that her housing in the male unit "exposed her to a significantly increased risk of sexual harassment [and] assault" would not be plausible. Complaint ¶ 2.

These differences mean the "segregation of inmates by sex is unquestionably constitutional." *Women Prisoners*, 93 F.3d at 926. *See also L. W. by & through Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir.), *cert. dismissed in part sub nom, Doe v. Kentucky*, —— U.S. ——, 144 S. Ct. 389, 217 L. Ed. 2d 285 (2023), *and cert. granted sub nom. United States v. Skrmetti*, —— U.S. ——, 144 S. Ct. 2679, 219 L.Ed.2d 1297 (2024) ("[T]he government does not trigger heightened review when it houses men and women separately at a prison without making distinctions in funding or programming available to members of each sex.").

Turner is so deferential to correctional policies because "[r]unning a prison 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." 482 U.S. at 84–85, 107 S.Ct. 2254 (invoking separation of powers concerns). *See also Florence*, 566 U.S. at 326, 132 S.Ct. 1510 ("The difficulties of operating a detention center must not be underestimated by the courts."). Given the "inordinate[ ] difficult[y]" in running a prison, we, the Supreme Court, and other circuits have mandated deference to these sorts of policies. *Id.*; *Est. of DiMarco v. Wyoming Dep't of Corr., Div. of Prisons*, 473 F.3d 1334, 1342 (10th Cir. 2007) (cautioning that "any assessment" of inmate housing assignments "must be mindful of the primary management role of prison officials who should be free from second-guessing or micro-management from the federal courts"); *Barney*, 143 F.3d at 1313 (reviewing county's policy of keeping women, but not men, in solitary confinement and noting "[w]e hesitate to interfere with prison officials' decisions concerning the day-to-day administration of prisons, to which we must accord deference"); *Griffin v. Brooks*, 13 F. App'x 861, 864–65 (10th Cir. 2001) (reviewing administrative segregation policy and noting "we hesitate to interfere with prison officials' decisions concerning the day-to-day administration of prisons, to which we must accord deference unless they violate the constitution or federal law"); *Klinger v. Dep't of Corr.*, 31 F.3d 727, 732 (8th Cir. 1994) ("[b]ecause courts have little expertise in the inordinately difficult task of running prisons, courts should accord a high degree of deference to prison authorities") (internal quotations omitted); *Women Prisoners*, 93 F.3d at 926–27 (applying *Turner* and warning against "completely eviscerat[ing] the deference that federal courts are obliged to give prison administrators"); *Veney v. Wyche*, 293 F.3d

726, 733 (4th Cir. 2002) (applying *Turner* and deferring housing decisions to prison officials).

Consistent with this approach, we applied *Turner* to an Equal Protection claim asserting sex-based discrimination in prison two years after *VMI*. *Barney*, 143 F.3d at 1313 n.17 (applying rational basis review to jail's policy of "keeping women"—but not men—"in solitary confinement" and upholding that policy as "reflect[ing] a legitimate and rational decision to provide for the safety of inmates and the efficient running of the jail."). We have also applied rational basis review to Equal Protection claims on two other occasions involving challenges to prison policies outside the sex-discrimination context. *See Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir. 1994) (applying *Turner* to prison's decision to transfer inmate to administrative segregation), and *Fogle*, 435 F.3d at 1261 (same).

Turner—and the caselaw applying it—prescribe deferential rational basis review for jail policies impacting constitutional rights other than race.[40] We are bound to apply that standard here.

b. VMI did not create a Turner carveout

The majority creates a new *Turner* "carve[ ] out," *Johnson*, 543 U.S. at 545, 125 S.Ct. 1141 (Thomas, J., dissenting), by focusing on *VMI*'s language saying "all gender-based classifications today warrant heightened

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[40] The detention context distinguishes the majority's citations to and reliance on *Doe through Doe v. Rocky Mountain Classical Acad.*, 99 F.4th 1256, 1258 (10th Cir. 2024) (Title IX claim); *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 799 (10th Cir. 2019) (city's public nudity ordinance); and *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024) (state practice denying sex-designation amendments to birth certificates).

scrutiny." 518 U.S. at 555, 116 S.Ct. 2264. I next explain why that cannot be correct.

First, *Turner* remains good law. In fact, the Court has twice reaffirmed its central holding after *VMI*. *Johnson*, 543 U.S. at 512, 125 S.Ct. 1141 (reaffirming *Turner*'s general applicability in 2005—9 years after *VMI*); *Florence*, 566 U.S. at 339, 132 S.Ct. 1510 (same in 2012 and also holding *Turner* applies to the "Fourth and Fourteenth Amendments."). Most recently in *Florence*, the Court "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." 566 U.S. at 326, 132 S.Ct. 1510 (quotation marks omitted). It also "reaffirm[ed]" in *Johnson* that the "necessities of prison security and discipline are a *compelling* government interest." *Johnson*, 543 U.S. at 512, 125 S.Ct. 1141 (emphasis added and citations omitted) (holding even racial segregation could satisfy strict scrutiny sometimes). *Turner* applies with particular force to policies directed at "[m]aintaining safety and order at these institutions [which] 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, 132 S.Ct. 1510. For that reason, *Turner* has uniformly been applied to policies "implicating prison security and day-to-day management concerns."[41] *Pitts v. Thornburgh*, 866 F.2d 1450, 1454 (D.C. Cir. 1989).

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[41] *Johnson*—the only case narrowing *Turner*—was also decided nine years after *VMI*. *Johnson*, 543 U.S. 499, 125 S.Ct. 1141. Yet it does not mention *VMI*. *See generally id.* If *VMI* created a *Turner* carve out for sex-based classifications, the Court would have mentioned it in creating *another*, ostensibly similar, carve out in *Johnson*. Yet it didn't. And it makes sense why: the Court does not "equat[e] gender classifications ... to classifications based on race or national origin."

Housing inmates and managing their personal property is a "day-to-day" management concern "implicating prison security." *Id.* Ms. Griffith concedes as much. *See, e.g.*, Complaint ¶ 134 (alleging the Jail "had no penological basis to deny Plaintiff a safe and appropriate placement in a female facility."). *Turner* applies to these policies.

Second, in *Washington v. Harper* the Court "made quite clear that the standard of review we adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." 494 U.S. at 224, 110 S.Ct. 1028 (emphasis added). To fall outside *Turner*'s ambit, the Court must explicitly recognize a carveout. It only did so once, in *Johnson*, for race.[42] *Id.* This was justified, it reasoned, because "[w]hen government officials are permitted to use race as a proxy for gang membership and violence ... society as a whole suffers." *Id.* at 511, 125 S.Ct. 1141. Yet *VMI* was careful to

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VMI, 518 U.S. at 532, 116 S.Ct. 2264. Race, according to the Court, is different; that is why race-based classifications get strict scrutiny while sex-based classifications (outside of prison) get intermediate scrutiny.

[42] The Court in *Johnson* also observed "[w]e have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the 'deliberate indifference' standard, rather than *Turner*'s 'reasonably related' standard." 543 U.S. at 511, 125 S.Ct. 1141. It would be odd for the Court to acknowledge the *Turner* "carve[ ] out[s]," *id.* at 546, 125 S.Ct. 1141, while ignoring a massive one the majority functionally alleges the Court created nine years beforehand. *See also supra* n.4.The majority resolves the tension between *VMI* and *Turner* by arguing that sex fits inside the *Johnson* carveout because race is "the Equal Protection category most like sex." Op. at 819. But the Supreme Court's sex discrimination caselaw developed "[w]ithout equating gender classifications, for all purposes, to classifications based on race or national origin." *VMI*, 518 U.S. at 532, 116 S.Ct. 2264.

note the Court does not "equat[e] gender classifications ... to classifications based on race." 518 U.S. at 532, 116 S.Ct. 2264. Rather, "[t]he Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin." *Id.* at 533, 116 S.Ct. 2264 n.6. We cannot infer from *Johnson* or *VMI* that sex-based housing classifications warrant a categorical *Turner* carve out simply because race-based classifications do. Race, the Court has explained, is different. Until the Supreme Court creates such a carveout, we must hold that the Jail's policies are one of the circumstances to which *Turner* applies. *Washington*, 494 U.S. at 224, 110 S.Ct. 1028 ("*Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights.") (emphasis added).

Third, the policies here do not lend themselves to *VMI*'s logic because they do not favor one sex over the other. The Court in *VMI* was concerned about the unequitable distribution of benefits to the sexes predicated on invidious stereotypes about sex. Its central teaching—and that of all the cases it relied on and all those coming since—is that unconstitutional sex *discrimination*—as opposed to constitutional sex-based *classification*—requires *favoring* one sex over the other. *VMI*, 518 U.S. at 555, 116 S.Ct. 2264 (favoring males by excluding female applicants from unrivaled military school based solely on sex); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) (favoring females by excluding male applicants from regional nursing school); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (creating a more favorable jury pool by striking potential jurors "based on gender stereotypes"). *See also Fowler v. Stitt*, 104 F.4th 770, 783–84 (10th Cir. 2024) (analyzing gender identity claim involving birth certificates: "[t]o state a viable equal protection claim, Plaintiffs must allege that the Policy

purposefully *discriminates* against them because of their membership in a particular class.") (emphasis added).

Underscoring the interpretation that discrimination is a necessary predicate, the Court has *not* applied heightened scrutiny to "all" sex-based classifications. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022) ("The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an *invidious discrimination* against members of one sex or the other.' ") (emphasis added) (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974)).

As the Sixth Circuit explained in *Skrmetti*:

> What of language in the cases saying that "all" sex-based classifications receive heightened review? *Virginia*, 518 U.S. at 555, 116 S.Ct. 2264, (quoting *J.E.B.*, 511 U.S. at 136, 114 S.Ct. 1419); *see Hogan*, 458 U.S. at 724–25, 102 S.Ct. 3331. The laws in those cases used sex classifications to bestow unequal treatment on men and women. *See Virginia*, 518 U.S. at 519, 116 S.Ct. 2264 (excluding female applicants); *Hogan*, 458 U.S. at 719, 102 S.Ct. 3331 (excluding male applicants). Those cases show only that the government cannot classify individuals by sex when doing so perpetuates invidious stereotypes or unfairly allocates benefits and burdens.

Id. (cleaned up and internal quotations omitted).

Justice Ginsburg recognized this bedrock tenet in *VMI*:

> "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an

> individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," *Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977) (per curiam), to "promot[e] equal employment opportunity," *see California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289, 107 S.Ct. 683, 93 L.Ed.2d 613, (1987), to advance full development of the talent and capacities of our Nation's people. *But such classifications may not be used*, as they once were, *see Goesaert v. Cleary*, 335 U.S. 464, 467, 69 S.Ct. 198, 93 L.Ed. 163 (1948), *to create or perpetuate the legal, social, and economic inferiority of women*. 518 U.S. at 533–34, 116 S.Ct. 2264 (cleaned up and emphasis added).

The Court in *VMI* was concerned with policies that "create or perpetuate the legal, social, and economic inferiority of women" based on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* at 533, 116 S.Ct. 2264. It was not concerned with "[m]aintaining safety and order" in prisons, *Florence*, 566 U.S. at 326, 132 S.Ct. 1510, by classifying inmates in accordance with their biological sex.

The touchstone of the Equal Protection scrutiny analysis is not whether sex factors into a policy or law, as the majority claims, but whether it *discriminates* based on sex by ascribing different benefits or burdens to the sexes. Put another way, it is differential treatment—not mere classification—that triggers heightened scrutiny. *See Women Prisoners*, 93 F.3d at 953 ("The Supreme Court's sex discrimination cases make it clear that the government may not rely on generalizations—even somewhat accurate ones—about women to justify different treatment of the sexes.") (Rogers, J., concurring in part).

Even if *VMI* applies to some degree in the prison context, its normative thrust is not implicated here because the complaint does not allege the Jail's policies favor one sex over the other by, for example, "making distinctions in funding or programming available to members of each sex." *Skrmetti*, 83 F.4th at 484 (citing *Women Prisoners*, 93 F.3d at 926). *See also Barney*, 143 F.3d at 1312 n.15 ("The Equal Protection Clause in the prison-conditions context is usually invoked to remedy disparities in educational, vocational, and recreational programs offered to male and female inmates."). The burden Ms. Griffith alleges is shared by both sexes without regard to stereotypes—they are classified based on their physical differences in furtherance of a "legitimate penological interest": "[m]aintaining safety and order." *Florence*, 566 U.S. at 326, 132 S.Ct. 1510. Because the Jail's policies do not impermissibly discriminate by favoring one sex over the other, but permissibly classify based on biological sex in furtherance of the "necessities of prison security and discipline," *id.* at 512, *Turner* applies.

That said, I acknowledge some doctrinal inconsistency between *Washington*'s holding that "*Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights," 494 U.S. at 224, 110 S.Ct. 1028 (emphasis added), and the Court's holding in *VMI*. 518 U.S. at 555, 116 S.Ct. 2264. While that inconsistency is ultimately not for lower courts to remedy, one principle must cede to the other. For the reasons explained above, I believe the best reading of the Court's precedent is that *Turner* applies to a prison's sex-based classifications when those classifications do not result in distinctions in funding or programming available to members of each sex. *See Skrmetti*, 83 F.4th at 484.

Because the policies here do not inequitably allocate benefits or burdens based on sex, we remain bound to apply *Turner*.[43]

* * * * *

To recap, "*Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." 494 U.S. at 224, 110 S.Ct. 1028 (emphasis added). For *Turner* not to apply, the Supreme Court must create a carveout. *See Johnson*, 543 U.S. at 511, 125 S.Ct. 1141. For the reasons explained above, *VMI* does not create a categorical carveout for sex-based classifications. Rather, heightened scrutiny only applies to sex-based classifications in prison when those classifications are the basis for bestowing unequal treatment upon the sexes. That is not the case here.

Accordingly, we remain compelled to apply *Turner* to "all" circumstances not otherwise delineated. *Washington*, 494 U.S. at 224, 110 S.Ct. 1028; *Johnson*, 543 U.S. at 511, 125 S.Ct. 1141. Ms. Griffith's allegations do not survive *Turner* review.[44]

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[43] Even if intermediate scrutiny applies, I am unaware of, nor has the majority identified any, case holding segregation of inmates by sex is unconstitutional. *Contra Women Prisoners*, 93 F.3d at 926 ("the segregation of inmates by sex is unquestionably constitutional.").

[44] Ms. Griffith also argues transgender status is a suspect or quasi-suspect class warranting heightened scrutiny. The majority does not reach this argument since it concludes the Jail's policies automatically trigger heightened scrutiny. Op. at 808-10. If I am wrong that rational basis review applies, I agree with the lower court that we are bound by *Brown v. Zavaras*'s holding that transgender status is not "a protected class"—meaning rational basis review applies either way. 63 F.3d 967, 971 (10th Cir. 1995).

3. Ms. Griffith cannot overcome rational basis review

"To survive a motion to dismiss, a complaint 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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)) (internal quotation marks omitted). "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.*

Recall that the Jail's policies are "valid if [they are] reasonably related to legitimate penological interests." *Turner*, 482 U.S. 78, 107 S.Ct. 2254. And the Court considers "institutional security" to be a "valid penological objective[ ]." *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 348, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987). So to overcome a motion to dismiss, Ms. Griffith's complaint must show that any "difference in treatment was not reasonably related to" its "legitimate penological interest[ ]" in institutional security. *Fogle*, 435 F.3d at 1261. It doesn't.

Ms. Griffith's challenge to the Jail's sex placement and accoutrement policies cannot overcome rational basis review because they "reflect[ ] a legitimate and rational decision to provide for the safety of inmates and the efficient running of the jail." *Barney*, 143 F.3d at 1313 n.17; *c.f. Johnson*, 543 U.S. at 512, 125 S.Ct. 1141 ("[T]he necessities of prison security and discipline are a compelling government interest.") (internal citations and quotations omitted). Ms. Griffith's only allegation that the Jail lacks a penological interest in its policies is her conclusory statement that it has "no penological basis to deny Plaintiff a safe and appropriate placement in a female facility." Complaint ¶¶ 134, 204. But this allegation is

simply a "[t]hreadbare recital[ ] of the elements of a cause of action, supported by mere conclusory statements," *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937, and cannot overcome the Jail's motion to dismiss.

Even if we accepted this allegation, her complaint would still be deficient because she has not "nudged [her] claim[ ] across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. Determining whether a complaint states a "plausible" claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. Facts alleged in a complaint might state a claim that is "conceivable," but not "plausible," if it disregards "obvious alternative explanations" for government action. *Id.* at 682, 129 S.Ct. 1937 (citing *Twombly*, 550 U.S. at 567, 127 S.Ct. 1955).

I do not think the existence of obvious alternative explanations is necessarily fatal to a complaint. *See Hughes v. Nw. Univ.*, 63 F.4th 615, 629 (7th Cir. 2023) ("Where alternative inferences are in equipoise—that is, where they are all reasonable based on the facts—the plaintiff is to prevail on a motion to dismiss."). But if obvious alternative explanations exist, a complaint may need to refute them for its allegations to be plausible—particularly when "common sense," *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937, counsels against accepting the allegations. That is the case here.

Without additional factual allegations, Ms. Griffith's assertion that the Jail lacks a penological interest in assigning her to a male facility based on her sex is not plausible. Complaint ¶ 134. The obvious reason for the Jail's sex-based classifications—indeed the reason cited in Ms. Griffith's complaint—is to "significantly" reduce the "risk of sexual harassment, assault, and emotional distress" for inmates by segregating the sexes—an

institutional safety concern. Complaint ¶ 2, *O'Lone*, 482 U.S. at 348, 107 S.Ct. 2400 ("institutional security" is a "valid penological objective[ ]."). The policy, therefore, is at least "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89, 107 S.Ct. 2254.

Our deference to these sorts of policies is particularly warranted in jails (as opposed to most prisons), which as a matter of day-to-day administration must accommodate a constant stream of newly arrested inmates—about whom they often have little information—meaning it is virtually impossible to make nuanced placement decisions based on an inmate's gender identity or particular risk factors. *Florence*, 566 U.S. at 326, 132 S.Ct. 1510 ("The largest [jails] process hundreds of people every day .... Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face."). Simply put, the obvious alternative explanation for the jail's sex-based classifications is that doing so is the best way to regulate institutional security in the dynamic jail environment.

And again, Ms. Griffith's complaint does not actually allege there is *no* penological interest in sex-based jail classifications *or* that such classifications are unconstitutional—just that she is on the wrong side of them. Even the majority's opinion acknowledges the obvious penological justifications for the Jail's policies: inmate safety, Op. at 803 ("housing her in an all-male unit subjected her to a risk of sexual harassment, sexual assault, and extreme emotional distress"); dignitary concerns as to other inmates, *id.* at 804 n.4 ("Ms. Griffith informed a deputy at the Jail she was uncomfortable that the other inmates in her unit were not wearing shirts"); and dignitary concerns as to staff, *id.* at 804 ("Ms. Griffith

claims male deputies regularly touch 'her breast[s] and groin when patting her down.").

Simply put, I do not believe the Constitution compels jails to house males and females together, or to otherwise be sex-blind in their policies. Her requested relief would impose on others the very consequences she fears, and which the Jail's policies aim to minimize. These consequences include female guards having to search and female prisoners being exposed to Ms. Griffith's male anatomy. Balancing these cross-sex consequences exactly the kind of decision we owe *Turner* deference. There is an obvious penological interest, so we need not accept her allegation as true.[45]

While I acknowledge that an inmate's transgender status raises significant placement, security, and treatment challenges for jail administrators, Ms. Griffith has not plausibly alleged her gender identity overrides the justifications for the Jail's sex-based policies—the outcome necessary to defeat rational basis review. Her desire to be placed in female housing is just one of many factors that a facility must consider when housing detainees. Indeed, one

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[45] The majority acknowledges this tension. *See, e.g.*, Op. at 827 ("[I]t is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex.") (quoting *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994)). Under Ms. Griffith's view, female guards will now have to perform cross-sex strip searches. Dignitary interests run both ways.

This observation leads to another. While the majority begins its opinion by defining sex relative to gender, Op. at 802, it later conflates the two. *See, e.g.*, *id.* at 829 (stating, "our law is clear that cross-gender strip searches must be motivated by some penological interest" but quoting *Shroff v. Spellman*, 604 F.3d 1179 (10th Cir. 2010), for support, which concerned cross-*sex* nudity and does not even mention "gender").

must acknowledge that many male and female inmates may also be at greater risk in a particular sex-based housing unit because of their individual characteristics (such as size, sexual orientation, type of crime, race, religion), and thus prefer to be housed in a different unit. These inmates do not have plausible sex-based Equal Protection claims. Under the majority's logic, they do.

Ms. Griffith's request to be housed with biological females undermines her claim that the Jail lacks a penological interest in sex-based classifications. Simply put, her complaint is circular. Detention facilities across the country must grapple with the challenges of transgender inmates in housing, medical care, programming, and security. The Jail (and every detention facility) must balance myriad such competing interests to promote safe, dignified inmate housing. But those challenges must be met by prison administrators on a case-by-case basis. And difficult decisions do not a viable Equal Protection claim make. Rather, they emphasize why deferential rational basis review applies.[46]

In sum, Ms. Griffith's complaint does not survive deferential rational basis review, so I would affirm the district court's dismissal of her complaint.[47]

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[46] If an individualized detention decision places inmates in harm's way, they might have Eighth Amendment or substantive due process claims. *See supra* n.4. But *c.f. Estate of DiMarco*, 473 F.3d at 1336 (concluding transgender inmate "does not have a liberty interest in her placement and the conditions of confinement.").

[47] Ms. Griffith's best Equal Protection claim is that the Jail's accoutrement policy impermissibly discriminates based on sex by allowing females, but not males, to have lipstick and female underwear. But recall that Ms. Griffith claims her "discernible feminine characteristics" placed her at "heightened risk of sexual victimization." Complaint ¶ 129. And she alleges "panties and lipstick" "conform[ ] with her [female] gender identity." Complaint ¶ 3. The

A. Fourth Amendment Claim

Ms. Griffith also brings two Fourth Amendment claims flowing from alleged "cross-gender" strip searches and pat downs: one directed at El Paso County and the other directly at Deputy Mustapick. *See, e.g.*, Complaint ¶ 3. Taking her claims in order, Ms. Griffith's claims fail for several independent reasons.

She first alleges a Fourth Amendment violation against the County because its alleged search policy resulted in a male deputy searching her lower body—even though a female deputy searched her upper body. Complaint ¶ 76. Adjudicating a Fourth Amendment unreasonable search claim requires courts to weigh "the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Boiled down, this claim asks us to find that the Constitution

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inference is that panties and lipstick make her appear more feminine, which will also place her at a heightened risk of sexual victimization. The obvious reason for the Jail's policy, then, is that permitting vulnerable male inmates to have articles that make them appear more "feminine" increases the likelihood of sexual violence and harassment—the harms Ms. Griffith fears. In *Barney*, we held this sort of jail policy—one treating women differently based on security concerns—"reflects a legitimate and rational decision to provide for the safety of inmates and the efficient running of the jail." 143 F.3d at 1313 n.17. And institutional security is more than a legitimate government interest, it is a "compelling" one. *Johnson*, 543 U.S. at 505, 125 S.Ct. 1141. Preventing inmates from having items that increase their likelihood of being sexually victimized is "substantially related to" achieving that compelling objective—meaning Ms. Griffith's complaint also facially fails heightened scrutiny.

requires female deputies to strip search biologically male inmates who identify as women.

As discussed above, prison policies such as this one are subject to rational basis review. *Turner*, 482 U.S. at 89, 107 S.Ct. 2254; *Florence*, 566 U.S. at 330, 132 S.Ct. 1510 (search policies in jails are "governed by the principles announced in *Turner* and *Bell*."). Ms. Griffith plausibly alleges that she found the search to be distressing. I have no doubt it was. But she offers no factual allegations which, taken as true, demonstrate that the Jail's same-sex strip search policy is unrelated to its legitimate interests in prison security and employee welfare or privacy. *Turner*, 482 U.S. at 90, 107 S.Ct. 2254 (relevant to the reasonableness of a prison regulation is "the impact accommodation of the asserted constitutional right will have on guards and other inmates."). I therefore disagree with the majority that Ms. Griffith has plausibly alleged that the policy violates the Fourth Amendment.

Second, Ms. Griffith asserts a Fourth Amendment claim directly against Deputy Mustapick owing to his use of abusive language while conducting a strip search. Deputy Mustapick is presumptively shielded by qualified immunity, so Ms. Griffith must show that her Fourth Amendment right "was clearly established at the time of the violation, such that every reasonable official would have understood, that such conduct constituted a violation of that right." *Reavis Estate of Coale v. Frost*, 967 F.3d 978, 984 (10th Cir. 2020) (internal quotation marks omitted). To do so, she must refer to a Supreme Court or Tenth Circuit opinion, or to the established weight of authority from other circuits. *Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021).

While it is clearly established that strip searches "must be conducted in a reasonable manner," *Bell*, 441 U.S. at 560, 99 S.Ct. 1861, Ms. Griffith has not pointed to any

precedent that would transform an otherwise reasonable search into a constitutionally violative one owing exclusively to offensive language. While Deputy Mustapick's alleged speech is deplorable, Ms. Griffith has not identified caselaw clearly establishing that deplorable language makes an otherwise permissible search unconstitutional. Nor does it appear that the Jail's search policy condoned abusive language as a part of its practices.

The majority thinks this isn't an issue because, it concludes, " 'a general constitutional rule already identified in the decisional law' can overcome qualified immunity when it 'appl[ies] with obvious clarity to the specific conduct in question.' " Op. at 831 (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). The "general constitutional rule" it relies on is that abusive searches "cannot be condoned." *Bell*, 441 U.S. at 560, 99 S.Ct. 1861.

In *Bell*, the Court concluded a prison did not violate the Fourth Amendment by mandating full-body strip searches after visits. *Id.* at 558–60, 99 S.Ct. 1861. It is impossible to conclude from an opinion *permitting* strip searches that abusive language during an otherwise reasonable search violates the Fourth Amendment. This undercuts the requirement that a "rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted" and that "courts must not define clearly established law at a high level of generality"—a requirement that is "especially important in the Fourth Amendment context." *D.C. v. Wesby*, 583 U.S. 48, 63–64, 138 S.Ct. 577, 199 L.Ed.2d 453 (2018).

By permitting Ms. Griffith to overcome qualified immunity based on *Bell*, the majority misapplies the "clearly established" prong to overcome qualified immunity. Because no such authority exists, I would affirm the district court's dismissal of this claim.

* * * * *

This case pits profoundly personal convictions against jail policies aimed at maintaining institutional security while balancing the dignitary concerns of officers and inmates. Ms. Griffith alleges her interests transcend the Jail's. But I do not believe either the Equal Protection Clause or the Fourth Amendment affords the relief she seeks.

For the reasons stated above, I would affirm the district court's dismissal of her complaint, and so respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DARLENE GRIFFITH,
Plaintiff -Appellant,

v.

EL PASO COUNTY, COLORADO; BILL ELDER, in his individual and official capacities; CY GILLESPIE, in his individual capacity; ELIZABETH O'NEAL, in her individual capacity; ANDREW MUSTAPICK, in his individual capacity; DAWNE ELLISS, in her individual capacity; TIFFANY NOE, in her individual capacity; BRANDE FORD, in her individual capacity,
Defendants - Appellees.

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; THE ARC OF THE UNITED

No. 23-1135

(D.C. No. 1:21-CV-00387-CMA-NRN)

(D. Colo.)

STATES; AUTISTIC SELF ADVOCACY NETWORK; AUTISTIC WOMEN AND NONBINARY NETWORK; THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW; THE COELHO CENTER FOR DISABILITY LAW POLICY AND INNOVATION; CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER; DISABILITY LAW COLORADO; DISABILITY RIGHTS ADVOCATES; DISABILITY RIGHTS BAR ASSOCIATION; IMPACT FUND; NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY; NATIONAL DISABILITY RIGHTS NETWORK; TRANSGENDER LEGAL DEFENSE & EDUCATION FUND; UNITED STATES OF AMERICA; AMERICAN CIVIL LIBERTIES

UNION; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; JEREMIAH HO; M. DRU LEVASSEUR; NANCY C. MARCUS; DARA E. PURVIS; ELIOT T. TRACZ; ANN E. TWEEDY; KYLE COURTENAY VELTE; EZRA ISHMAEL YOUNG,
Amici Curiae.

FILED February 19, 2025

[129 F.4th 790]

JUDGMENT

Before **TYMKOVICH, EBEL**, and **ROSSMAN**, Circuit Judges.

This case originated in the District of Colorado and was argued by counsel. The judgment of that court is reversed, affirmed, and vacated.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DARLENE GRIFFITH, Plaintiff -Appellant, v. EL PASO COUNTY, COLORADO; BILL ELDER, in his individual and official capacities; CY GILLESPIE, in his individual capacity; ELIZABETH O'NEAL, in her individual capacity; ANDREW MUSTAPICK, in his individual capacity; DAWNE ELLISS, in her individual capacity; TIFFANY NOE, in her individual capacity; BRANDE FORD, in her individual capacity, Defendants - Appellees. - - - - - - - - - - - - - - - - - - - DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; THE ARC OF THE UNITED	No. 23-1135 (D.C. No. 1:21-CV-00387-CMA-NRN) (D. Colo.)

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Amici Curiae.

FILED June 10, 2025

[129 F.4th 790]

ORDER

Before **HOLMES**, Chief Judge, **HARTZ**, **TYMKOVICH**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, **CARSON**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

This matter is before the court on *Defendants'-Appellees' Petition for Rehearing En Banc* and *Appellant's Response to Petition for Rehearing En Banc*. The petition and the response were circulated to all judges of the court who are in regular active service, and a poll was called. The

poll did not carry. Consequently, Appellee's request for en banc rehearing is DENIED.

Judges Tymkovich, Eid, and Carson would grant the petition. Judge Rossman has filed a separate concurrence in support of the denial of en banc rehearing, which is joined by Judge Federico. Judge Tymkovich has filed a separate dissent from the denial of en banc rehearing, which is joined by Judge Eid and Judge Carson. Judge Hartz has filed a separate statement.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

Griffith v. *El Paso County, Colorado*, No. 23-1135
ROSSMAN, J., concurring in the denial of rehearing *en banc*

I respectfully concur in the denial of rehearing *en banc*. I write briefly only to address two points raised in the dissent to this denial, authored by my colleague Judge Tymkovich.

First, my colleague contends *en banc* rehearing was justified because "[t]he panel majority" in this case "avoided the central question." Dissent at 3. According to the dissent, this "central question" was the tension between *Turner* v. *Safley*, 482 U.S. 78 (1987)—which holds rational-basis review attends to most prison policies—and *United States* v. *Virginia* (*VMI*), 518 U.S.

515 (1996)—which holds intermediate scrutiny attends to all sex classifications. But the panel majority did not avoid anything. Instead, we adjudicated the arguments the parties actually raised. Insofar as *the dissent* raised and resolved the *Turner*/*VMI* tension *sua sponte*, we responded at some length. *See Griffith* v. *El Paso Cnty., Colo.*, 129 F.4th 790, 816–19 (10th Cir. 2025).

It is worth repeating: "In our adversary system, . . . in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw* v. *United States*, 554

U.S. 237, 243 (2008). To be sure, federal courts always maintain the authority to construe the law correctly "[w]hen an issue or claim is properly before the court." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). But courts are not "self-directed boards of legal inquiry and research." *State* v. *EPA*, 989 F.3d 874, 885 (10th Cir. 2021) (quoting *NASA* v. *Nelson*, 562 U.S. 134, 147 n.10

(2011)). These principles state fundamental norms that govern the appellate process. When we abide them, we safeguard our own legitimacy. That the entire *Turner*/*VMI* tension is one "the dissent raise[d] and resolve[d] for Appellees," *Griffith*, 129 F.4th at 816, makes this case a particularly poor vehicle for further review.

Second, my colleague suggests transgender classifications are *not* sex classifications for Equal Protection purposes, contrary to our precedent in *Fowler* v. *Stitt*, 104 F.4th 770 (10th Cir. 2024). *See* Dissent at 1–2, 2 n.1. But that suggestion runs counter to *all parties'* litigation positions. Even the Appellees have represented to this court that Ms. Griffith was subject to sex classifications. *See* Aplee. July 3, 2024, Rule 28(j) Resp. at 2 (conceding "intermediate scrutiny would apply to their classification decisions made with respect" to Ms. Griffith, and arguing only that the Appellees "had not been given fair notice" of that standard of scrutiny). Nowhere in their petition for rehearing *en banc* did the Appellees argue otherwise.

23-1135, *Griffith v. El Paso County*
HARTZ, J., dissenting

Although I am not voting to en banc this case, I agree in full with Judge Tymkovich's dissent. Also, I fail to see why we should issue a mandate in this case at this time when it is so likely that the Supreme Court will give us guidance on a relevant important issue within the next few weeks. *See* Tymkovich dissent at 2 n.1.

23-1135, *Griffith v. El Paso County*
TYMKOVICH, Circuit Judge, dissenting in denial of petition for rehearing en banc.

This court is between a rock and a hard place. The Supreme Court has held that "that the [rational basis] standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990) (emphasis added) (citing *Turner v. Safley*, 482 U.S. 78, 85 (1987)). But it also held in a later case that "all gender- based classifications today warrant heightened scrutiny," *United States v. Virginia*, 518

U.S. 515, 555 (1996) [*VMI*] (emphasis added) (quotations omitted). This case puts those statements at odds because prison officials house inmates according to their sex.

Darlene Griffith is a transgender woman—biologically male but living according to her female identity. El Paso County Jail housed her with other male prisoners based on her sex. She claims this policy violates the Equal Protection Clause. Her claim implicates both *VMI*'s heightened scrutiny for sex discrimination, and *Turner*'s rational basis review for prison regulations.

Rather than face the hard question of how to harmonize these holdings, relying on our case that applied intermediate scrutiny to transgender classifications, *see Fowler v. Stitt*, F.4th 770, 789 (10th. Cir. 2024) (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020)), we found a plausible claim of sex discrimination. Had we properly wrestled with the question, we would have concluded that *Turner* applies unless the Supreme Court explicitly creates a

carveout for sex classifications in the prison context. Even so, I do not think that transgender classifications are based on sex for purposes of the Equal

Protection Clause and that heightened scrutiny was impermissible for that reason as well.[1]

But we did not, so I respectfully dissent from the denial of rehearing en banc.

I.

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. It is a constitutional requirement that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But the Equal Protection Clause "does not forbid classifications." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). And courts look more skeptically at some classifications than others. Ms.

Griffith claims that El Paso County Jail's housing policy should receive intermediate scrutiny because it classifies inmates based on sex. *See VMI*, 518 U.S. at 533. But the Supreme Court has ruled that even "when a prison regulation impinges on inmates'

[1] I should note that the Supreme Court in the pending *Skrmetti* case may hold that transgender classifications are subject to rational basis review for equal protection purposes. *See L. W. by & through Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024). Ms. Griffith's argument at its core is not the propriety of men's and women's prisons, but that as a transgender woman she should be placed in the women's prison. That denial should be subject to rational basis review.

constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. The Court clarified that it meant "*all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington*, 494 U.S. at 224 (emphasis added).

The panel majority avoided the central question. It held that whether *Turner* controlled was unclear, so El Paso County's failure to thoroughly present the argument in its briefing was decisive.

This cannot be so. The party presentation principle only prevents us from raising new issues; "it would be quite another to allow parties to stipulate or bind us to the application of an incorrect legal standard." *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) (McConnell, J.). The Supreme Court and other circuits agree. *See, e.g.*, *Moody v. NetChoice, LLC*, 603 U.S. 707, 779–80 (2024) (Alito, J., concurring) (quoting *Gardner*, 568 F.3d at 879 (10th Cir. 2009)); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *Kairys v. Southern Pines Trucking, Inc.*, 75 F.4th 153, 160 (3rd Cir. 2023) ("But parties cannot forfeit the application of 'controlling law'"); *United States v. Escobar*, 866 F.3d 333, 339, n. 13 (5th Cir. 2017) (*per curiam*) ("A party cannot waive, concede, or abandon the applicable standard of review." (internal quotations omitted)).

II.

Both *Turner* and *VMI* appear to sweep so broadly that they are irreconcilable. Still as an inferior court we remain bound by both decisions and must seek to reconcile them. A closer read of caselaw shows that *Turner* should control unless the right at issue "is not a right that need necessarily be compromised for the sake of proper prison

administration." *Johnson v. California*, 543 U.S. 499, 510 (2005). And sex-based housing raises safety concerns that obviously go to the heart of proper prison administration.

Turner counsels deference to prison officials so long as the regulation is "reasonably related to legitimate penological interests." *Turner* 482 U.S. at 89. "This is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." *Washington*, 494 U.S. at 223 (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)). The Supreme Court has carved a right out of *Turner* deference only once. In *Johnson*, the Supreme Court held that race-based discrimination was unnecessary for proper prison administration. 543 U.S. at 510–11. Even racial discrimination, "especially pernicious in the administration of justice," *id.* at 511 (internal quotations omitted), required an explicit carve-out from *Turner*. This exception proves the rule.

There is no *Turner* carve-out for sex discrimination, and it does not fit into the carve out for race. *See VMI*, 518 U.S. at 532 (refusing to "equat[e] gender classifications . . . to classifications based on race"). We cannot create a *Turner* carve- out,

but even if we could, it would be unwise. Sex-segregated housing is necessary to

"[m]aintain[] safety and order" and so courts should defer to prison officials. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 326 (2012). The D.C. Circuit has explicitly held "the segregation of inmates by sex is *unquestionably constitutional*." *Women Prisoners of D.C. Dep't of Corr. v. D.C.*, 93 F.3d 910, 926 (D.C. Cir. 1996) [*Women Prisoners*] (emphasis added).

After all, the reason sex receives only intermediate scrutiny is that there remain "enduring" differences between men and women. *VMI*, 518 U.S. at 533. For this reason, *VMI* does not sweep as broadly as it suggests. As the Sixth Circuit put it, "necessity of heightened review, will not be present every time that sex factors into a government decision." *L. W. by & through Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir.), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023), and *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024). Even though sex differences determine their outcomes, courts have not applied heightened scrutiny to laws that regulate medical procedures, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022), marriage, *Obergefell v. Hodges*, 576 U.S. 644 (2015), or prison housing unless there is a difference in facilities or funding, *Women Prisoners*, 93 F.3d at 926.

In sum, the best reading of *Turner* and *VMI* is that *Turner* controls absent a clear exception from the Supreme Court. After all, even racial discrimination fell under *Turner*'s control until the Supreme Court carved it out in *Johnson*. On the other hand, courts have held that even in light of *VMI*, "[m]ere

appearance of the words sex or gender in a law does not by itself require skeptical review under the Constitution." *Skrmetti*, 83 F.4th at 484. Our duty is simply to apply Supreme Court precedent, and in my view it requires rational basis review.

III.

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. It is not our place as inferior courts to sweep aside one for the other; we must try to honor both.

I respectfully dissent. But only the Supreme Court can truly solve this conflict.

This case is a good candidate for its review.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00387-NRN-CMA

DARLENE GRIFFITH,

Plaintiff,

v.

EL PASO COUNTY, COLORADO,BILL ELDER, in his individual and official capacities, CY GILLESPIE, in his individual capacity, ELIZABETH O'NEAL, in her individual capacity, ANDREW MUSTAPICK, in his individual capacity, DAWNE ELLISS, in her individual capacity, TIFFANY NOE, in her individual capacity, BRANDE FORD, in her individual capacity,

Defendants.

FILED June 7, 2022

THIRD AMENDED COMPLAINT
AND JURY DEMAND

Plaintiff, by and through her attorneys, Andy McNulty and Mari Newman of KILLMER, LANE & NEWMAN, LLP, respectfully alleges for her Third Amended Complaint and Jury Demand as follows:

INTRODUCTION

1. Darlene Griffith suffered repeated sexual harassment, sexual assault, and discrimination as a result of El Paso County's policy of refusing to house transgender inmates based on their gender identity, and a pervasive culture of purposeful discrimination against, and subjugation of, transgender inmates who suffer from Gender Dysphoria.

2. Ms. Griffith is a transgender woman who has been diagnosed with Gender Dysphoria. In the community, she lives in accordance with her female gender identity and undergoes hormone therapy. Despite this well-documented history, Defendants purposefully housed Ms. Griffith in an all-male unit in the El Paso County Jail. Despite Ms. Griffith's multiple requests to be moved to a unit that corresponds with her gender identity, El Paso County continued to discriminatorily house her in a unit that exposed her to a significantly increased risk of sexual harassment, assault, and emotional distress.

3. Defendants also subjected Ms. Griffith to a pervasive culture of discrimination and sexual harassment at the El Paso County Jail. Defendant Andrew Mustapick, an El Paso County Sheriff Deputy, sexually harassed Ms. Griffith and subjected her to a highly invasive (and completely unnecessary) visual body cavity search upon intake, while telling her that he wanted to go "balls deep in [her] ass." Because she was housed in an all-male unit, Ms. Griffith was then subjected to repeated cross-gender pat-down searches. Defendants continuously and intentionally mis-gendered Ms. Griffith while she was incarcerated. Defendants denied Ms. Griffith clothing that conforms with her

gender identity despite the fact that cisgendered women are allowed panties and lipstick. When El Paso County officials learned that Ms. Griffith had told her medical care providers that she would attempt to self-castrate due to the pervasive discrimination that she faced, they took no action to rectify their on-going discrimination and harassment of her, and continued to house her in an all-male housing unit.

4. Defendants took all of these actions in accordance with the official policies of El Paso County, or pursuant to widespread unwritten customs and practices that El Paso County has condoned.

5. Ms. Griffith brings this lawsuit to vindicate her rights and the rights of all transgender women, so that they do not have to suffer the daily indignities that she suffered in the El Paso County Jail.

JURISDICTION AND VENUE

6. This action arises under the Constitution and laws of the United States.

7. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Jurisdiction supporting Plaintiff's claims for attorney fees and costs is conferred by 42 U.S.C. § 1988.

8. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391(b). All of the events alleged herein occurred within the State of Colorado, and all of the parties were residents of the State of Colorado at all times relevant to the subject matter of this Third Amended Complaint.

9. Supplemental pendent jurisdiction for Plaintiff's state law claims is based on 28 U.S.C. §

1367 because the violations of federal law alleged are substantial and the pendent state law causes of action derive from a common nucleus of operative facts.

PARTIES

Plaintiff:

10. At all times relevant to the subject matter of this Third Amended Complaint, Plaintiff Darlene Griffith was a citizen of the United States and a resident of the State of Colorado.

11. During the relevant time period, Ms. Griffith was detained at the El Paso County Jail.

12. All available administrative remedies have been exhausted to the extent required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). There are no other administrative exhaustion requirements that would pose as a bar to the claims asserted herein.

Defendants:

13. Defendant El Paso County is a municipality and as such is a proper defendant under 42 U.S.C. § 1983.

14. At all times relevant to the subject matter of this litigation, Defendant Bill Elder was a citizen of the United States and a resident of Colorado. At all relevant times, Defendant Elder was acting under color of state law in his capacity as the El Paso County Sheriff. Defendant Elder was responsible for training and supervising all other Defendants and other employees of the El Paso County Sheriff's Department working at the jail, for setting jail policy for the county and the overall management of the jail, and for insuring the health and welfare of all persons

detained in the El Paso County Jail.

15. At all times relevant to the subject matter of this litigation, Defendant Cy Gillespie was a citizen of the United States and a resident of Colorado. At all relevant times, Defendant Gillespie was acting under color of state law in his capacity as a Commander employed by El Paso County and Defendant Elder.

16. At all times relevant to the subject matter of this litigation, Defendant Elizabeth O'Neal was a citizen of the United States and a resident of Colorado. At all relevant times, Defendant O'Neal was acting under color of state law in her capacity as an official employed by El Paso County and Defendant Elder.

17. At all times relevant to the subject matter of this litigation, Defendant Andrew Mustapick was a citizen of the United States and a resident of Colorado. At all relevant times, Defendant Mustapick was acting under color of state law in his capacity as a deputy employed by El Paso County and Defendant Elder.

18. At all times relevant to the subject matter of this litigation, Defendant Dawne Elliss was a citizen of the United States and a resident of Colorado. At all relevant times, Defendant Elliss was acting under color of state law in her capacity as a deputy employed by El Paso County and Defendant Elder.

19. At all times relevant to the subject matter of this litigation, Defendant Tiffany Noe was a citizen of the United States and a resident of Colorado. At all relevant times, Defendant Noe was acting under color of state law in her capacity as a deputy employed

by El Paso County and Defendant Elder.

20. At all times relevant to the subject matter of this litigation, Defendant Brande Ford was a citizen of the United States and a resident of Colorado. At all relevant times, Defendant Ford was acting under color of state law in her capacity as a deputy employed by El Paso County and Defendant Elder.

FACTUAL ALLEGATIONS

Gender Identity, Gender Dysphoria, And The Incarceration Of Transgender Women Like Ms. Griffith

21. Gender identity is an innate, internal sense of one's sex—e.g., being male or female—and is a basic part of every person's core identity. Everyone has a gender identity. Most people's gender identity is consistent with the sex they were assigned at birth ("assigned sex"). Transgender people, however, have a gender identity that is different from their assigned sex. For example, a transgender woman is a woman who was assigned male at birth and has a female gender identity. A cisgender woman is a woman who was assigned female at birth and has a female gender identity.

22. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) ("DSM-5") recognizes that being transgender is not itself a disability, but that the clinically relevant condition is the "Gender Dysphoria" experienced by many individuals whose gender identity conflicts with their assigned sex. Gender Dysphoria is defined as the significant

distress that may accompany the incongruence between a transgender person's gender identity and assigned sex. This distress limits major life activities and is therefore a disability. A transgender person's Gender Dysphoria can be alleviated when the person is able to live, and be treated by others, consistently with the person's gender identity.

23. Gender Dysphoria often, but not always, emerges during childhood.

24. The accepted course of medical treatment to alleviate the symptoms of Gender Dysphoria often involves allowing the individual to live as his or her chosen gender through one or more of the following treatments: changes in gender expression and role; dressing, grooming, and otherwise outwardly presenting in a manner consistent with one's gender identity; hormone therapy; psychotherapy; and, in some cases, surgery to change primary and/or secondary sex characteristics.

25. Ms. Griffith has been diagnosed with Gender Dysphoria and has been living as a transgender woman for over twenty years. As part of her medically supervised treatment, she changed her name and altered her physical appearance to conform to her female gender identity, including dressing in feminine attire and taking feminizing hormones, which caused her to develop female secondary sex characteristics such as breasts, soft skin, a lack of facial hair, and other characteristics typically associated with women.

26. At all times relevant to this action, Defendants were aware of Ms. Griffith's Gender Dysphoria and her identity as a transgender woman.

27. At all times relevant to this action, Defendants were aware of Ms. Griffith's history of Gender Dysphoria and her identity as a transgender woman.

28. At all times relevant to this action, Defendants perceived Ms. Griffith as having Gender Dysphoria and being a transgender woman.

29. Defendants were aware that Ms. Griffith has a history of self-harm, which is a symptom and manifestation of her diagnosed Gender Dysphoria. Defendants were also aware that Ms. Griffith had an increased suicide risk because of her transgender status and history of past suicide attempts. And, Ms. Griffith alerted Defendants to self-harming thoughts throughout her incarceration.

30. On March 11, 2021, Ms. Griffith told Christine Mohr, a Wellpath mental health provider, that she wanted to cut off her penis on a daily basis. Ms. Mohr acknowledged that Ms. Griffith has an extensive history of self-mutilation. Ms. Mohr spoke with an El Paso County sergeant about Ms. Griffith's expressed intent to self-mutilate and her housing, but the El Paso County official decided that Ms. Griffith would remain housed in an all-male unit.

31. On July 1, 2021, Ms. Griffith told Raymond Carrington, a Wellpath mental health provider, that she would remove her penis herself once she could figure out how to do it and would do it as soon as possible. Mr. Carrington noted the conversation in Ms. Griffith's medical records. Mr. Carrington also alerted an El Paso County official that Ms. Griffith had expressed ideation of self-harm, but the El Paso County official deliberately decided not to place Ms. Griffith on housing precautions or move her

to housing that conforms with her gender identity.

32. After alerting El Paso County officials, and its medical contractors (who communicated those concerns to El Paso County officials), that she was contemplating engaging in self-castration because of the pervasive discrimination and harassment she experienced within the El Paso County Jail, Ms. Griffith attempted to self-castrate by wrapping a rubber band around her genitals.

33. Ms. Griffith's Gender Dysphoria is a mental impairment that substantially limits one or more major life activities.

34. Ms. Griffith is substantially limited in her ability to care for herself because she requires regular, ongoing, and life-long medical treatment, including ongoing psychotherapy and periodic hormone treatment. She is also substantially limited in other major life activities, such as eating, sleeping, learning, concentrating, thinking, communicating, and interacting with others because of distress associated with her Gender Dysphoria

35. Ms. Griffith is substantially limited in the operation of major bodily functions, including neurological function, brain function, endocrine function, and reproductive function.

36. Ms. Griffith has a history of Gender Dysphoria, which substantially limits one or more major life activities, including the ability to care for herself, eating, sleeping, learning, concentrating, thinking, communicating, interacting with others, and reproducing, and which substantially limits neurological function, brain function, endocrine function, and reproductive function.

37. When a transgender person's Gender

Dysphoria is left untreated, or is inadequately treated, the consequences can be dire. Symptoms of untreated Gender Dysphoria often include intense emotional suffering, anxiety and depression, suicidality, and thoughts or acts of self-harm. All of those symptoms can be mitigated, and often prevented altogether, for transgender people with access to appropriate individualized medical care as part of their gender transitions.

38. Ms. Griffith has engaged in multiple acts of self-harm since childhood during times when her Gender Dysphoria has not been accommodated and treated. Ms. Griffith engages in self-harm, specifically self-castration behavior, regularly. This activity is worsened when she is not receiving treatment for Gender Dysphoria, which includes not being allowed to live, and dress, consistent with her gender identity and being subjected to sexual harassment in the form of mis-gendering.

39. The prison environment can be particularly harmful to transgender women. Reports (including the 2009 report by the National Prison Rape Elimination Commission) consistently document that transgender women are victims of sexual abuse at much higher rates than the rest of the population while in custodial environments including lock-ups, jails and prisons, as well as while being searched by male prison guards. In its June 2015 report of data collection activities, the Bureau of Justice Statistics ("BJS") disclosed that an estimated 35% of transgender people held in prisons such as those in Colorado reported experiencing one or more incidents of sexual victimization in the past 12 months or since admission. According to the BJS report, when asked about the experiences

surrounding their victimization by other incarcerated people, 72% of the transgender respondees said they experienced force or threat of force and 29% said they were physically injured.

The Relevant Standards For Incarcerating Transgender People

40. The World Professional Association for Transgender Health ("WPATH") is an "international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect for transgender health. The vision of WPATH is to bring together diverse professionals dedicated to developing best practices and supportive policies worldwide that promote health, research, education, respect, dignity, and equality for transsexual, transgender, and gender nonconforming people in all cultural settings." [2] All Defendants entrusted with the care and safety of the transgender women in the El Paso County Jail are aware that WPATH standards of care are applicable to Ms. Griffith and other transgender women in the El Paso County Jail. The WPATH Standards of Care are widely recognized as the authoritative standard for the treatment of transgender individuals and the National Commission on Correctional Healthcare recommends the WPATH standards for use in all correctional facilities.

41. The WPATH standards of care apply

[2] WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, p. 1 (available at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC% 20V7_English.pdf.).

in their entirety to transgender people in prisons and require individual assessment for appropriate treatment in a fair and tolerant climate, which may consist of outward expression of one's internal sense of gender identity, and social role transition, including access to gender-affirming canteen items, like feminine grooming products and clothing.

42. The WPATH standards dictate that placement of transgender people in a single-sex housing unit, ward, or pod on the sole basis of the appearance of the external genitalia places transgender people at risk for victimization. Despite these known risks, El Paso County and its officials promulgating and carrying out official policy, including Defendants Elder and Gillespie, make facility assignments to people in custody solely on the basis of the individual's genitalia.

43. The WPATH standards state that housing and shower/bathroom facilities for transsexual, transgender, and gender nonconforming people living in institutions should take into account their gender identity and role, physical status, dignity, and personal safety. Placement in a single-sex housing unit, ward, or pod on the sole basis of the appearance of the external genitalia may not be appropriate and may place the individual at risk for victimization. Institutions where transsexual, transgender, and gender nonconforming people reside and receive health care should monitor for a tolerant and positive climate to ensure that residents are not under attack by staff or other residents.

44. WPATH also provides that housing and shower/bathroom facilities for transgender people living in institutions should take into account their gender identity and role, physical status, dignity, and

personal safety. Defendants have failed to follow these requirements for Ms. Griffith and other transgender women in El Paso County's care, resulting in the continued violation of their rights and exposure to obvious danger from other inmates and self-mutilation.

45. In 2003, Congress passed the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 et seq. ("PREA"). PREA establishes a zero-tolerance standard against sexual abuse in adult prisons and other confinement centers. PREA requires agencies to comply with national standards to eliminate sexual abuse, recognizes that transgender people face elevated risks of being victimized in prisons, mandates that state correctional facilities provide proper training to correctional staff, and requires subject agencies to establish methods to deter and detect sexual violence in prison, to identify and treat such victims, and to report incidents of such violence to the Bureau of Justice Statistics.

46. The Commission established to monitor compliance with PREA noted in 2009 that gender nonconformity places transgender people at extremely high risk for abuse, and, as a result, the Commission opined that, "In determining whether to house transgender individuals in men's or women's facilities, the Commission requires individualized determinations based on other factors in addition to the person's current genital status" (NPREC, 2009, p. 89). Defendants are and have been aware of the standards required by PREA.

El Paso County And Its Officials Have An Official Policy Of Housing Transgender Women, Like Ms. Griffith, In All-Male Units At The El Paso County Jail

47. When Ms. Griffith first entered El Paso County Jail on July 20, 2020, she was an openly transgender woman with a feminine appearance.

48. During her intake screening, she notified El Paso County Jail and its healthcare personnel that she was a transgender woman with a diagnosis of Gender Dysphoria. Ms. Griffith explicitly requested placement in a women's facility because she feared being sexually abused and assaulted in male facilities by both guards and inmates, along with fearing the humiliation of being constantly searched by male guards in a male unit and the general degradation of being considered a man when she is a transgender woman.

49. Ms. Griffith's medical records note that she has been diagnosed with Gender Dysphoria.

50. Ms. Griffith also alerted Defendants that she is legally blind.

51. El Paso County, as a matter of official policy, refuses to house transgender women in female housing facilities. El Paso County continued to house Ms. Griffith, and continues to house other transgender women in its custody, in male units within the El Paso County Jail.

52. El Paso County officials ignored Ms. Griffith's health and safety requests, despite knowing the risks she faced, and subjected her to a terrible sequence of constitutional violations throughout the entirety of her incarceration.

53. El Paso County officials disregarded Ms. Griffith's safety concerns and housed her in men's units within the El Paso County Jail where she foreseeably became a victim of multiple instances of sexual assault, harassment, and degrading and transphobic behavior at the hands of male deputies.

54. On intake, Defendant Noe classified Ms. Griffith and purposefully placed her into an all-male unit despite knowing that Ms. Griffith is a transgender woman and that Ms. Griffith wished to be placed into housing that corresponded with her gender identity. Defendant Noe did this in accordance with the customs, policies, and practices of El Paso County and Defendant Elder.

55. On July 29, 2020, Defendant Brande Ford did an ADA initial interview of Ms. Griffith. It was clear to Defendant Ford that Ms. Griffith is a transgender woman and that Ms. Griffith wished to be placed into housing that corresponded with her gender identity. Despite this, Defendant Forde did not re- classify Ms. Griffith and place her into a unit that corresponded with her gender identity. In fact, despite Gender Dysphoria being a disability under the Americans with Disabilities Act, Defendant Forde wrote in Ms. Griffith's records that there were no disability concerns related to Ms. Griffith's housing.

56. After her initial classification into an all-male unit, Ms. Griffith continuously requested that she be placed in a unit that conformed with her gender identity.

57. On October 29, 2020, Ms. Griffith filed an inmate grievance, which she believed would be transmitted to Defendant Gillespie, requesting that she be housed in a female ward because she is a

transgender woman. Ms. Griffith further informed Defendant Gillespie that she had previously been housed in the Denver Women's Prison Facility and that all of her documentation outside of El Paso County's system correctly notes that she is a transgender woman. In response to Ms. Griffith's grievance, Defendant O'Neal stated that El Paso County had reviewed Ms. Griffith's request and denied her the accommodation of housing her in a facility that corresponded with her gender identity. It was clear that this decision was made in accordance with the policies and procedures put into place by Defendants Elder and Gillespie.

58. On December 9, 2020, Ms. Griffith filed another inmate grievance requesting that she be placed in a female unit. That grievance also complained that deputies at the El Paso County Jail were continuously referring to her with male pronouns. Ms. Griffith again pointed out that all of her documentation outside of the El Paso County system reflects her correct gender identity and that she had previously been housed in female units in other correctional facilities. On January 4, 2021, El Paso County responded to Ms. Griffith's grievance by stating that she would continue to be housed in a male unit based on El Paso County's policies and procedures.

59. On January 15, 2021, Ms. Griffith again requested appropriate housing in a female ward. Ms. Griffith grieved numerous staff regarding the issue and alerted El Paso County officials and its medical provider that she had previously been housed in two DOC facilities in female wards.

60. On January 22, 2021, Ms. Griffith told jail mental health provider Raymond Carrington

that she was suffering from extreme anxiety because she feared repercussion for grieving her treatment in custody: namely, that she was continuing to be housed in a male ward and treated as male, even though she is a transgender woman. Ms. Griffith also reported to the jail medical official that she felt as though people in the El Paso County Jail do not accept her for the person that she is and that she was being ostracized in the male ward for being a transgender woman. Ms. Griffith expressed to the jail medical official the difficulty on her mental health of being housed in a male ward and expressed her desire to be housed with women because she is a transgender woman.

61. On January 22, 2021, Ms. Griffith also wrote a grievance that again asked that she be moved to a women's unit. Ms. Griffith wrote that every day she was suffering mentally and physically due to the trauma of being housed in an all-male unit with male guards. On January 23, 2021, Ms. Griffith wrote another grievance asking to be moved to a women's unit within the El Paso County Jail, stating that she was suffering on a daily basis due to El Paso County's failure to move her to a unit that corresponds with her gender identity. On January 23, 2021, Ms. Griffith wrote another kite complaining about the lack of accommodations for her Gender Dysphoria, including housing in a men's ward.

62. On February 26, 2021, Ms. Griffith asked the mental health provider why she continued to be housed in a men's ward and that this was creating anxiety and depression for her. Ms. Griffith also stated that she continued to be called "sir" by deputies.

63. On March 9, 2021, Ms. Griffith wrote a grievance requesting that Christine Mohr provide

information about Ms. Griffith's diagnosed Gender Dysphoria to El Paso County Jail officials so that they would move Ms. Griffith to housing that corresponded with her gender identity which, upon information and belief, was communicated to El Paso County.

64. On March 10, 2021, Ms. Griffith again wrote a kite complaining about being housed in a male ward and being considered a male within the Jail.

65. On March 11, 2021, Ms. Griffith told Christine Mohr that she wanted to be housed with women and that she had previously been housed with women in CDOC, which Ms. Mohr confirmed by reviewing Ms. Griffith's previous incarceration records. Ms. Mohr acknowledged consulting with an El Paso County official about Ms. Griffith's housing and property requests.

66. On March 19, 20201, Christine Mohr noted that Ms. Griffith expressed frustration to her because Ms. Griffith continued to want to be housed in a female unit but had not been moved. Ms. Mohr acknowledged talking to the multiple El Paso County officials about Ms. Griffith's concerns. On March 27, 2021, Ms. Mohr told Ms. Griffith that El Paso County had determined that she would not be moved to a female ward.

67. El Paso County continues to house transgender women in facilities that do not correspond with their gender identity. El Paso County is routinely discriminating against these women, including Ms. Griffith, based on their sex, transgender status and/or disability and exposing them to harassment, rape, sexual assault, and other anti-transgender violence, or a heightened risk thereof by

refusing to provide them safe housing.

68. The decision to house Ms. Griffith in housing that does not conform with her gender identity has exacerbated symptoms of her Gender Dysphoria leading her to suffer significant emotional distress and have increased ideation of self-harm.

69. As a result of El Paso County's, and its officials', decision to house Ms. Griffith in a housing unit that did not conform with her gender identity, Ms. Griffith engaged in self-harm by wrapping a rubber band around her genitalia extremely tightly with the purpose of self-castration.

70. El Paso County's decision to house Ms. Griffith in housing that does not conform with her gender identity was a discriminatory action and a failure to reasonably accommodate Ms. Griffith's diagnosed Gender Dysphoria.

Defendant Andrew Mustapick Sexually Harassed And Assaulted Ms. Griffith During An Unconstitutional Cross-Gender Visual Body-Cavity Search Pursuant To El Paso County's Official Policy That Male Guards Conduct Unsupervised Visual Body-Cavity Searches Of Transgender Women Inmates

71. It is El Paso County's official policy that transgender women (including those with Gender Dysphoria) are searched, including strip searched, by male staff and not by female staff. No female guards are required to be present during searches (including visual body-cavity searches). Transgender women in El Paso County custody have routinely been subjected to searches, including visual

body-cavity searches, by male staff.

72. Ms. Griffith was subjected to a visual body-cavity search by a male deputy upon arrival at the El Paso County Jail in accordance with this policy.

73. When Ms. Griffith was booked into the jail, she was taken to a separate room. Before Ms.

Griffith began stripping off her clothes, both a male and female deputy arrived.

74. When Ms. Griffith saw that both a male and female deputy would be conducting her visual body-cavity search, Ms. Griffith protested and asked that the male deputy leave. Ms. Griffith told both deputies that, because she is transgender, she did not want a male deputy to be present. Defendant Dawn Elliss told Ms. Griffith that, per her sergeant's orders, the male deputy would stay throughout the entire visual body-cavity search process. Defendant Elliss told Ms. Griffith that because she was "still a male" in El Paso County's "system" that a male deputy would be conducting her search pursuant to El Paso County policy and procedure. Ms. Griffith again asked that Defendant Elliss conduct the search because Ms. Griffith is a transgender woman. Defendant Elliss refused and cited El Paso County's policy.

75. Defendant Elliss then told Ms. Griffith to take off her shirt, which she did. Ms. Griffith was compliant throughout the whole visual body-cavity search process.

76. After examining Ms. Griffith's breasts, with Defendant Andrew Mustapick present, Defendant Elliss gave Ms. Griffith a sports bra and then left the room. As Defendant Elliss left the room, she intentionally and discriminatorily mis-gendered Ms. Griffith, telling Defendant Mustapick, "*he* is all

yours now to strip out." Defendant Elliss left Ms. Griffith alone with Defendant Mustapick and did nothing to ensure that Defendant Mustapick did not sexually harass Ms. Griffith and subject her to an unconstitutional visual body-cavity search.

77. After Defendant Elliss left the room, Defendant Mustapick ordered Ms. Griffith to take off her socks, pants, and panties, and then place her hands on the wall. Defendant Mustapick then told Ms. Griffith to step back, bend over, and "spread [her] sexy cheeks." Ms. Griffith protested Defendant Mustapick's use of this derogatory and harassing language, but complied with his directive.

78. Defendant Mustapick then told Ms. Griffith that he was "going to go balls deep in that ass" while grabbing his own penis in view of Ms. Griffith. Defendant Mustapick was extremely aggressive while searching Ms. Griffith's genitals and making these comments.

79. After Defendant Mustapick was finished sexually harassing Ms. Griffith, he warned her that she had better not tell anyone about what he did and said to her. He threatened Ms. Griffith that if she did tell someone, he would make sure that she was brutalized by the guards at the El Paso County Jail.

80. There was no legitimate penological purpose for allowing a male guard to conduct a visual body-cavity search of Ms. Griffith. And, there was certainly no penological purpose for any of the actions taken by Defendants Mustapick and Elliss.

81. El Paso County officials' threatening, intimidating and harassing visual body-cavity search of Ms. Griffith, which per policy was conducted by an unaccompanied male deputy, was a discriminatory

action and a failure to reasonably accommodate Ms. Griffith's diagnosed Gender Dysphoria.

82. El Paso County officials' threatening, intimidating and harassing visual body-cavity search of Ms. Griffith, which per policy was conducted by an unaccompanied male deputy, has exacerbated symptoms of her Gender Dysphoria leading her to suffer significant emotional distress and have increased ideation of self-harm.

83. As a result of El Paso County's, and its officials', decision to sexually harass Ms. Griffith, Ms. Griffith engaged in self-harm by wrapping a rubber band around her genitalia extremely tightly with the purpose of self-castration.

Ms. Griffith Was Sexually Assaulted By A Male Inmate After Putting Defendants On Notice That She Was Not Safe In An All-Male Unit

84. After pleading to be moved to a female unit for over a year, and Defendants' refusal to heed her repeated pleas, Ms. Griffith was sexually assaulted by another male inmate on November 18, 2021.

85. The inmate approached Ms. Griffith while she was laying in her bunk in the all-male unit she continued to be assigned to by El Paso County officials, and groped her right breast. Then, the inmate jeered Ms. Griffith, "you know you want this dick."

86. After being sexually assaulted, Ms. Griffith was so distressed that she asked to see a mental health provider.

87. This was not the first time that Ms. Griffith was assaulted by the other inmate. A witness to the assault told El Paso County officials that he witnessed at least three to four other similar assaults of Ms. Griffith.

88. Even after being assaulted by another male inmate, Defendants did not move Ms. Griffith to a unit within the El Paso County Jail that corresponded with her Gender Identity.

Defendants Subjected Ms. Griffith To Continuous Cross-Gender Pat-Down Searches By Male Deputies, Which Caused Her Significant Distress, And Were Done Pursuant To El Paso County's Policies, Customs, And Practices

89. Throughout her incarceration at the El Paso County Jail, Defendants subjected Ms. Griffith to continuous cross-gender pat-down searches by male deputies pursuant to official El Paso County policy. Ms. Griffith complained about these cross-gender searches, and the harmful effects they were having on her physical and mental health, but El Paso County did nothing to cease subjecting Ms. Griffith to cross-gender searches.

90. On January 20, 2021, Ms. Griffith wrote a grievance where she stated that her anxiety was "through the roof" every time she is patted down by male deputies. Additionally, Ms. Griffith complained about male deputies continually touching her breast and groin when patting her down. Ms. Griffith pointed out that female inmates are not patted down by male deputies, and that she was being singled out as a transgender woman for different

treatment. On January 21, 2021, Ms. Griffith complained to a jail medical provider about the effect of male pat downs on her mental health, and the disparate treatment given to her by male pat downs.

91. On January 22, 2021, Ms. Griffith was especially upset that male officers continued to pat search her and, particularly, she was upset about a pat-down search performed by a male deputy that had just occurred when she returned from the law library. Ms. Griffith wrote a grievance because Defendants continued to subject her to cross-gender pat down searches, including the one in which the deputy intentionally touched her breast. Ms. Griffith wrote that every day she was suffering mentally and physically due to the trauma of being patted down by male guards. Ms. Griffith wrote this grievance, which was viewed by El Paso County officials. Later that day, Ms. Griffith told a jail medical provider that she felt violated when male officers touch her.

92. On January 23, 2021, Ms. Griffith wrote a kite complaining about the lack of accommodations for her Gender Dysphoria, including being constantly patted down by male deputies.

93. On February 3, 2021, Ms. Griffith wrote yet another grievance because she was being subjected to non-routine cross-gender pat down searches on a daily basis, and that these pat-down searches were causing her physical and emotional pain.

94. El Paso County officials' continuous searches of Ms. Griffith, which per policy, custom, and practice were conducted by unaccompanied male deputies, were discriminatory and harassing actions and a failure to reasonably accommodate Ms.

Griffith's diagnosed Gender Dysphoria.

95. Defendants' decision to subject Ms. Griffith to continuous searches by unaccompanied male deputies has exacerbated symptoms of her Gender Dysphoria leading her to suffer significant emotional distress and have increased ideation of self-harm.

96. As a result of El Paso County's, and its officials', decision to subject Ms. Griffith to continuous cross-gender pat-down searches, Ms. Griffith engaged in self-harm by wrapping a rubber band around her genitalia extremely tightly with the purpose of self-castration.

El Paso County Customarily Mis-Genders Ms. Griffith and other Transgender Individuals In Its Custody

97. WPATH guidelines dictate that, as part of treatment for Ms. Griffith's diagnosed Gender Dysphoria, she should have been treated as the woman that she is. That includes providing Ms. Griffith gender-affirming clothing, addressing her by her proper pronouns and name, and housing her in a unit that corresponds with her gender identity. El Paso County, and its officials, failed to provide Ms. Griffith with care in accordance with these widely recognized standards.

98. El Paso County refuses to recognize transgender women in its custody as the women that they are. Instead, El Paso County officials routinely refer to these women, including Ms. Griffith, using the male names they were assigned at birth. Documentation maintained by El Paso County, whether in case management, mental health or

medical files, routinely refer to these women as "men" or using male pronouns, despite El Paso County's own documentation showing that these individuals belong to the community of transgender women.

99. Throughout her incarceration at the El Paso County Jail, sergeants and deputies mis-gendered Ms. Griffith and used language that does not conform with her gender identity.

100. On September 16, 2020, Ms. Griffith complained to Deputy Daniel Holder about other inmates in her unit not wearing shirts because the male inmate's failure to wear their shirts made her uncomfortable as a transgender woman. In response, Deputy Holder walked over to the other inmates and loudly yelled at them, "the blind faggot said you need to put your shirts on" in reference to Ms. Griffith. Beyond mis-gendering Ms. Griffith (and highlighting her vision disability), this statement was designed to create an antagonistic relationship between her and other inmates, placing her at an even greater risk of assault. Based on our information, Deputy Holder was not disciplined for this gross abuse of his authority.

101. On November 10, 2020, Ms. Griffith wrote in a grievance that an El Paso County deputy had consistently mis-gendered her. When Ms. Griffith attempted to correct the deputy, the deputy confronted Ms. Griffith. El Paso County did not discipline the deputy for these actions. On December 9, 2020, Ms. Griffith wrote in a grievance that El Paso County deputies continuously mis-gendered her, which was causing her significant emotional distress.

102. On February 3, 2021, Ms. Griffith wrote in a grievance that she was being subjected to verbal harassment by male deputies in the El Paso

County Jail on a daily basis, and that this harassment was causing her pain. On February 26, 2021, Ms. Griffith stated to a jail medical provider that she continued to be called "sir" by deputies and that this caused her anxiety.

103. On June 23, 2021, Ms. Griffith wrote a grievance because she was, again, mis-gendered by an El Paso County Jail official, and felt as though El Paso County Jail officials were purposefully mis-gendering her to discriminate against her.

104. On July 1, 2021, Ms. Griffith told Raymond Carrington that when she identifies herself as female, the jail (including the guards) do not respect her wishes or use the appropriate pronouns. Ms. Griffith also told Defendant Carrington that she would remove her penis herself once she could figure out how to do it, and would do it as soon as possible. Ms. Griffith told Mr. Carrington that the WPATH standards of care should be followed. Mr. Carrington informed El Paso County officials about Ms. Griffith's statements about self-harming, and El Paso County officials took no action to rectify the consistent mis-gendering that Ms. Griffith endured and did not take any action to ensure that Ms. Griffith was moved to an appropriate housing unit so as to prevent her from engaging in self-harming activity.

105. Mis-gendering is a form of sexual harassment.

106. This constant mis-gendering of Ms. Griffith has been caused by El Paso County's and Defendant Elder's policy of housing Ms. Griffith in a male unit, along with the customs and practices at the El Paso County Jail that condone discriminatory and harassing treatment of transgender prisoners.

107. El Paso County officials' actions in constantly mis-gendering Ms. Griffith was a discriminatory action and a failure to reasonably accommodate Ms. Griffith's diagnosed Gender Dysphoria.

108. The constant mis-gendering of Ms. Griffith has exacerbated symptoms of her Gender Dysphoria leading her to suffer significant emotional distress, become depressed, and have increased ideation of self-harm.

109. As a result of El Paso County's, and its officials', decision to constantly mis-gender and sexually harass Ms. Griffith, Ms. Griffith engaged in self-harm by wrapping a rubber band around her genitalia extremely tightly with the purpose of self-castration.

El Paso County Customarily Denies Ms. Griffith And Other Transgender Inmates The Ability To Dress In Accordance With Their Gender Identity

110. On September 7, 2020, Ms. Griffith wrote a grievance requesting the ability to dress in accordance with her gender identity. Specifically, Ms. Griffith requested that she be provided with a sports bra and women's underwear. Previously, Ms. Griffith had orally requested to be provided with a sports bra and women's underwear. Ms. Griffith had been denied a sports bra since being incarcerated two months earlier. Defendants denied Ms. Griffith a reasonable accommodation for her Gender Dysphoria and forced to leave her breasts without a bra, to be ogled by male inmates and deputies for over a month. This caused Ms. Griffith significant emotional distress and

physical discomfort.

111. In response to her formal grievance, Ms. Griffith was provided with a sports bra. Lieutenant Eric Carnell came to Ms. Griffith's cell with a sports bra. Lieutenant Carnell told Ms. Griffith that she would only receive one sports bra, and not panties, because she did not need to "hold female products down there." When Ms. Griffith protested, and again asked for an accommodation for her Gender Dysphoria in the form of being provided the ability to purchase panties, Lieutenant Carnell again denied her request. Ms. Griffith did not receive the sports bra until the middle of October.

112. On October 14, 2020, Ms. Griffith wrote another grievance requesting that she be given a medical permission slip to receive women's underwear. In response, Ms. Griffith was told that she would not receive a medical permission slip to purchase women's underwear.

113. Eventually, El Paso County officials responded to Ms. Griffith's grievance from September 7, 2020. On October 24, 2020, Lieutenant Carnell, wrote an official response to Ms. Griffith's grievance and told her that she had been provided a sports bra, but that she would not be issued, or allowed to purchase, panties.

114. Ms. Griffith subsequently elevated her concerns to Commander Cy Gillespie and requested that she be provided panties. In response, Defendant Gillespie told Ms. Griffith that she would never get panties in the El Paso County Jail.

115. On January 15, 2021, Ms. Griffith requested panties rather than boxers because she is a transgender woman. This request was again denied.

116. On March 11, 2021, Ms. Griffith told a jail medical provider that she would like to be provided women's underwear. On March 19, 2021, the provider noted that Ms. Griffith expressed frustration on wanting panties. The provider acknowledged talking to the El Paso County officials about Ms. Griffith's concerns. In a follow-up conversation on March 27, 2021, the medical provider told Ms. Griffith that El Paso County officials told her that Ms. Griffith would not be issued panties because Ms. Griffith does not require the use of feminine napkins. Illustrating the obviously pretextual nature of this articulated justification for their discriminatory conduct, Defendants do not require post-menopausal and other non-menstruating women in their custody to wear men's underwear.

117. Defendants have also denied Ms. Griffith the ability to purchase lipstick because she is a transgender woman. Cisgender women are allowed to purchase lipstick at the commissary. Defendant Gillespie specifically told Ms. Griffith that she cannot purchase lipstick per El Paso County Jail policy.

118. Defendants' denial of gender appropriate undergarments and lipstick to Ms. Griffith was caused by El Paso County's and Defendant Elder's policy of housing Ms. Griffith in a male unit, along

with the customs and practices at the El Paso County Jail that condone discriminatory treatment of transgender prisoners.

119. El Paso County officials' actions in denying Ms. Griffith access to female undergarments and lipstick was a discriminatory action and a failure to reasonably accommodate Ms. Griffith's diagnosed

Gender Dysphoria.

120. El Paso County officials' customary decisions to deny Ms. Griffith the right to dress in accordance with her gender identity was a discriminatory action and a failure to reasonably accommodate Ms. Griffith's diagnosed Gender Dysphoria.

121. El Paso County officials' customary decisions to deny Ms. Griffith the right to dress in accordance with her gender identity has exacerbated symptoms of her Gender Dysphoria leading her to suffer significant emotional distress and have increased ideation of self-harm.

122. As a result of El Paso County's, and its officials', decision to not allow Ms. Griffith to dress in accordance with her gender identity, Ms. Griffith engaged in self-harm by wrapping a rubber band around her genitalia extremely tightly with the purpose of self-castration.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

42 U.S.C. § 1983 – Fourteenth Amendment – Equal Protection Discrimination

Against All Defendants

123. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

124. Defendants were acting under color of state law at all times relevant to this action.

125. Under the Equal Protection Clause of

the Fourteenth Amendment, discrimination against transgender people is a form of sex discrimination that is presumptively unconstitutional and subject to heightened scrutiny.

126. Discrimination based on sex includes, but is not limited to, discrimination based on gender, gender nonconformity, transgender status, gender expression, and gender transition.

127. Discrimination based on transgender status is also presumptively unconstitutional under the Equal Protection Clause and subject to heightened scrutiny.

128. Transgender people have suffered a long history of extreme discrimination across the country, in prisons and outside of prisons, and continue to suffer such discrimination to this day.

129. Many, if not most, transgender and cisgender women who are incarcerated, including Plaintiff, have discernable feminine characteristics and secondary female-typical sex characteristics that place them at heightened risk of sexual victimization by male deputies without adequate safeguards and subject to the humiliation of searches by male deputies if placed in men's prisons.

130. Both transgender and cisgender women face substantially similar risks of sexual victimization by male deputies without adequate safeguards and the humiliation through searches by male deputies.

131. Defendants' actions and inactions in placing and keeping Plaintiff in the men's unit at the El Paso County Jail and requiring that male deputies search transgender women without any supervision discriminated against her on the basis of sex.

132. Defendants' actions and inactions in placing and keeping Plaintiff in the men's unit at the El Paso County Jail also discriminated against her based on sex stereotyping, namely, treating her as though she were a cisgender man based on the conclusion that her gender identity and expression should align with her sex assigned at birth, and housing her in accordance with that erroneous conclusion. This sex stereotyping is based solely on Plaintiff's sex assigned at birth, disregarding her gender identity even though she is a woman and has had medical treatment to bring her body into alignment with her female gender identity.

133. Defendants, acting under color of state law, intentionally discriminated against Plaintiff by placing her, and continuing to house her, exclusively in men's wards without adequate safeguards, even though she faces similar risks as all other women in such custody.

134. Defendants' actions as described herein were taken without an important or legitimate governmental interest or rational reason, and they had no penological basis to deny Plaintiff a safe and appropriate placement in a female facility, based on her sex, gender identity, characteristics, risk factors, and her history of sexual victimization in male facilities.

135. Plaintiff was placed in the male unit and searched by male deputies at the El Paso County Jail in accordance with the customs, policies, and practices of the El Paso County Jail, which are set by Defendant El Paso County and Elder. Defendants El Paso County and Elder discriminated against Plaintiff and other transgender women by adopting and applying these customs policies, and practices

that deny transgender women safe and appropriate housing placements based on their sex, transgender identity, and impermissible sex stereotypes without a compelling, important, or legitimate governmental interest.

136. Defendants' actions and inactions were taken in reckless and callous indifference to the federally protected rights of Plaintiff.

137. Defendants' acts and omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical intrusion into bodily privacy and integrity, humiliation, and mental and emotional pain and anguish, physical manifestations of emotional distress, physical injury, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

138. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

SECOND CLAIM FOR RELIEF

42 U.S.C. § 1983 – Fourteenth Amendment Conditions Of Confinement

Against All Defendants

139. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

140. Defendants were acting under color of state law at all times relevant to this action.

141. Plaintiff was a pre-trial detainee.

142. As a pre-trial detainee, Plainitff was protected from unconstitutional conditions of confinement by the Fourteenth Amendment.

143. Under the Fourteenth Amendment, Plaintifff was also protected from conduct that is not rationally related to a legitimate nonpunitive governmental purpose or actions that appear objectively excessive in relation to that purpose under *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015).

144. Each Defendant knew or should have known of these clearly established rights at the time of Plainitff's incarceration.

145. Defendants El Paso County's policy of assigning all detained transgender individuals to housing units based on their genitalia as the default or sole criterion, without any individualized assessment of the individual's safety or gender identity, posed an excessive risk to Ms. Griffith's health and safety.

146. Defendants knew that Plainitff was a transgender woman and that housing her in an all-male unit subjected her to a risk of sexual harrassment, sexual assault, and extreme emotional distress from being treated as a man given her Gender Dysphoria. They knew that this posed a substantial risk of serious harm to Plaintiff.

147. Despite this knowledge and Plainitff's repeated requests for a transfer, Defendants refused to house Plaintiff in a unit that conformed with her gender identity in deliberate indifference to a serious risk of harm to her.

148. Defendants' failure to recognize Plaintiff as the transgender woman that she is subjected her to unconstitutional conditions of

confinement.

149. Defendants' sexual harrassment of Plaintiff subjected her to unconstitutional conditions of confinement.

150. Defendants subjected Plaintiff to unconstitutional conditions of confinement by subjecting her to continuous mis-gendering and cross-gender pat-down searches

151. Defendants failed to protect Plaintiff from sexual assault at the hands of other inmates.

152. All of the deliberately indifferent acts of each individual Defendant were conducted within the scope of their official duties and employment.

153. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

154. Defendants' acts or omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical pain and suffering, humiliation, and mental and emotional pain and anguish, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

155. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

THIRD CLAIM FOR RELIEF

42 U.S.C. § 1983 – Fourth Amendment Unreasonable Search

Against Defendants El Paso County, Elder, Mustapick, and Elliss

156. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

157. Defendants were acting under color of state law at all times relevant to this action.

158. Plaintiff has a legitimate expectation of privacy in her body being free from unreasonable governmental search.

159. Defendants' actions were objectively unreasonable in light of the circumstances confronting them. Namely, there was no basis for Defendant Mustapick to perform a visual body-cavity search of Plaintiff. Defendant Mustapick's sexually charged and offensive comments while strip searching Plaintiff and sexual harassment of her were objectively unreasonable.

160. Defendants El Paso County and Elder's custom, policy, and practice of housing, per official policy, transgender women, like Plaintiff, in the men's facility and continuing to require, per official policy, male deputies to search transgender women without any supervision caused the violation of Plaintiff's rights and it was obvious and foreseeable to Defendants El Paso County and Elder that their custom, policy, and practice of allowing male deputies to search transgender women without any supervision would cause a violation of Plaintiff's constitutional rights in the manner in which that violation occurred.

161. Defendant Elliss failed to intervene to prevent the unconstitutional search by Defendant Mustapick.

162. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

163. Defendants' acts and omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical intrusion into bodily privacy and integrity, humiliation, and mental and emotional pain and anguish, physical manifestations of emotional distress, physical injury, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

164. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

FOURTH CLAIM FOR RELIEF

42 U.S.C. § 1983 – Fourteenth Amendment – Substantive Due Process Invasion of Bodily Privacy and Integrity

Against Defendants El Paso County, Elder, Gillespie, Mustapick, and Elliss

165. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

166. Defendants were acting under color of state law at all times relevant to this action.

167. By sexually harassing and assaulting Plaintiff without her consent, Defendants violated

Plaintiff's right to be secure in her bodily integrity, a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

168. Defendants El Paso County and Elder recklessly, with conscious disregard to the serious and obvious risk to the safety of transgender inmates like Plaintiff, violated Plaintiff's right to be secure in her bodily integrity by allowing male deputies to search transgender women without any supervision.

169. Defendant Elliss failed to intervene to prevent the unconstitutional invasion of privacy by Defendant Mustapick.

170. Defendants El Paso County and Elder knew that their acts or omissions were substantially certain to cause El Paso County officials to violate constitutional rights of transgender inmates like Plaintiff to be free from secure in their bodily integrity, and Defendants El Paso County and Elder consciously or deliberately chose to disregard this risk of harm in failing to provide and/or in deliberately choosing not to change the policy that housed transgender women inmates with men and required, per official policy, male deputies to search transgender women without any supervision.

171. Defendants El Paso County and Elder exhibited deliberate indifference to the substantial and obvious risk of harm to Plaintiff, and other transgender inmates, by housing, per official policy, transgender women, like Plaintiff, in the men's facility and continuing to require, per official policy, male deputies to search transgender women without any supervision.

172. Defendants El Paso County and Elder proximately caused an unconstitutional invasion of Plaintiff's bodily integrity by housing, per official

policy, transgender women, like Plaintiff, in the men's facility and continuing to require, per official policy, male deputies to search transgender women without any supervision.

173. Defendants El Paso County and Elder set in motion a series of events that they knew would cause an inmate in Plaintiff's situation to be deprived of her constitutional right to be secure in her bodily integrity; but for the above acts or omissions of Defendants, Plaintiff would not have been subjected to a violation of her constitutional rights; and such a deprivation was a natural and foreseeable consequence of these acts and omissions.

174. Defendant Gillespie's decision to house Plaintiff in an all-male unit subjected her to have her privacy constantly invaded.

175. The policies implemented by Defendants El Paso County and Elder, as well as Defendants' actions and inactions, violated Plaintiff's substantive due process right to bodily integrity under the Fourteenth Amendment to the United States Constitution.

176. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

177. When viewed in total, this conduct is outrageous and shocks the conscience.

178. Defendants' acts and omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical intrusion into bodily privacy and integrity, humiliation, and mental and emotional pain and anguish, physical manifestations of emotional distress, physical injury, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

179. As a direct and proximate cause and

consequence of the unconstitutional policies, procedures, customs, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

FIFTH CLAIM FOR RELIEF

C.R.S. § 13-21-131 – Colo. Const. Art. II, Section 25 Unreasonable Search

Against Defendants Elder, Gillespie, Mustapick, and Elliss

180. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

181. Defendants acted under color of state law, and within the course and scope of their employment, in their capacities as law enforcement officers at all times relevant to the allegations in this Third Amended Complaint.

182. Defendants are "peace officers" under C.R.S. § 24-31-901(3) employed by a local government and therefore subject to C.R.S. § 13-21-131.

183. Plaintiff had a protected Colo. Const. Art. II, Section 25 interest against being unreasonably searched.

184. Plaintiff has a legitimate expectation of privacy in her body being free from unreasonable governmental search.

185. Defendants' actions were objectively unreasonable in light of the circumstances confronting them. Namely, there was no basis for Defendant Mustapick to visually body-cavity search Plaintiff. Defendant Mustapick's offensive sexually charged comments while strip searching Plaintiff and

sexual harassment of her were objectively unreasonable.

186. Defendant Elliss failed to intervene to prevent the unconstitutional search by Defendant Mustapick.

187. Defendant Elder's custom, policy, and practice of housing, per official policy, transgender women, like Plaintiff, in the men's facility and continuing to require, per official policy, male deputies to search transgender women without any supervision caused the violation of Plaintiff's rights and it would have been obvious and foreseeable to Defendant Elder that his custom, policy, and practice of allowing male deputies to search transgender women without any supervision would cause a violation of Plaintiff's constitutional rights in the manner in which that violation occurred.

188. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

189. Defendants acts and omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical intrusion into bodily privacy and integrity, humiliation, and mental and emotional pain and anguish, physical manifestations of emotional distress, physical injury, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

190. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

SIXTH CLAIM FOR RELIEF

C.R.S. § 13-21-131 – Colo. Const. Art. II, Section 29 – Equality of the Sexes Discrimination

Against Defendants Elder, Gillespie, O'Neal, Mustapick, Elliss, Noe, and Ford

191. Plaintiffs hereby incorporate all other paragraphs of this Third Amended Complaint as if fully set forth herein.

192. The Individual Defendants acted under color of state law, and within the course and scope of their employment, in their capacities as law enforcement officers at all times relevant to the allegations in this Third Amended Complaint.

193. The Individual Defendants are "peace officers" under C.R.S. § 24-31-901(3) employed by a local government and therefore subject to C.R.S. § 13-21-131.

194. Plaintiffs had a protected Colo. Const. Art. II, Section 25 right against discrimination based on sex. The Colorado Constitution, Article II, Section 29 provides: "Equality of the sexes. Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."

195. Under Colo. Const. Art. II, Section 25, discrimination against transgender people is a form of sex discrimination that is presumptively unconstitutional and subject to strict scrutiny.

196. Discrimination based on sex includes, but is not limited to, discrimination based on gender, gender nonconformity, transgender status, gender expression, and gender transition.

197. Discrimination based on transgender

status is also presumptively unconstitutional under the Equal Protection Clause and subject to strict, or at least heightened, scrutiny.

198. Transgender people have suffered a long history of extreme discrimination across the country, in prisons and outside of prisons, and continue to suffer such discrimination to this day.

199. Many, if not most, transgender and cisgender women who are incarcerated, including Plaintiff, have discernable feminine characteristics and secondary female-typical sex characteristics that place them at heightened risk of sexual victimization by male deputies without adequate safeguards and subject to the humiliation of searches by male deputies if placed in men's prisons.

200. Both transgender and cisgender women face substantially similar risks of sexual victimization by male deputies without adequate safeguards and the humiliation through searches by male deputies.

201. Defendants' actions and inactions in placing and keeping Plaintiff in the men's unit at the El Paso County Jail and requiring that male deputies search transgender women without any supervision discriminated against her on the basis of sex.

202. Defendants' actions and inactions in placing and keeping Plaintiff in the men's unit at the El Paso County Jail also discriminated against her based on sex stereotyping, namely, treating her as though she were a cisgender man based on the conclusions that her gender identity and expression should align with her sex assigned at birth, and housing her in accordance with that conclusion. This sex stereotyping is based solely on Plaintiff's sex

assigned at birth, disregarding her gender identity even though she is a woman and has had medical treatment to bring her body into alignment with her female gender identity.

203. Defendants, acting under color of state law, intentionally discriminated against Plaintiff by placing her, and continuing to house her, exclusively in men's units without adequate safeguards, even though she faces similar risks as all other women in custody.

204. Defendant's actions as described herein were taken without an important or legitimate governmental interest or rational reason, and they had no penological basis to deny Plaintiff a safe and appropriate placement in a female facility, based on her sex, gender identity, characteristics, risk factors, and her history of sexual victimization in male facilities.

205. Plaintiff was placed in the male unit, and searched by male deputies, at the El Paso County Jail in accordance with the customs, policies, and practices of the El Paso County Jail, which are set by Defendant Elder. Defendant Elder discriminated against Plaintiff and other transgender women by adopting and applying these customs policies, and practices that deny transgender women safe and appropriate housing placements based on their sex, transgender identity, and impermissible sex stereotypes without a compelling, important, or legitimate governmental interest.

206. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

207. Defendants' acts and omissions were

the legal and proximate cause of Plaintiff's damages in that she suffered physical intrusion into bodily privacy and integrity, humiliation, and mental and emotional pain and anguish, physical manifestations of emotional distress, physical injury, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

208. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

SEVENTH CLAIM FOR RELIEF

C.R.S. § 13-21-131 – Colo. Const. Art. II, Section 25 – Substantive Due Process Invasion of Bodily Privacy and Integrity

Against Defendants Elder, Gillespie, Mustapick, and Elliss

209. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

210. Defendants acted under color of state law, and within the course and scope of their employment, in their capacities as law enforcement officers at all times relevant to the allegations in this Third Amended Complaint.

211. Defendants are "peace officers" under C.R.S. § 24-31-901(3) employed by a local government and therefore subject to C.R.S. § 13-21-131.

212. Plaintiff had a protected Colo. Const. Art. II, Section 25 interest against deprivation of life, liberty, or property without due process of law.

213. By sexually harassing and assaulting Plaintiff without her consent, Defendants violated Plaintiff's right to be secure in her bodily integrity, a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

214. Defendant Elder recklessly, with conscious disregard to the serious and obvious risk to the safety of transgender inmates like Plaintiff, violated Plaintiff's right to be secure in her bodily integrity by allowing male deputies to search transgender women without any supervision.

215. Defendant Elliss failed to intervene to prevent the unconstitutional invasion of bodily integrity by Defendant Mustapick.

216. Defendant Elder knew that his acts or omissions were substantially certain to cause El Paso County officials to violate constitutional rights of transgender inmates like Plaintiff to be free from secure in their bodily integrity, and Defendant Elder consciously or deliberately chose to disregard this risk of harm in failing to provide and/or in deliberately choosing not to change the policy that housed transgender women inmates with men and required, per official policy, male deputies to search transgender women without any supervision.

217. Defendant Elder exhibited deliberate indifference to the substantial and obvious risk of harm to Plaintiff, and other transgender inmates, by housing, per official policy, transgender women, like Plaintiff, in the men's facility and continuing to require, per official policy, male deputies to search transgender women without any supervision.

218. Defendant Elder proximately caused an unconstitutional invasion of Plaintiff's bodily

integrity by housing, per official policy, transgender women, like Plaintiff, in the men's facility and continuing to require, per official policy, male deputies to search transgender women without any supervision.

219. Defendant Elder set in motion a series of events that he knew would cause an inmate in Plaintiff's situation to be deprived of her constitutional right to be secure in her bodily integrity; but for the above acts or omissions of Defendants, Plaintiff would not have been subjected to a violation of her constitutional rights; and such a deprivation was a natural and foreseeable consequence of these acts and omissions.

220. Defendant Gillespie's decision to house Plaintiff in an all-male unit subjected her to have her privacy constantly invaded.

221. The policies implemented by Defendant Elder, as well as Defendants' actions and inactions, violated Plaintiff's substantive due process right to bodily integrity.

222. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

223. When viewed in total, this conduct is outrageous and shocks the conscience.

224. Defendants' acts or omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical intrusion into bodily privacy and integrity, humiliation, and mental and emotional pain and anguish, physical manifestations of emotional distress, physical injury, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

225. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

EIGHTH CLAIM FOR RELIEF

C.R.S. § 13-21-131 – Colo. Const. Art. II, Section 20 – Cruel And Unusual Punishment Conditions Of Confinement

Against Defendants Elder, Gillespie, O'Neal, Mustapick, Elliss, Noe, and Ford

226. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

227. Defendants were acting under color of state law at all times relevant to this action.

228. Plaintiff was a pre-trial detainee.

229. As a pre-trial detainee, Plainitff was protected from unconstitutional conditions of confinement.

230. Plaintifff was also protected from conduct that is not rationally related to a legitimate nonpunitive governmental purpose or actions that appear objectively excessive in relation to that purpose.

231. Each Defendant knew or should have known of these clearly established rights at the time of Plainitff's incarceration.

232. Defendant Elder' policy of assigning all detained transgender individuals to housing units based on their genitalia as the default or sole

criterion, without any individualized assessment of the individual's safety or gender identity, posed an excessive risk to Ms. Griffith's health and safety.

233. Defendants knew that Plainitff was a transgender woman and that housing her in an all-male unit subjected her to a risk of sexual harrassment, sexual assault, and extreme emotional distress from being treated as a man given her Gender Dysphoria. They knew that this posed a substantial risk of serious harm to Plaintiff.

234. Despite this knowledge, and Plainitff's repeated requests for a transfer, Defendants refused to house Plaintiff in a unit that conformed with her gender identity in deliberate indifference to a serious risk of harm to her.

235. Defendants subjected Plaintiff to unconstitutional conditions of confinement by sexually harrassing her and failing to protect her from sexual assault.

236. Defendants subjected Plaintiff to unconstitutional conditions of confinement by subjecting her to continuous mis-gendering and cross-gender pat-down searches.

237. All of the deliberately indifferent acts of each individual Defendant were conducted within the scope of their official duties and employment.

238. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

239. Defendants' acts and omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical pain and suffering, humiliation, and mental and emotional pain and

anguish, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

240. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

NINTH CLAIM FOR RELIEF

C.R.S. § 13-21-131 – Colo. Const. Art. II, Section 25 – Due Process Conditions Of Confinement

Against Defendants Elder, Gillespie, O'Neal, Mustapick, Elliss, Noe, and Ford

241. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

242. Defendants were acting under color of state law at all times relevant to this action.

243. Plaintiff was a pre-trial detainee.

244. As a pre-trial detainee, Plainitff was protected from unconstitutional conditions of confinement.

245. Plaintifff was also protected from conduct that is not rationally related to a legitimate nonpunitive governmental purpose or actions that appear objectively excessive in relation to that purpose.

246. Each Defendant knew or should have known of these clearly established rights at the time of Plainitff's incarceration.

247. Defendants Elder's policy of

assigning all detained transgender individuals to housing units based on their anatomy as the default or sole criterion, without any individualized assessment of the individual's safety or gender identity, posed an excessive risk to Ms. Griffith's health and safety.

248. Defendants knew that Plainitff was a transgender woman and that housing her in an all-male unit subjected her to a risk of sexual harrassment, sexual assault, and extreme emotional distress from being treated as a man given her Gender Dysphoria. They knew that this posed a substantial risk of serious harm to Plaintiff.

249. Despite this knowledge, and Plainitff's repeated requests for a transfer, Defendants refused to house Plaintiff in a unit that conformed with her gender identity in deliberate indifference to a serious risk of harm to her.

250. Defendants subjected Plaintiff to unconstitutional conditions of confinement by sexually harrassing her and failing to protect her from sexual assault.

251. Defendants subjected Plaintiff to unconstitutional conditions of confinement by subjecting her to continuous mis-gendering and cross-gender pat-down searches

252. All of the deliberately indifferent acts of each individual Defendant were conducted within the scope of their official duties and employment.

253. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

254. Defendants' acts and omissions were

the legal and proximate cause of Plaintiff's damages in that she suffered physical pain and suffering, humiliation, and mental and emotional pain and anguish, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

255. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein

TENTH CLAIM FOR RELIEF

U.S.C. § 12101, *et. seq.* – Americans with Disabilities Act Disability Discrimination

Against Defendant El Paso County

256. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

257. Title II of the ADA provides that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

258. In particular, in providing any aid, benefit, or service, under Title II of the ADA, a public entity "may not ... [d]eny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit or service," "[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service

that is not equal to that afforded others," "[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity . . . as that provided to others," or "[o]therwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others[.]" 28 C.F.R. § 35.130(b)(1)(i), (ii), (iii), and (vii).

259. A public entity "shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7).

260. A public entity may not (1) "impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary," 28 C.F.R.§ 35.130(b)(8); or (2) "utilize criteria or methods of administration … that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability … or the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(3)(i)(ii).

261. A public entity is also prohibited from aiding and perpetuating discrimination against persons with disabilities in the programs, services, or activities it provides. 28 C.F.R. § 35.130(b)(1)(v).

262. The ADA's "integration mandate" requires public entities to "administer services, programs, and activities in the most integrated

setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d); 28 C.F.R. § 35.152(b)(2) (requiring that prisoners with disabilities be housed in the most integrated setting appropriate to their needs under the program access obligation); see also Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, originally published July 26, 1991, 28 C.F.R. pt. 35, App. B ("Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status.").

263. Defendant El Paso County violated the rights of Plaintiff secured by Title II of the ADA and its implementing regulations.

264. El Paso County is currently, and at all times relevant to this action has been a "public entity" as defined by the ADA, 42 U.S.C. § 12131(1)(B), and provides a "program, service, or activity" within the meaning of the ADA, including educational and rehabilitative programs and services.

265. Plaintiff suffers from Gender Dysphoria, Developmental Trauma Disorder.

266. Gender Dysphoria is not excluded under the ADA, 42 U.S.C. § 12211(b)(1), because it is a gender identity disorder that results from a physical impairment. In 2015, the U.S. Department of Justice concluded that, "[i]n light of the evolving scientific evidence suggesting that Gender Dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms 'disability' and 'physical impairment' be read broadly, the [ADA's

exclusion of gender identity disorders not resulting from a physical impairment] should be construed narrowly such that Gender Dysphoria falls outside its scope."[3]

267. Alternatively, Gender Dysphoria is not excluded under the ADA because it is not a "gender identity disorder" under 42 U.S.C. § 12211(b)(1)—it is a dysphoria.

268. Because of the date of the actions complained of, the expanded definition of "disability" under the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") applies.

269. Under the ADAAA and DOJ regulations, the definition of disability is to be construed broadly in favor of expansive coverage. 42 U.S.C. § 12102(4)(A); 28 C.F.R. §§ 35.108(a)(2)(i), 35.108(d)(1)(i). Accordingly, the terms "substantially" and "major" in the definition of disability are to be interpreted consistently with the ADAAA's findings and purposes, which reinstate "the broad scope of protection intended to be afforded by the ADA" and convey Congress's intent "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." 42 U.S.C. §§ 12102(4)(B), ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ (2)(a)(5), (b)(5).

270. In determining disability, the ADAAA requires that impairments must be assessed "without regard to the ameliorative effects of mitigating measures," such as medication, therapy,

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[3] Second Statement of Interest of the United States at 5, *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-4822- JFL, 2015 WL 9872493 (E.D. Pa. Nov. 16, 2015).

and reasonable accommodations. 42 U.S.C. § 12102(4)(E)(i).

271. In determining disability, the ADAAA requires that impairments that are "episodic or in remission" must be assessed in their active state. 42 U.S.C. § 12102(4)(D).

272. In determining disability, a "major life activity" includes "the operation of a major bodily function," including neurological, brain, and reproductive functions. 42 U.S.C. § 12102(2)(B).

273. Under the ADAAA and DOJ regulations, "an individual meets the requirement of 'being regarded as having' an impairment that substantially limits one or more major life activities if the individual establishes that he or she has been subjected to an action prohibited under th[e ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. §§ 12102(3)(A); see also 28 C.F.R. § 35.108(f)(1); ADA Amendments Act of 2008, Pub. L. No. 110-325, § (2)(b)(3) (reinstating "broad view of the third prong" of the definition of disability). Accordingly, no showing of substantial limitation of a major life activity is required under the regarded-as prong. 28 C.F.R. § 35.108(a)(2)(iii) ("[T]he 'regarded as' prong of the definition of "disability" . . . does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment.").

274. Plainitff's Gender Dysphoria substantially limits one or more major life activities, including her ability to care for herself, eating, sleeping, learning, concentrating, thinking, communicating, interacting with others, and

reproducing, and also substantially limits the operation of major bodily functions, including neurological function, brain function, endocrine function, and reproductive function.

275. Plaintiff has a record of Gender Dysphoria, which substantially limits one or more major life activities, including her ability to care for herself, eating, sleeping, learning, concentrating, thinking, communicating, interacting with others, and reproducing, and also substantially limits the operation of major bodily functions, including neurological function, brain function, endocrine function, and reproductive function.

276. Plaintiff "meets the requirement of 'being regarded as having' an impairment that substantially limits one or more major life activities" because El Paso County excluded her from participation in and denied her the benefits of El Paso County's programs, services, and activities based on Gender Dysphoria, and also subjected her to discrimination based on Gender Dysphoria.

277. Plaintiff is currently and at all times relevant to this action has been a "qualified individual with a disability" within the meaning of Title II of the ADA.

278. As an inmate in the custody of El Paso County, Plaintiff was qualified to participate in El Paso County's programs, services, and activities. El Paso County provides these services to other inmates committed to its custody.

279. El Paso County failed to provide reasonable modification to its policies, procedures, and practices regarding Ms. Griffith, as it was legally required to do. 28 C.F.R. § 35.130(b)(7). El Paso County

did not attempt accommodations such as approrpiate housing, dress, and access to female grooming products, and gender-appropriate searches. By virtue of the fact that El Paso County did not put these or other reasonable modifications in place, Plaintiff was discriminated against because of her disabilities.

280. By confining Plainitff in the men's unit at the El Paso County Jail, a facility where staff members referred to Plaintiff using a male pronoun and her male given name and staff refused to permit Plainitff to wear her own gender's clothes and underwear, El Paso County subjected Plainitff to discrimination based on Gender Dysphoria.

281. Defendants' actions and inactions were taken in reckless and callous indifference to the protected rights of Plaintiff.

282. Defendants' acts or omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical pain and suffering, humiliation, and mental and emotional pain and anguish, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

283. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

ELEVENTH CLAIM FOR RELIEF

U.S.C. § 701, *et. seq.* – Rehabilitation Act of 1973 Disability Discrimination

Against Defendant El Paso County

284. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

285. Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…. " 29 U.S.C. § 794(a).

286. El Paso County accepts federal financial assistance and has done so at all times relevant to this Third Amended Complaint. El Paso County is therefore a "program receiving Federal financial assistance" for purposes of the Rehabilitation Act. 214. The definition of disability is identical under the ADA and Rehabilitation Act, and the expanded definition of "disability" under the ADAAA applies with equal force to the definition of "disability" under Section 504 of the Rehabilitation Act. See ADA Amendments Act of 2008, Pub. L. No. 110-325, §7 (conforming Section 504 of Rehabilitation Act's definition of "disability," 29 U.S.C. § 705, to definition of disability "in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102))."

287. Plaintiff suffers from Gender Dysphoria, which substantially limits one or more major life activities and also the operation of major bodily functions. Plaintiff "meets the requirement of 'being regarded as having' an impairment that substantially limits one or more major life activities" because El Paso County excluded her from participation in and denied her the benefits of El Paso County's programs, services, and activities based on Gender Dysphoria, and also subjected her to

discrimination based on these impairments.

288. Gender Dysphoria is not excluded under the Rehabilitation Act because it is a gender identity disorder that results from a physical impairment or, alternatively, it is not a gender identity disorder—it is a dysphoria.

289. Plaintiff is currently and at all times relevant to this action has been a "qualified individual with a disability" for purposes of the Rehabilitation Act.

290. By confining Plaintiff in the men's unit at the El Paso County Jail, a facility where staff members referred to Plaintiff using a male pronoun and her male given name and staff refused to permit Plainitff to wear her own gender's clothes and underwear, El Paso County subjected Plainitff to discrimination based on Gender Dysphoria in violation of Section 504 of the Rehabilitation Act.

291. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's protected rights.

292. Defendants' acts and omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical pain and suffering, humiliation, and mental and emotional pain and anguish, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

293. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

TWELFTH CLAIM FOR RELIEF

C.R.S. § 24-34-601, *et. seq.* – Colorado Anti-Discrimination Act
Sex and Transgender Discrimination
Against All Defendants

294. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

295. The Colorado Anti-Discrimination Act, C.R.S. § 24-34-601(2)(a) provides that it is a violation of Colorado law for any place of public accommodation to discriminate against any person based on sex or sexual orientation, including transgender status.

296. The El Paso County Jail is a place of "public accommodation" as defined under C.R.S. § 24-34-601(1). Defendants operate the facilities that housed Plaintiff and are responsible for providing the full and equal enjoyment of its services, programs and benefits to the public regardless of the status of Plaintiff as a transgender woman.

297. Defendants refused to provide these services, programs and benefits of these public accommodations to Plaintiff because of her transgender status.

298. Defendants provide these public accommodations to cisgender men and cisgender women but deny these services to transgender women because of their sex and transgender status.

299. Defendants discriminated against Plaintiff on the basis of her sex and transgender status, in violation of Colorado law, and in so doing, caused Plaintiff serious physical and psychological

harm, and subjected her to an unreasonable risk of harm.

THIRTEENTH CLAIM FOR RELIEF

C.R.S. § 24-34-601, *et. seq.* – Colorado Anti-Discrimination Act Disability Discrimination
Against All Defendants

300. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

301. The Colorado Anti-Discrimination Act, C.R.S. § 24-34-601(2)(a) provides that it is a violation of Colorado law for any place of public accommodation to discriminate against any person based the disability of that person.

302. The El Paso County Jail is a place of "public accommodation" as defined under C.R.S. § 24-34-601(1). Defendants operate the facilities that housed Plaintiff and are responsible for providing the full and equal enjoyment of its services, programs and benefits to the public regardless of the status of Plaintiff as a transgender woman.

303. Defendants refused to provide these services, programs and benefits of these public accommodations to Plaintiff because of her transgender status.

304. Defendants provide these public accommodations to cisgender men and cisgender women but deny these services to transgender women because of their sex and transgender status.

305. Defendants discriminated against Plaintiff on the basis of her sex and transgender status, in violation of Colorado law, and in so doing,

caused Plaintiff serious physical and psychological harm, and subjected her to an unreasonable risk of harm.

FOURTEENTH CLAIM FOR RELIEF

42 U.S.C. § 1983 – Fourteenth Amendment Failure To Protect

Against Defendants El Paso County, Elder, Gillespie, O'Neal, Noe, and Ford

306. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

307. Defendants were acting under color of state law at all times relevant to this action.

308. Plaintiff was a pre-trial detainee.

309. As a pre-trial detainee, Plainitff was protected from unconstitutional conditions of confinement by the Fourteenth Amendment.

310. Under the Fourteenth Amendment, Plaintifff was also protected from conduct that is not rationally related to a legitimate nonpunitive governmental purpose or actions that appear objectively excessive in relation to that purpose under *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015).

311. Each Defendant knew or should have known of these clearly established rights at the time of Plainitff's incarceration.

312. Defendants El Paso County's, Elder's, and Gillespie's policy of assigning all detained transgender individuals to housing units based on their genitalia as the default or sole criterion, without any individualized assessment of the individual's

safety or gender identity, posed an excessive risk to Ms. Griffith's health and safety.

313. Defendants knew that Plainitff was a transgender woman and that housing her in an all-male unit subjected her to a risk of sexual harrassment, sexual assault, and extreme emotional distress from being treated as a man given her Gender Dysphoria. They knew that this posed a substantial risk of serious harm to Plaintiff.

314. Despite this knowledge and Plainitff's repeated requests for a transfer, Defendants refused to house Plaintiff in a unit that conformed with her gender identity in deliberate indifference to a serious risk of harm to her.

315. Defendants failed to protect Plaintiff from sexual assault at the hands of other inmates.

316. All of the deliberately indifferent acts of each individual Defendant were conducted within the scope of their official duties and employment.

317. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

318. Defendants' acts or omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical pain and suffering, humiliation, and mental and emotional pain and anguish, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

319. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to

suffer injuries, damages and losses as set forth herein.

FIFTEENTH CLAIM FOR RELIEF

C.R.S. § 13-21-131 – Colo. Const. Art. II, Section 20 – Cruel And Unusual Punishment Failure To Protect

Against Defendants El Paso County, Elder, Gillespie, O'Neal, Noe, and Ford

320. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

321. Defendants were acting under color of state law at all times relevant to this action.

322. Plaintiff was a pre-trial detainee.

323. As a pre-trial detainee, Plainitff was protected from unconstitutional conditions of confinement by the Fourteenth Amendment.

324. Under the Fourteenth Amendment, Plaintifff was also protected from conduct that is not rationally related to a legitimate nonpunitive governmental purpose or actions that appear objectively excessive in relation to that purpose under *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015).

325. Each Defendant knew or should have known of these clearly established rights at the time of Plainitff's incarceration.

326. Defendants El Paso County's, Elder's, and Gillespie's policy of assigning all detained transgender individuals to housing units based on their genitalia as the default or sole criterion, without any individualized assessment of the individual's safety or gender identity, posed an excessive risk to

Ms. Griffith's health and safety.

327. Defendants knew that Plainitff was a transgender woman and that housing her in an all-male unit subjected her to a risk of sexual harrassment, sexual assault, and extreme emotional distress from being treated as a man given her Gender Dysphoria. They knew that this posed a substantial risk of serious harm to Plaintiff.

328. Despite this knowledge and Plainitff's repeated requests for a transfer, Defendants refused to house Plaintiff in a unit that conformed with her gender identity in deliberate indifference to a serious risk of harm to her.

329. Defendants failed to protect Plaintiff from sexual assault at the hands of other inmates.

330. All of the deliberately indifferent acts of each individual Defendant were conducted within the scope of their official duties and employment.

331. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

332. Defendants' acts or omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical pain and suffering, humiliation, and mental and emotional pain and anguish, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

333. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein.

SIXTEENTH CLAIM FOR RELIEF

C.R.S. § 13-21-131 – Colo. Const. Art. II, Section 25 – Due Process Failure To Protect

Against Defendants El Paso County, Elder, Gillespie, O'Neal, Noe, and Ford

334. Plaintiff hereby incorporates all other paragraphs of this Third Amended Complaint as if fully set forth herein.

335. Defendants were acting under color of state law at all times relevant to this action.

336. Plaintiff was a pre-trial detainee.

337. As a pre-trial detainee, Plainitff was protected from unconstitutional conditions of confinement by the Fourteenth Amendment.

338. Under the Fourteenth Amendment, Plaintifff was also protected from conduct that is not rationally related to a legitimate nonpunitive governmental purpose or actions that appear objectively excessive in relation to that purpose under *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015).

339. Each Defendant knew or should have known of these clearly established rights at the time of Plainitff's incarceration.

340. Defendants El Paso County's, Elder's, and Gillespie's policy of assigning all detained transgender individuals to housing units based on their genitalia as the default or sole criterion, without any individualized assessment of the individual's safety or gender identity, posed an excessive risk to Ms. Griffith's health and safety.

341. Defendants knew that Plainitff was a transgender woman and that housing her in an all-

male unit subjected her to a risk of sexual harrassment, sexual assault, and extreme emotional distress from being treated as a man given her Gender Dysphoria. They knew that this posed a substantial risk of serious harm to Plaintiff.

342. Despite this knowledge and Plainitff's repeated requests for a transfer, Defendants refused to house Plaintiff in a unit that conformed with her gender identity in deliberate indifference to a serious risk of harm to her.

343. Defendants failed to protect Plaintiff from sexual assault at the hands of other inmates.

344. All of the deliberately indifferent acts of each individual Defendant were conducted within the scope of their official duties and employment.

345. Defendants' actions and inactions were taken in reckless and callous indifference to Plaintiff's federally protected rights.

346. Defendants' acts or omissions were the legal and proximate cause of Plaintiff's damages in that she suffered physical pain and suffering, humiliation, and mental and emotional pain and anguish, and continues to suffer mental and emotional pain and anguish to this day and likely for the rest of her life.

347. As a direct and proximate cause and consequence of the unconstitutional policies, procedures, customs, acts, inactions, and/or practices described above, Plaintiff suffered and continues to suffer injuries, damages and losses as set forth herein

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in her favor and against Defendants, and grant:

(a) Appropriate declaratory and other injunctive and/or equitable relief;

(b) Compensatory and consequential damages, including damages for emotional distress, humiliation, loss of enjoyment of life, and other pain and suffering on all claims allowed by law in an amount to be determined at trial;

(c) All economic losses on all claims allowed by law;

(d) Punitive damages on all claims allowed by law and in an amount to be determined at trial;

(e) Attorney fees and the costs associated with this action on all claims allowed by law;

(f) Pre- and post-judgment interest at the lawful rate; and

(g) Any further relief that this court deems just and proper, and any other relief as allowed by law and equity.

PLAINTIFF REQUESTS A TRIAL TO A JURY ON ALL ISSUES SO TRIABLE.

Dated this 2nd day of June 2022.

KILLMER, LANE & NEWMAN, LLP

s/ Andy McNulty

Andy McNulty
Mari Newman
1543 Champa St., Ste. 400
Denver, CO 80202
Phone: (303) 571-1000
Fax: (303) 571-1001
amcnulty@kln-law.com
mnewman@kln-law.com

ATTORNEYS FOR
PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00387-NRN-CMA

DARLENE GRIFFITH,

Plaintiff,

v.

EL PASO COUNTY, COLORADO, BILL ELDER, in his individual and official capacities, CY GILLESPIE, in his individual capacity, ELIZABETH O'NEAL, in her individual capacity, ANDREW MUSTAPICK, in his individual capacity, DAWNE ELLISS, in her individual capacity, TIFFANY NOE, in her individual capacity, BRANDE FORD, in her individual capacity,

Defendants.

FILED February 27, 2023

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT

N. REID NEUREITER

United States Magistrate Judge

This prisoner civil rights case is before the Court

pursuant to an Order (Dkt. #135) issued by Judge Christine M. Arguello referring Defendants El Paso County, Bill Elder, Cy Gillespie, Andrew Mustapick, Dawne Elliss, Tiffany Noe, and Brande Ford's (collectively "Defendants")[1] Motion to Dismiss Third Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and (6) (the "Motion to Dismiss"). (Dkt. #132.) Plaintiff Darlene Griffith ("Plaintiff" or "Ms. Griffith") filed a response (Dkt. #147) and Defendants filed a reply. (Dkt. #155.) The Court heard argument on the subject motion on October 11, 2022. (*See* Dkt. #161.) The Court has carefully considered the motion. The Court has taken judicial notice of the Court's file and has considered the applicable Federal Rules of Civil Procedure and case law. The Court now being fully informed makes the following recommendation.

PROCEDURAL HISTORY

Plaintiff is a transgender woman who was housed in an all-male unit in the El Paso County Criminal Justice Center ("CJC"). Initially proceeding pro se, Plaintiff filed a Prisoner Complaint relating to her conditions of confinement on February 8, 2021. (Dkt. #1.) Complying with an order (Dkt. #5) issued the next day by Magistrate Judge Gordon P. Gallagher, Plaintiff filed an Amended Prisoner Complaint on March 4, 2021. (Dkt. #9.) On April 19, 2021, Judge

[1] Defendant Elder is the El Paso County Sheriff and is sued in his individual and official capacities. (Dkt. #124 ¶ 14.) The other Defendants are sued in their individual capacities and are employed in various positions by the El Paso County Sheriff's Office: Defendant Gillepsie is a Commander (*id.* ¶ 15), Defendant O'Neal is an "official" who apparently processes inmate grievances (*id.* ¶¶ 16, 57), and Defendants Mustapick, Elliss, Noe, and Ford are deputies (*id.* ¶¶ 17–20).

Lewis T. Babcock entered an Order to Dismiss in Part and to Draw Case and the case was randomly reassigned to the undersigned. (Dkt. #16.) The matter was eventually assigned to Judge Arguello as the presiding judge. (*See* Dkt. ##25 & 58.)

On June 8, 2021, the Court entered an Appointment Order (Dkt. #28) and Andrew McNulty of the law firm of Killmer Lane & Newman LLP subsequently entered a notice of appearance on Plaintiff's behalf on September 15, 2021. (Dkt. #41.)

The Court granted Plaintiff leave to file a Second Amended Complaint on October 4, 2021. (*See* Dkt. ##46 & 47.) Plaintiff then moved for a preliminary injunction that would require, among other things, El Paso County to house her in a women's unit. (Dkt. #48.) The day before the December 9, 2021 hearing on the injunction, the parties reached an agreement that resulted in Plaintiff being transferred to a female ward and having access to the same items from the commissary as all female inmates. (*See* Dkt. #91.) The preliminary injunction motion was denied as moot and the hearing vacated. (Dkt. #92.)

On April 8, 2022, the Court conducted a Settlement Conference. (*See* Dkt. #110.) While no settlement was reached at that time, Plaintiff eventually settled her claims with jail's private medical services provider and its employees. (*See* Dkt. ##117, 119, 121, & 122.)

On June 7, 2022, with Defendants' consent, Plaintiff filed a Third Amended Complaint and Jury Demand ("TAC"), the operative pleading. (Dkt. #124.) The subject Motion to Dismiss followed and further discovery was stayed. (*See* Dkt. #162.)

BACKGROUND[2]

This lawsuit arises from El Paso County's policy of housing transgender women in male units within the CJC. Plaintiff alleges that, as a result of this policy, she suffered repeated sexual harassment, sexual assault, and discrimination at the hands of jail staff and other inmates.

Plaintiff has been diagnosed with gender dysphoria and has been openly living as a transgender woman for over twenty years. (Dkt. #124 ¶ 25.) Gender dysphoria is "the significant distress that may accompany the incongruence between a transgender person's gender identity and assigned sex." (*Id.* ¶ 22.) The symptoms of gender dysphoria can be alleviated by allowing the transgender person "to live, and be treated by others, consistently with the person's gender identity." (*Id.*) To that end, and as part of her medically supervised treatment, Plaintiff has "changed her name and altered her physical appearance to conform to her female gender identity, including dressing in feminine attire and taking feminizing hormones, which caused her to develop female secondary sex characteristics such as breasts, soft skin, a lack of facial hair, and other characteristics typically associated with women." (*Id.* ¶ 25.)

Plaintiff entered the CJC on July 20, 2020. (*Id.* ¶ 47.) On intake, Defendant Noe, in accordance with official El Paso County policy, classified and housed

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[2] Allegations in this section are taken from the TAC, and all non-conclusory allegations are presumed true for the purposes of the Motion to Dismiss. All citations to docketed materials are to the page number in the CM/ECF header, which sometimes differs from a document's internal pagination

Plaintiff in an all-male unit, despite (1) Plaintiff's explicit request that she be placed in a women's facility "because she feared being sexually abused and assaulted in male facilities by both guards and inmates, along with fearing the humiliation of being constantly searched by male guards in a male unit and the general degradation of being considered a man when she is a transgender woman," and (2) her medical records noting that she has been diagnosed with gender dysphoria.[3] (*Id.* ¶¶ 48–54.) Plaintiff alleges that making facility assignments to people in custody solely on the basis of the individual's genitalia violates accepted World Professional Association for Transgender Health ("WPATH") and Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 *et seq.,* ("PREA") standards. (*Id.* ¶¶ 40–46.)

Also pursuant to the county's policies, when booked into the CJC, Plaintiff was subjected to a visual body-cavity search by a male deputy. (*Id.* ¶ 72.) Plaintiff told Defendant Elliss, a female deputy, that she did not want Defendant Mustapick, a male deputy, present during the search. (*Id.* ¶ 74.) Nevertheless, after examining Plaintiff's breasts, Defendant Elliss left the room (intentionally misgendering Plaintiff on her way out by referring to Plaintiff using male pronouns) and left Plaintiff alone with Defendant Mustapick. (*Id.* ¶ 76.) Defendant Mustapick made lewd and derogatory comments to Plaintiff (telling Plaintiff to "spread [her] sexy cheeks" and that he was "going to go balls deep in that ass" while grabbing his groin) and "aggressively" searched Plaintiff's genitals. (*Id.* ¶ 78.) He then threatened Plaintiff and warned her not to tell anyone what

[3] Plaintiff is also legally blind. (Dkt. #124 ¶ 50.)

happened. (*Id.* ¶ 79.)

On July 29, 2020, Plaintiff had an ADA interview with Defendant Ford, to whom she repeated her request to be placed into housing that corresponded with her gender identity. (*Id.* ¶ 55.) That request was again denied, and Defendant Ford wrote in Plaintiff's records that that there were no disability concerns related to Ms. Griffith's housing, despite gender dysphoria being a disability under the ADA. (*Id.*)

Over the next year, Plaintiff submitted numerous grievances and kites about her housing assignment and the ongoing harassment. (*See id.* ¶¶ 56–66.) On at least one occasion, it was Defendant O'Neal who conveyed to Plaintiff that one of the grievances was denied, although it is unclear if Defendant O'Neal was responsible for denying the grievance. (*Id.* ¶ 57.) In any event, Plaintiff remained housed in the all-male unit.

Throughout her incarceration, Plaintiff was subjected to cross-gender searches by male deputies, who would intentionally touch her breasts. (*Id.* ¶¶ 89–91.) These searches caused Plaintiff anxiety and exacerbated her gender dysphoria, and she complained about them several times. (*Id.* ¶¶ 91–95.)

Plaintiff was also continuously misgendered. For example, on September 16, 2020, Plaintiff informed Deputy Daniel Holder that, as a transgender woman, she was uncomfortable that other inmates in her unit were not wearing shirts. Deputy Holder walked over to the other inmates and loudly yelled at them, "the blind faggot said you need to put your shirts on." (*Id.* ¶ 100.) She was also frequently referred to as "Sir." (*Id.*¶ 102.) She consistently complained through the grievance process about being misgendered. (*Id.* ¶¶

101–04.)

Defendants denied Plaintiff the ability to dress in accordance with her gender identity as well. She had to go without a bra for over a month and, over her repeated protests, Plaintiff was denied any women's underwear. (*Id.* ¶¶ 110–16.) Plaintiff was not allowed to purchase lipstick at the commissary. (*Id.* ¶¶ 117–19.)

On July 1, 2021, Plaintiff told Raymond Carrington, a mental health provider, that, due to the constant mistreatment, she would remove her penis herself as soon she could figure out how to do. (*Id.* ¶ 31.) Although these concerns were communicated to El Paso County officials, Plaintiff attempted self-castration by wrapping a rubber band around her genitals. (*Id.* ¶ 32.) Plaintiff has a long history of self-harm, including self- castration behavior, which worsens when she is not permitted to live in accordance with her gender identity and when she is subjected to sexual harassment and misgendering. (*Id.* ¶ 38.)

Finally, on November 18, 2021, Plaintiff was groped and taunted by another inmate while laying on her bunk. (*Id.* ¶ 85.) This was not the first time she had been sexually assaulted by this individual; "[a] witness to the assault told El Paso County officials that he witnessed at least three to four other similar assaults[.]" (*Id.* ¶ 87.) Plaintiff was not moved to a female unit after the incident.

Plaintiff asserts sixteen claims for relief under state and federal law:

- The **First Claim for Relief** is a Fourteenth Amendment equal protection claim for discrimination against all Defendants.

- The **Second Claim for Relief** is a Fourteenth Amendment conditions of confinement claim against all Defendants.

- The **Third Claim for Relief** is a Fourth Amendment unreasonable search claim against Defendants El Paso County, Elder, Mustapick, and Elliss.

- The **Fourth Claim for Relief** is a Fourteenth Amendment substantive due process claim for invasion of bodily privacy and integrity against Defendants El Paso County, Elder, Gillespie, Mustapick, and Elliss.

- The **Fifth Claim for Relief** is brought under Colo. Rev. Stat. § 13-21-131 and Colo. Const. Art. II, Section 25 for unreasonable search against Defendants Elder, Gillespie, Mustapick, and Elliss.

- The **Sixth Claim for Relief** is brought under Colo. Rev. Stat. § 13-21-131 and Colo. Const. Art. II, Section 29 for sex discrimination against Defendants Elder, Gillespie, O'Neal, Mustapick, Elliss, Noe, and Ford.

- The **Seventh Claim for Relief** is a substantive due process claim brought under Colo. Rev. Stat. § 13-21-131 and Colo. Const. Art. II, Section 25 for invasion of

bodily privacy and integrity against Defendants Elder, Gillespie, Mustapick, and Elliss.

- The **Eighth Claim for Relief** is a cruel and unusual punishment conditions of

confinement claim brought under Colo. Rev. Stat. § 13-21-131 and Colo. Const. Art. II, Section 20 against Defendants Elder, Gillespie, O'Neal, Mustapick, Elliss, Noe, and Ford.

- The **Ninth Claim for Relief** is a due process conditions of confinement claim brought under Colo. Rev. Stat. § 13-21-131 and Colo. Const. Art. II, Section 25 against Defendants Elder, Gillespie, O'Neal, Mustapick, Elliss, Noe, and Ford.

- The **Tenth Claim for Relief** is a disability discrimination claim brought pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et. seq.*, against Defendant El Paso County.

- The **Eleventh Claim for Relief** is a disability discrimination claim brought pursuant to the Rehabilitation Act of 1973 ("RA"), 29 U.S.C. § 701, *et. seq*., against Defendant El Paso County.

- The **Twelfth Claim for Relief** is a sex and transgender discrimination claim brought pursuant to the Colorado Anti-Discrimination Act ("CADA"), Colo. Rev. Stat. § 24-34-601, *et. seq*., against all Defendants.

- The **Thirteenth Claim for Relief** is a disability discrimination claim brought pursuant to the CADA against all Defendants.

- The **Fourteenth Claim for Relief** is a Fourteenth Amendment failure to protect claim against Defendants El Paso County,

Elder, Gillespie, O'Neal, Noe, and Ford.

- The **Fifteenth Claim for Relief** is a cruel and unusual punishment/failure to protect claim brought pursuant to Colo. Rev. Stat. § 13-21-131 and Colo. Const. Art. II, Section 20 against Defendants El Paso County, Elder, Gillespie, O'Neal, Noe, and Ford.

- The **Sixteenth Claim for Relief** is a due process failure to protect claim brought pursuant to Colo. Rev. Stat. § 13-21-131 and Colo. Const. Art. II, Section 25 against Defendants El Paso County, Elder, Gillespie, O'Neal, Noe, and Ford. *Id.* ¶¶ 123–347.

Defendants now move to dismiss all claims under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

LEGAL STANDARDS

I. Rule 12(b)(1)

"Federal courts are courts of limited jurisdiction; they are empowered to hear only those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress." *Henry v. Off. of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994). Statutes conferring subject matter jurisdiction on federal courts are to be strictly construed. *F & S Constr. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). "[T]he party invoking federal jurisdiction," generally the plaintiff, "bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*, 523 U.S.83, 104 (1998). Rule 12(b)(1)

allows Defendants to raise the defense of the Court's "lack of subject-matter jurisdiction" by motion. Fed. R. Civ. P. 12(b)(1).

Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction "generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002).

A facial attack "questions the sufficiency of the complaint," and when "reviewing a facial attack . . . a district court must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001). When reviewing a factual attack, courts cannot "presume the truthfulness of the complaint's factual allegations," and may consider documents outside the complaint without converting the motion to dismiss into a motion for summary judgment. *Ratheal v. United States*, No. 20-4099, 2021 WL 3619902, at *3 (10th Cir. Aug. 16, 2021) (unpublished).

II. Rule 12(b)(6)

Rule 12(b)(6) "tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). To survive a Rule 12(b)(6) motion, "[t]he complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support plaintiff's allegations." *Shero v. City of*

Grove, Okla., 510 F.3d 1196, 1200 (10th Cir. 2007) (citing Bell *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[P]lausibility refers to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiff[ ] [has] not nudged [her] claims across the line from conceivable to plausible." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (internal quotations and citations omitted).

"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) (citing *Twombly*, 550 U.S. at 556). In making a plausibility assessment, the Court first discards those averments in the TAC that are merely legal conclusions or "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id*. at 678– 79. The Court takes the remaining, well-pled factual contentions, treats them as true, and ascertains whether those facts (coupled, of course, with the law establishing the requisite elements of the claim) support a claim that is "plausible" or whether the claim being asserted is merely "conceivable" or "possible" under the facts alleged. *Id*. "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id*. at 678 (brackets in original; internal quotation marks omitted).

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that [a] defendant has acted unlawfully." *Id.* (citation omitted). To survive a

motion to dismiss pursuant to Rule 12(b)(6), the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009). What is required to reach the level of "plausibility" varies from context to context, but generally, allegations that are "so general that they encompass a wide swath of conduct, much of it innocent," will not be sufficient. *Khalik*, 671 F.3d at 1191. And "the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

III. Qualified Immunity

Qualified immunity, in certain circumstances, protects government officials from litigation when they are sued in their individual capacities. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 814-18 (1982). A government official is entitled to qualified immunity from liability for civil damages when the allegedly unlawful conduct did not violate any of the plaintiff's statutory or constitutional rights that (1) were "clearly established" at the time of the conduct, and (2) would have been known to a reasonable person in the official's position. Id. at 818. A government official is entitled to qualified immunity "[i]n all but the most exceptional cases." *Harris v. Bd. of Educ. of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997).

"Qualified immunity gives government officials breathing room to make reasonable but mistaken

judgments . . . [and] protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "The key to the qualified immunity inquiry is the objective reasonableness of the official's conduct in light of the legal rules that were clearly established at the time the action was taken." *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 516 (10th Cir. 1998) (internal quotation marks omitted).

The threshold inquiry is whether the facts taken in the light most favorable to the plaintiff sufficiently allege a constitutional violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* However, "if a violation could be made out on a favorable view of the parties' submissions," a court must "ask whether the right was clearly established." *Id.*; *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that although qualified immunity determination involves a two-part inquiry, if the plaintiff fails either inquiry reviewed in any order, no further analysis need be undertaken and qualified immunity is appropriate).

Raising a qualified immunity defense in a motion to dismiss "subjects the defendant to a more challenging standard of review than would apply on summary judgment." *Sayed v. Virginia*, 744 F. App'x 542, 545–46 (10th Cir. 2018) (quoting *Peterson v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004)). "At the motion to dismiss stage, it is the defendant's conduct as alleged in the complaint that is scrutinized for objective legal reasonableness." *Id.* at 546 (quoting *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir.

2014)). Accordingly, to survive a motion to dismiss, a plaintiff "need 'only allege enough factual matter' to state a claim that is 'plausible on its face and provide fair notice to a defendant.'" *Id.* (quoting *Keith v. Koerner*, 707 F.3d 1185, 1188 (10th Cir. 2013)).

ANALYSIS

Defendants move to dismiss all sixteen claims asserted against them. The Court will address Defendants' arguments in turn.

I. Plaintiff's Claim Against El Paso County

Defendant contends that the Court cannot exercise jurisdiction over El Paso County because it has not been properly named under Colo. Rev. Stat. § 30-11-105, which states, "In all suits or proceedings by or against a county, the name in which the county shall sue or be sued shall be, 'The board of county commissioners of the county of'" As this is the "exclusive method by which jurisdiction over a county can be obtained," *Calahan v. Jefferson Cnty.*, 429 P.2d 301, 302 (Colo. 1967), Plaintiff's naming of the El Paso County as a defendant is defective, and the County can be dismissed due to this jurisdictional defect alone.

Moreover, Defendants point out that El Paso County is not responsible for the CJC's operations, the El Paso Sheriff's Office is, and under Colorado law, the county sheriff is a separate and distinct position from the board of county commissioners. *See Terry v. Sullivan,* 58 P.3d 1098, 1102 (Colo. App. 2002) ("[T]he Board [of County Commissioners] does not exercise managerial control over either the sheriff or the detention center and its staff."); Colo. Rev. Stat. § 30-

10-511 ("[T]he sheriff shall have charge and custody of the jails of the county, and of the prisoners in the jails, and shall supervise them himself or herself through a deputy or jailer.").

The Court agrees that El Paso County is not a proper party because Plaintiff only alleges misconduct on the party of employees of the El Paso County Sheriff's Office ("EPSO") working at the CJC. Without more, such misconduct cannot be attributed to El Paso County. While the Court will address Plaintiff's municipal liability claims as asserted against the El Paso Sheriff's Office, her claims against El Paso County should be dismissed.

II. The § 1983 Claims Asserted Against Defendants Elder and Gillespie

Next, Defendants argue that Plaintiff fails to adequately allege that Defendants Elder and Gillespie personally participated in violating Plaintiff's constitutional rights.42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." Section 1983 creates a "species of tort liability" that provides relief to persons deprived of rights secured to them by the Constitution. *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (quotations omitted).

"Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation." *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) (quoting *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997)). "Personal participation in the specific constitutional violation complained of is essential" in a § 1983 action. *Henry v. Storey*, 658 F.3d 1235, 1241 (10th Cir. 2011); *see also Foote*, 118 F.3d at 1423 ("Individual liability . . . must be based on

personal involvement in the alleged constitutional violation."). To establish personal participation, a plaintiff must show that each individual defendant caused the deprivation of a federal right. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

Defendants Elder and Gillespie are being sued in their roles of Sheriff and Commander, respectively. But the mere fact that a government official has supervisory or managerial authority does not create § 1983 liability. *Id.* (citing *Duffield v. Jackson*, 545 F.3d 1234, 1239 (10th Cir. 2008)). Rather, there must be "an affirmative link . . . between the constitutional deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise." *Id.* (quoting *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997)); *accord Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993) (citing *Meade v. Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1988)). "When an official is sued on the basis of his supervisory status and policy- making authority, a plaintiff may establish the affirmative link by demonstrating that the defendant: '(1) promulgated, created, implemented or possessed responsibility for the continued operation of a policy, (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.'" *Est. of Yoemans by & through Ishmael v. Campbell*, 501 F. Supp. 3d 1034, 1053 (D. Colo. 2020) (quoting *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010)).

With respect to Defendant Gillespie, Plaintiff makes several accusations that he was personally responsible for denying Plaintiff female clothing and grooming products. (*See* Dkt. #124 ¶¶ 114, 117.) Thus, Plaintiff has alleged that he personally participated in that alleged violation of Plaintiff's equal protection rights (although, as discussed below, Gillespie is protected by qualified immunity on this claim). However, Plaintiff's allegations regarding Gillespie's role in her housing assignments (*see id.* ¶ 220) and as a policymaker (*see id.* ¶¶ 42, 57, 312, 326, 340) are

conclusory. Thus, Plaintiff's claims against Defendant Gillespie should be dismissed

The Court will address Plaintiff's claims against Defendant Elder as a final policymaker in its municipal liability section below.

III. Plaintiff's Fourteenth Amendment Claims (One, Two, Four, and Fourteen)

Plaintiff asserts four claims under the Fourteenth Amendment for: (1) violating her equal protection rights; (2) subjecting her to unconstitutional conditions of confinement; (3) violating her substantive due process rights, and (4) failure to protect.

a. Equal Protection Claim (Claim One)

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV, § 1. The Fourteenth Amendment's equal protection guarantee "is essentially a directive that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But the Equal Protection Clause "doesn't guarantee equal results for all, or suggest that the law may never draw distinctions between persons in meaningful dissimilar situations." *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684 (10th Cir. 2012). Rather, "[i]t seeks to ensure that any classifications the law makes are made 'without respect to persons,' that like cases are treated alike, [and] that those who 'appear similarly situated' are not treated differently without, at the very least, a rational reason for the difference.'" *Id.* at 684–85

(quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008)). A plaintiff can assert an equal protection claim either under the "traditional" theory of a class-based claim or under a "class-of-one theory." *See id*. at 685–690 (discussing both theories).

To state an equal protection claim, a plaintiff must allege:

> (1) that similarly-situated individuals were treated differently; and (2) either that the differential treatment was based on a suspect classification or fundamental right and not supported by a compelling government interest, or if the differential treatment was not based on a suspect classification or fundamental right, the differential treatment was not justified by a rational connection to a legitimate state interest.

Buggs v. Trujillo, No. 13-cv-00300-CMA-MJW, 2014 WL 420005, at *7 (D. Colo. Feb. 4, 2014) (citations omitted).

The Tenth Circuit has explained,

> 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. *See Johnson v. California,* 543 U.S. 499, 505, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) (addressing racial classification); *Save Palisade FruitLands v. Todd,* 279 F.3d 1204, 1210

(10th Cir. 2002) (addressing classifications that "target a suspect class or involve a fundamental right"). In such a case, "the government has the burden of proving that [its] classifications are narrowly tailored measures that further compelling governmental interests." *Johnson,* 543 U.S. at 505, 125 S. Ct. 1141 (quotation omitted).

If, instead, the challenged government action classifies people according to a quasi-suspect characteristic, such as gender or illegitimacy, then this court will apply intermediate scrutiny. *See Todd,* 279 F.3d at 1210. 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." *Concrete Works of Colo., Inc. v. City and County of Denver,* 321 F.3d 950, 959 (10th Cir. 2003).

Finally, where the challenged government action does not implicate either a fundamental right or a protected class, this court will apply a rational basis test. *See Todd,* 279 F.3d at 1210. In those cases, this court inquires whether the government's classification bears "a rational relation to some legitimate end." *Id.* at 1213 (quotation omitted).

Price-Cornelison v. Brooks, 524 F.3d 1103, 1109–10 (10th Cir. 2008).

Plaintiff alleges that "discrimination against transgender people is a form of sex discrimination that is presumptively unconstitutional and subject to heightened scrutiny." (Dkt. #124 ¶ 125.) Defendants disagree, arguing that "[t]ransgender is not a suspect or quasi-suspect class; therefore, the Defendants' classifications are subject to only rational basis analysis." (Dkt. #132 at 11.) Regretfully, based on binding Tenth Circuit precedent that this Court is obligated to follow, the Court must agree with Defendants.

Over twenty years ago, the Tenth Circuit issued its opinion in *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995). In that case, the court rejected a transgender[4] inmate's claim that by denying her estrogen treatment, the defendants violated her equal protection rights. The court relied on *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), where the Ninth Circuit "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*, 566 F.2d at 663). Despite recognizing that "[r]ecent research concluding that sexual identity may be biological suggests

[4] The court in *Brown* used the older term "transexual" and, although the plaintiff identified as female, the court used he/him pronouns because the plaintiff "is biologically male and refers to himself with masculine pronouns throughout his pleadings." *Brown,* 63 F.3d at 968 n.1.

reevaluating *Holloway*," 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.* Subsequent unpublished Tenth Circuit opinions have 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." *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015); *see also Qz'etax v. Ortiz,* 170 F. App'x 551, 553 (10th Cir. 2006).

This Court has little trouble stating that the Tenth Circuit needs to revisit its holding in *Brown v. Zavaras*. First, the Ninth Circuit authority it followed has since been overruled. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *see also Norsworthy v. Beard,* 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (recognizing that *Holloway* "is no longer good law" and, applying *Schwenk*, concluding that "discrimination based on transgender status independently qualifies as a suspect classification under the Equal Protection Clause because transgender persons meet the indicia of a 'suspect' or 'quasi-suspect classification' identified by the Supreme Court"); *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (affirming the district court's reasoning as to why transgender people are a quasi-suspect class). Second, it appears that the Tenth Circuit 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." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) (citing cases). Indeed, in *Grimm*, the Fourth Circuit, pointing to *Brown*, stated "[o]nly one

court of appeals decision holding otherwise remains good law." *Id.* The *Grimm* decision also noted that *Brown* "reluctantly followed a since-overruled Ninth Circuit opinion. *Id.* at 611. Thus, it is likely that heightened scrutiny *should* apply to transgender people.

But *Brown* does remain, if not *good* in the normative sense, at least *binding* law on district courts in this district. The Court acknowledges the undeniable truth of Plaintiff's statement that a "growing consensus of courts have held that transgender individuals constitute a suspect or quasi-suspect class." (*See* Dkt. #147 at 9 n.1 (citing cases).) As articulated by one district court, "one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people." *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018); *see also Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *1 (W.D. Wash. Apr. 13, 2018) ("The Court also rules that, because transgender people have long been subjected to systemic oppression and forced to live in silence, they are a protected class.").

Indeed, if this Court were to apply the four-factor test used to determine whether a group constitutes a suspect or quasi-suspect class, in this Court's view, transgender people easily check all the boxes. The group has historically been subject to discrimination. The group has a defining characteristic that bears a relation to its ability to perform or contribute to society. The group may be defined as a discrete group by obvious, immutable, or distinguishing

characteristics.[5] And the group is a minority that lacks political power. *See Grimm*, 972 F.3d at 611–13.

But, conspicuously, despite the "growing consensus" seen in district court cases around the country that apply heightened scrutiny to transgender people, none of the cases cited come from this circuit. Even if the Court were to agree with the straightforward holding in *Grimm* that it is "apparent that transgender persons constitute a quasi-suspect class," 972 F.3d at 611, it cannot ignore or overrule binding Tenth Circuit precedent that says otherwise. As Plaintiff herself says in opposing the motion to dismiss, "this case 'is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected.'" (Dkt. #147 at 1 (quoting *G.G. v. Gloucester Cnty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring)). But to the extent that Plaintiff, via this case, wants to "broaden the scope of civil and human rights" by changing Tenth Circuit law, it must be for the Tenth Circuit (or the Supreme Court) to take that step. This

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[5] The *Grimm* decision relied on an amicus brief from medical experts to come to a very different conclusion as to the immutability of transgender characteristics from the Tenth Circuit in *Brown:* "As to the third factor, transgender people constitute a discrete group with immutable characteristics: Recall that gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice. Rather, it is as natural and immutable as being cisgender." *Grimm*, 972 F.3d at 612–13. By contrast, the *Brown* court was presented with a pro se plaintiff whose "conclusory" allegations were inadequate to allow the Tenth Circuit to make a "proper analysis" of the immutability question. *Brown*, 63 F.3d at 971.

Court is bound to follow Tenth Circuit precedent unless it is overturned by the Tenth Circuit or a superseding contrary decision by the Supreme Court. *See Burlington N. & Santa Fe Ry. Co. v. Burton*, 270 F.3d 942, 947 (10th Cir. 2001).

Of course, if a transgender person does not qualify as a member of a suspect or quasi-suspect class, unequal treatment that does not involve a fundamental right or suspect classification must still bear a rational relation to legitimate penal interest. In this circumstance, a state action survives judicial review "if there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Davoll v. Webb*, 194 F.3d 1116, 1145 (10th Cir. 1999) (citing *Spragens v. Shalala*, 36 F.3d 947, 951 n.3 (10th Cir. 1994)). A court "will only strike the [action] down if the state's classification 'rests on grounds *wholly irrelevant* to the achievement of the State's objective.'" *City of Herriman v. Bell*, 590 F.3d 1176, 1194 (10th Cir. 2010) (emphasis in original).

As the Tenth Circuit explained in *Brown*, it is a "perplexing situation . . . when the rational basis standard meets the standard applied to a dismissal." 63 F.3d at 971 (quoting *Wroblewski v. City of Washburn*, 965 F.2d 452, 459-60 (7th Cir. 1992)). In adopting the framework applied by the Seventh Circuit, the Tenth Circuit instructed that lower courts should "take as true all of the complaint's allegations and reasonable inferences that follow" and "apply the resulting 'facts' in light of the deferential rational basis standard." *Id.* (citing *Wroblewski*, 965 F.2d at 460). Thus, the Tenth Circuit opined, "[t]o survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the

presumption of rationality that applies to government classifications." *Id.*

Here, Plaintiff alleges that that the El Paso County Sheriff's Office (via Defendant Elder) has a policy in place to "make facility assignments to people in custody solely on the basis of the individual's genitalia," despite knowing that this "places transgender people at risk for victimization." (Dkt. #124 ¶ 42.) She alleges that the discriminatory placement decisions "were taken without an important or legitimate governmental interest or rational reason, and they had no penological basis to deny Plaintiff a safe and appropriate placement in a female facility, based on her sex, gender identity, characteristics, risk factors, and her history of sexual victimization in male facilities." (*Id.* ¶ 134.) She also alleges that she and other transgender inmates were denied access to items like clothing and grooming products that were available to cisgender female inmates. (*Id.* ¶¶ 110–22.) For their part, Defendants claim only that the "classification of Plaintiff as male, housing Plaintiff in the male ward, and employing reasonable search procedures were all actions rationally based in the need to provide for the safe and secure function of CJC." (Dkt. #132 at 13.)

If the Tenth Circuit were to recognize transgender people as a quasi-suspect or suspect class whose treatment was subject to intermediate or strict scrutiny, then the Court would not hesitate to conclude (at least at the motion to dismiss stage) that Plaintiff's placement as a transgender woman in an all-male unit was not substantially related to an important governmental interest. *See*, e.*g. Tay v. Dennison,* 457 F. Supp. 3d 657, 682 (S.D. Ill. 2020) (holding that a transgender prisoner's placement in a

men's prison was not substantially related to an important government interest even though the prisoner had a history of violent behavior); *Hampton v. Baldwin*, No. 3:18-CV-550- NJR-RJD, 2018 WL 5830730, at *12 (S.D. Ill. Nov. 7, 2018) (finding that a transgender female inmate's equal protection claim based on her placement in a men's prison had a "greater than negligible chance of success on the merits"). But, this Court is compelled by the Tenth Circuit to apply the rational basis test.

The Court finds that Plaintiff has not adequately alleged that there is no rational reason for Defendants to house transgender women in all-male units and not provide them with feminine products. Plaintiff's claims to the contrary cannot overcome the presumption of rationality that attach to government decision involving a person who is not a member of a suspect class. *See Druley*, 601 F. App'x at 635 ("Ms. Druley did not allege any facts suggesting the ODOC defendants' decisions concerning her clothing or housing do not bear a rational relation to a legitimate state purpose."). Thus, the Court cannot find that there was no rational basis for assigning all prisoners with male genitalia, including transgender women, to the same housing facility, and Plaintiff's equal protection claim should be dismissed.

b. Conditions of Confinement/Substantive Due Process Claims (Claims Two and Four)

"Pre-trial detainees have a Fourteenth Amendment due process right to humane conditions of confinement that is co-extensive with the Eighth Amendment right of convicted prisoners." *Waring v. Storey*, No. 12-cv-01338-BNB, 2012 WL 3245951, at *2

(D. Colo. Aug. 7, 2012). To state a due process claim based on unconstitutional conditions of confinement, a plaintiff must allege facts plausibly establishing both an objective and a subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). A plaintiff satisfies the objective component by alleging facts demonstrating that the "conditions [of confinement] were more than uncomfortable, and instead rose to the level of 'conditions posing a substantial risk of serious harm' to inmate health or safety." *DeSpain v. Uphoff*, 264 F.3d 965, 973 (10th Cir. 2001). And with respect to the subjective prong, a claimant makes a sufficient showing by alleging that the defendant "[knew] of and disregard[ed] an excessive risk to inmate health or safety." *Id*. at 975.

Moreover, "a pretrial detainee can establish a due-process violation by 'providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.'" *Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019) (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 389 (2015)).

Defendants argue in their motion that Plaintiff's claim fails for a variety of reasons. Unhelpfully, Plaintiff ignores these arguments and proceeds to her substantive due process claim. The Court will therefore address the two claims together.

Defendants first contend, and the Court agrees, that Plaintiff does not allege personal participation as to Defendant O'Neal, who is only alleged to have informed Plaintiff that one of her grievances was denied. (Dkt. #124 ¶ 57.) Plaintiff does not allege that Defendant O'Neal was even the one to deny the grievance and, in any event, a denial of a grievance,

by itself and without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983." *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009).

Defendants next argue that Plaintiff cannot maintain a claim against Defendant Noe (who made the initial housing assignment) or Ford (who later refused to "re- classify" Plaintiff) because she does not allege either subjective or objective elements of deliberate indifference. Plaintiff does not counter this argument, and the Court must agree with Defendants. Plaintiff does not plausibly allege that Defendants Noe or Ford were aware that Plaintiff would be at risk of substantial harm if placed in the all-male facility or that they disregarded that risk. Moreover, Plaintiff has not demonstrated that her right to be placed in a female unit was clearly established, given the binding Tenth Circuit precedent described above.

Defendants further maintain that Plaintiff's conditions of confinement claim should be dismissed as to Defendants Elliss and Mustapick. Again, Plaintiff chose not to respond to these arguments. As to Defendant Elliss, the Court agrees with Defendants that one instance of misgendering, although no light matter, is not sufficient to state a claim for unconstitutional conditions of confinement. As to Defendant Mustapick, however, Plaintiff does argue that he violated her *substantive due process rights* by "subject[ing] her to unconstitutional conditions of confinement through the cross-gender visual body-cavity search he performed on her." (Dkt. #147 at 17.)

The Tenth Circuit has recognized that inmates retain a limited right to bodily privacy under the

Fourteenth Amendment. *See Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) ("Although the inmates' right to privacy must yield to the penal institution's need to maintain security, it does not vanish altogether."); *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988) ("Shielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex is impelled by elementary self-respect and personal dignity."). An inmate's interest in bodily privacy may be restricted "only to the extent necessary to further the correction system's legitimate goals and policies." *Cumbey*, 684 F.2d at 714.

As an initial matter, the Court disagrees with Defendants that this claim is more properly brought under the Eighth Amendment's cruel and unusual punishment clause rather than the Fourteenth Amendment's substantive due process guarantee. In *Graham v. Connor*, the Supreme Court held that when government conduct is constrained by "an explicit textual source of constitutional protection . . . that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" because "[a]ny protection that 'substantive due process' affords convicted prisoners against excessive force is . . . at best redundant of that provided by the Eighth Amendment." 490 U.S. 386, 395 n.10 (1989). But the Eighth Amendment applies to those prisoners already convicted of a crime. Plaintiff is (or was at the time of filing) a pretrial detainee, and therefore "finds h[er]self in the criminal justice system somewhere between the two stools of an initial seizure and post-conviction punishment. *Porro v. Barnes*, 624 F.3d 1322, 1326 (10th Cir. 2010). In these circumstances, the due process clause of the Fourteenth Amendment and its protection against

arbitrary governmental action by federal or state authorities applies. *Id.*

Turning to the visual body-cavity search itself, Plaintiff alleges that she was made to strip naked and told to spread her "sexy" butt cheeks to "go balls deep" while Defendant Mustapick grabbed his own penis. (Dkt. #124 ¶¶ 71-83.) Though this is sickening behavior, Plaintiff does not meet her burden in showing that it is clearly established that cross-gender searches of transgender women, even ones accompanied by odious verbal harassment, violate a clearly established constitutional right, nor is the conduct so egregious and the right so obvious that it could be deemed clearly established even without materially similar cases. *C.f. Lowe v. Raemisch*, 864 F.3d 1205, 1210 (10th Cir. 2017) ("When the public official's conduct is egregious, even a general precedent would apply with obvious clarity. After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing" (citations and quotations omitted)). Despite the alleged abhorrent statements that accompanied the search, Plaintiff has failed to persuade the Court that such a comment in connection with a cross-gender search rises to the point of violating an established constitutional right. Defendant Mustapick is entitled to qualified immunity on Plaintiff's substantive due process claim and, by extension, so is Defendant Elliss on any claim that she failed to intervene.

Finally, the Court agrees with Defendants that Plaintiff's argument that Defendants should be liable for the "near-constant" harassment she was subjected to and the "repeated" cross-gender pat down search is

too generalized and imprecise to adequately allege personal participation as to the specified individual Defendants.

c. Failure to Protect (Claim Fourteen)

A failure to protect claim is comprised of two elements. "First, an inmate must show that [s]he is incarcerated under conditions posing a substantial risk of serious harm." *Riddle v. Mondragon*, 83 F.3d 1197, 1204 (10th Cir.1996) (citation omitted). "Second, the inmate must establish that the prison official has a sufficiently culpable state of mind, i.e., that he or she is deliberately indifferent to the inmate's health or safety." *Id*. (internal quotation marks and citation omitted). "The prison official's state of mind is measured by a subjective, rather than an objective, standard." *Id*. (citation omitted). "In other words, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. *see also Benefield v. McDowell*, 241 F.3d 1267, 1270–71 (10th Cir. 2001) ("[I]n order to establish a cognizable Eighth Amendment claim for failure to protect, a plaintiff must show that he is incarcerated under conditions posing a substantial risk of serious harm, the objective component, and that the prison official was deliberately indifferent to his safety, the subjective component.") (internal quotation marks and citations omitted).

Plaintiff claims that Defendants were aware that Ms. Griffith is a transgender woman, knew she is blind, and knew, because of these two things, that placing her into an all-male unit would make her particularly vulnerable to sexual assault. The Court is not persuaded.

First, as Defendants' note, Plaintiff does not allege that any Defendants other than Noe and Ford were involved in Plaintiff's housing assignment. Therefore, this failure to protect claim could only be maintained against these two Defendants due to the personal participation requirement.

Second, their mere knowledge of Plaintiff's disabilities (gender dysphoria and blindness) alone is not enough for hold Defendants Noe and Ford liable for failing to prevent Plaintiff's sexual assault. Significantly, both Defendants made their decisions regarding Plaintiff's housing assignment in July 2020, but Plaintiff alleges she was sexually assaulted by a fellow inmate on November 18, 2021. This 16-month span raises evident questions of causation. It strongly suggests that Defendants Noe and Ford had no reason to suspect that Plaintiff was in substantial and immediate danger.

Accordingly, Plaintiff does not state a claim for failure to protect, and Defendants Ford, O'Neal, Noe, Gillespie, and Elder are entitled to qualified immunity.

III. Fourth Amendment

Plaintiff asserts that the visual strip search conducted by Defendants Mustapick and Elliss violated her Fourth Amendment right to be free from unreasonable searches and seizures as well as her Fourteenth Amendment substantive due process rights. As both claims require the careful balancing of penological concerns with inmates' right to privacy, the Court's analysis of the two will necessarily overlap.

It has long been recognized that "[l]awful

incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). Thus, a prisoner's limited constitutional right to bodily privacy under the

Fourteenth Amendment, as addressed above, and to be free of unreasonable searches and seizures under the Fourth Amendment, must be weighed against the requirements of prison administration. *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). The Court affords deference to the expertise of correctional officials, who "must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities." *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 328, (2012) (citing *Bell v. Wolfish,* 441 U.S. 520, 546 (1979). However, as previously, "[a]lthough the inmates' right to privacy must yield to the penal institution's need to maintain security, it does not vanish altogether." *Cumbey*, 684 F.2d at 714.

"[A] strip search is an invasion of personal rights of the first magnitude." *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir.1993); "[T]he greater the intrusion, the greater must be the reason for conducting a search." *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986) (citing *Blackburn v. Snow*, 771 F.2d 556, 565 (1st Cir.1985)).

Determining the reasonableness or "constitutionality of a strip search 'requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.'" *Farmer v. Perrill*, 288 F.3d 1254, 1259 (10th Cir. 2002) (quoting *Bell*, 441 U.S. at 559). Although the "test of reasonableness under the Fourth

Amendment is not capable of precise definition or mechanical application," in making this determination, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell*, 441 U.S. at 559. These factors aim to "[b]alanc[e] the significant and legitimate security interests of the institution against the privacy interests of the inmates." *Id*. at 560. "[A] regulation impinging on an inmate's constitutional rights must be upheld if it is reasonably related to legitimate penological interests." *Florence*, 566 U.S. at 326 (internal quotation marks omitted).

Here, the scope of the search was invasive. *See Hyberg v. Enslow,* 801 F. App'x 647, 650 (10th Cir. 2020) (unpublished) (labelling strip searches "undeniably invasive"). However, "there are obvious security concerns inherent when an inmate will be placed in the general prison population." *Id.* (citing *Archuleta v. Wagner*, 523 F.3d 1278, 1284 (10th Cir. 2008)). Plaintiff was being processed for placement in the CJC's general population; "[t]here were therefore legitimate security interests served by the search[ ]." *Id.* According to the TAC, the search was performed in a "separate room," away from other inmates and CJC staff. *See Farmer*, 288 F.3d at 1260 (recognizing a strip search may be unreasonable if conducted in the open, "visible to a number of other inmates and staff," and without regard for the inmate's privacy interests); *see also id*. at 1261 ("[I]nfringements on prisoners' constitutional rights must not be arbitrary or irrational, nor an exaggerated response to security needs." (internal quotation marks omitted)). And In the Tenth Circuit, it is established that "the Constitution does not require 'complete privacy' for a strip search." *Smith v. Trapp*, No. 14-3220-JAR-JPO,

2018 WL 587230, *4 (D. Kan. Jan. 29, 2018) (quoting *Daughtery v. Harris*, 476 F.2d 292, 294 (10th Cir. 1973)).

As to the manner in which the search was conducted, a female deputy, Defendant Elliss, examined Plaintiff's bare breasts, and a male deputy, Defendant Mustapick, performed the search of Plaintiff's genitals. "Courts throughout the country have universally frowned upon cross-gender strip searches in the absence of an emergency or exigent circumstances." *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1143 (9th Cir. 2011); *see* also *Hayes v. Marriott*, 70 F.3d 1147 (10th Cir.1995) (recognizing that an inmate's privacy rights may be violated by a single cross-gender strip search); (*Harris v. Miller*, 818 F.3d 49, 59 (2d Cir. 2016) ("Indeed, best-practice standards in prison management typically discourage cross-gender strip searches."). Plaintiff also alleges that Defendant Mustapick made frightening and humiliating comments to her and performed the search "aggressively." A search conducted in an abusive manner can be considered unreasonable and violative of the Fourth Amendment. *See Bell*, 441 U.S. at 560. However, "not . . . every malevolent touch by a prison guard gives rise to a federal cause of action." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). In *Hyberg*, the Tenth Circuit cited some examples type of conduct courts have found to be needlessly intrusive or abusive. *See* 801 F. App'x at 650–51 (citing *Hayes*, 70 F.3d at 1147 (reversing grant of summary judgment on Fourth Amendment claim where inmate alleged he was subjected to a video recorded "body cavity search [conducted] in the presence of over 100 people, including female secretaries and case managers from other buildings");

Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (holding inmate stated an Eighth Amendment claim by alleging that during search, guards made "ribald comments and sexually explicit gestures," "forced him to perform sexually provocative acts," and female guards "were neither mere passersby nor performing [a] legitimate penological function," but "were instead invited spectators")). The alleged conduct here, reprehensible as it is, does not rise to that level. On balance, then, despite the intrusiveness of the search and offensive manner it was performed, the Court finds that Plaintiff does not state a plausible violation of the Fourth Amendment.

Even if the Court determined that Plaintiff could plausibly state a Fourth Amendment claim, like her Fourteenth Amendment claim, it would necessarily fail based on the "clearly established" prong of qualified immunity. Plaintiff offers no Supreme Court or Tenth Circuit precedent clearly establishing that a visual strip search by a male and female deputy of a transgender inmate who identifies as female, has female breasts, and has male genitals violates the Fourth Amendment's prohibition of unreasonable searches and seizures. Accordingly, this claim should be dismissed.

IV. Municipal Liability

Plaintiff asserts claims against Defendant Elder in his personal capacity and his official capacity as El Paso County Sheriff. "An action against a person in his official capacity is, in reality, an action against the government entity for whom the person works." *Pietrowski v. Town of Dibble*, 134 F.3d 1006, 1009 (10th Cir. 1998).

Government entities can be sued directly only where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id*. at 694.

"[A] claim under § 1983 against . . . a municipality cannot survive a determination that there has been no constitutional violation." *Crowson v. Wash. Cnty. Utah*, 983 F.3d 1166 (10th Cir. 2020). "[T]here must be a constitutional violation, not just an unconstitutional policy, for a municipality to be held liable." *Id*. at 1191. As discussed above, Plaintiff has not alleged facts demonstrating that she suffered a constitutional injury. Therefore, the Court finds that he cannot state a claim against Defendant Elder in his official capacity. Accordingly, the Court respectfully recommends that Plaintiff's municipal liability claims be dismissed.

V. Plaintiff's ADA and RA Claims (Claims Ten and Eleven)

Title II of the ADA states, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. ADA regulations require public

entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). To state a claim under Title II, a plaintiff must allege that "(1) [s]he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." *Id*. at 1193.

Section 504 of the RA provides that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). To state a claim under Section 504, "a plaintiff must allege (1) that [s]he is a 'handicapped individual' under the [ADA], (2) that [s]he is 'otherwise qualified for the [benefit] sought, (3) that [s]he was [discriminated against] solely by reason of his handicap, and (4) that the program or activity in question receives federal financial assistance." *Cohon ex rel. Bass v. N.M. Dep't of Health*, 646 F.3d 717, 725 (10th Cir. 2011) (quoting *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1492 (10th Cir.1992)).

It has been commonly observed that "[t]he Rehabilitation Act is materially identical to and the model for the ADA," *Crawford v. Ind. Dep't of Corr*., 115 F.3d 481, 483 (7th Cir. 1997) (citing *Bryant v. Madigan*, 84 F.3d 246, 248 (7th Cir. 1996*)); see also McDonald v. Penn. Dep't of Pub. Welfare*, 62 F.3d 92, 94 (3d Cir. 1995); *Duffy v. Riveland*, 98 F.3d 447, 455

(9th Cir. 1996)), "except that it is limited to programs that receive federal financial assistance." *Crawford*, 115 F.3d at 483. However, the Tenth Circuit recently clarified that the causation standards of the statutes are different: "the ADA merely requires the plaintiff's disability be a but-for cause (i.e., "by reason of") of the discrimination, rather than—as the Rehabilitation Act requires—its sole cause (i.e., "solely by reason of")." *Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 1313 (10th Cir. 2021). With this in mind, the Court will evaluate Plaintiff's ADA claim and RA claim together. *See Jarvis v. Potter*, 500 F.3d 1113, 1121 (10th Cir. 2007) (citing 29 U.S.C. § 794(d)).

a. Whether Plaintiff Alleges a Disability

Defendants argue that Plaintiff fails to allege a disability. While the ADA defines the term "disability" broadly to include "a physical or mental impairment that substantially limits one or more major life activities of such individual," 42 U.S.C. § 12102(1)(A), it excludes "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, *gender identity disorders not resulting from physical impairments*, [and] other sexual behavior disorders," Id. § 12211(b) (emphasis added). It is Defendants' position that gender dysphoria falls squarely within this exclusion.

Defendants acknowledge that there is significant disagreement amongst district courts across the country regarding whether gender dysphoria is a "gender identity disorder" and categorically excluded from the ADA's definition of "disability." They cite a case from this district where the court found that "gender dysphoria, as a gender identity disorder, is specifically exempted as a disability by the Rehabilitation Act." *Michaels v. Akal Sec., Inc.*, No.

09-cv-01300-ZLW-CBS, 2010 WL 2573988, at *6 (D. Colo. June 24, 2010). The Court is not bound by this ruling. It was decided over a decade ago and dealt with the issue summarily.

Instead, the Court finds persuasive a recent thorough and closely-reasoned decision issued by the Fourth Circuit in *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022). There, after careful analysis, the court held that "as a matter of statutory construction, gender dysphoria is not a gender identity disorder." *Id.* at 769. The court also held that a plaintiff need not plead by specific words that her gender dysphoria "result[ed] from a physical impairments") in order to state a claim. *Id.* at 771. Absent any Tenth Circuit authority to the contrary, the Court is likewise convinced that gender dysphoria is a disability included in the ADA's protections. *See Gibson v. Cmty. Dev. Partners*, No. 3:22-CV-454-SI, 2022 WL 10481324, at *7 (D. Or. Oct. 18, 2022) (citing *Williams* for the proposition that "nothing in the ADA compels the conclusion that gender dysphoria is excluded from ADA protection").

b. Causation

Nevertheless, Defendants argue that Plaintiff's ADA and RA claims fail because she fails to allege that her gender dysphoria was the "but for" (much less "sole") cause of the alleged discrimination. Specifically, Defendants contend that Plaintiff complains that the discrimination was a result of her gender identity and transgender status—not gender dysphoria—and transgenderism ("transexualism") is specifically excluded from the definition of a disability. Defendants cite several allegations from the TAC that refer to EPSO's treatment of

transgender women.

This argument misses the mark. First, Plaintiff alleges that the symptoms of gender dysphoria can be alleviated by, among other things, "outwardly presenting in a manner consistent with one's gender identity" (Dkt. #123 ¶ 24), and that placing her "in housing that does not conform with her gender identity has exacerbated symptoms of her Gender Dysphoria leading her to suffer significant emotional distress and have increased ideation of self-harm." (*Id.* ¶ 68.) Plaintiff also alleges that, pursuant to WPATH guidelines, part of the treatment of gender dysphoria is to "be treated as the woman she is." (*Id.* ¶ 97.) She also states she requested accommodations for her gender dysphoria. (*Id.* ¶¶ 48, 55, 61, 63, 92, 110, 111.)

A public entity must provide a reasonable accommodation under the ADA when it knows that the individual is disabled and "requires an accommodation of some kind to participate in or receive the benefits of its services." *Robertson v. Las Animas Cnty.*

Sheriff's Dep't, 500 F.3d 1185, 1197 (10th Cir. 2007). "[A] public entity is on notice that an individual needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individual requests an accommodation." *Id.* at 1197–98. Thus, Plaintiff's gender identity is relevant to the reasonable accommodation of her disability.

Moreover, the cherry-picked excerpts Defendants cite from the pleading ignore the numerous references Plaintiff makes to the EPSO's consistent failure to accommodate her gender dysphoria. (*See, e.g.,* Dkt.

#124 ¶¶ 70 ("El Paso County's decision to house Ms. Griffith in housing that does not conform with her gender identity was a discriminatory action and a failure to reasonably accommodate Ms. Griffith's diagnosed Gender Dysphoria."); 81 ("El Paso County officials' threatening, intimidating and harassing visual body-cavity search of Ms. Griffith, . . . conducted by an unaccompanied male deputy, was a discriminatory action and a failure to reasonably accommodate Ms. Griffith's diagnosed Gender Dysphoria."); 107 ("El Paso County officials' actions in constantly mis-gendering Ms. Griffith was a discriminatory action and a failure to reasonably accommodate Ms. Griffith's diagnosed Gender Dysphoria."); 119 ("El Paso County officials' actions in denying Ms. Griffith access to female undergarments and lipstick was a discriminatory action and a failure to reasonably accommodate Ms. Griffith's diagnosed Gender Dysphoria."); 280 ("By confining Plaintiff in the men's unit at the El Paso County Jail, a facility where staff members referred to Plaintiff using a male pronoun and her male given name and staff refused to permit Plaintiff to wear her own gender's clothes and underwear, El Paso County subjected Plaintiff to discrimination based on Gender Dysphoria.").

For these reasons, the Court rejects Defendant's contention that Plaintiff asserts that her transgender status—not gender dysphoria—was the reason for her exclusion from certain programs and services within CJC.

c. Damages

In *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1565 (2022), the Supreme Court held that emotional distress damages are not recoverable

in a private action to enforce . . . the Rehabilitation Act of 1973." Instead, "victims of discrimination to recover damages only if they can prove that they have suffered economic harm." *Id.* at 1562 (Breyer, J., dissenting). Defendants therefore posit that other types of damages that are generally unavailable in breach of contract claims, like those for pain and suffering, should also be unavailable as a remedy under the RA. Defendants also claim that *Cummings*' damage limitation should also apply with equal force to claims asserted under Title II of the ADA.

Plaintiff argues that *Cummings* does not apply to other damages or ADA claims, and contends that the Supreme Court's holding should not apply retroactively. These are interesting arguments, but in the end, they need not be decided now because even pre-*Cummings*, the Tenth Circuit required a showing of intentional discrimination before a plaintiff may recover compensatory damages for mental or emotional injury. *Tyler v.City of Manhattan*, 118 F.3d 1400, 1403–4 (10th Cir. 1997); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152 (10th Cir. 1999). "Intentional discrimination does not require a showing of personal ill will or animosity toward the disabled person; rather, 'intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights.'" *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1229 (10th Cir. 2009) (quoting *Powers.*, 184 F.3d at 1153). "The test for deliberate indifference in the context of intentional discrimination comprises two prongs: (1) 'knowledge that a harm to a federally protected right is substantially likely,' and (2) 'a failure to act upon that likelihood.'" *Id.* (quoting *Duvall v. Cnty. of Kitsap*, 260

F.3d 1124, 1139 (9th Cir. 2001) (alteration omitted).

While the Court believes that discrimination based on gender dysphoria violates the ADA and RA, this is not remotely settled law. Indeed, it appears that the "majority approach[ ] views the [ADA]'s language as expressing Congress's intent to exclude from the ADA's protection both disabling and non-disabling gender identity disorders that do not result from a physical impairment." *Doe v. Pa. Dep't of Corr.*, No. 120CV00023SPBRAL, 2021 WL 1583556, at *8 (W.D. Pa. Feb. 19, 2021), *report and recommendation adopted,* No. CV 20-23, 2021 WL 1115373 (W.D. Pa. Mar. 24, 2021). A court from this district took this tack. *See Michaels*, 2010 WL 2573988, at *6. Under these circumstances, the Court cannot say that the EPSO was deliberately indifferent to the "strong likelihood" of harm to a right that may not even be protected by the ADA and RA. *See Roberts v. City of Omaha*, 723 F.3d 966, 975–76 (8th Cir. 2013) ("Roberts can only prevail on his ADA and Rehabilitation Act claims by showing the city's deliberate indifference to his alleged right to be free from discrimination in the circumstances of this case, but the city, like the individual officers, lacked notice the officers' actions might have violated Roberts's asserted rights.").

Plaintiff cannot obtain compensatory damages for mental or emotional injury, and any injunctive relief is moot because she has been moved to a female facility and given access to feminine clothing and grooming items. Accordingly, Claims Twelve and Thirteen should be dismissed.

VI. State Law Claims (Claims Five, Six, Seven, Eight, Nine, Twelve, and Thirteen)

Plaintiff asserts various claims under the Colorado Constitution and state statute. "If federal claims are dismissed before trial, leaving only issues of state law, 'the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.'" *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 549 (10th Cir. 1997) (quoting *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 (1988)). "Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary." *Thatcher Enters. v. Cache Cnty. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990). Because this Court has recommended dismissal of the federal claims, the Court further recommends that the presiding judge decline to exercise supplemental jurisdiction over Plaintiff's state-law claims and dismiss those claims without prejudice.

CONCLUSION

In light of the foregoing, it is hereby **RECOMMENDED** that Defendants' Motion to Dismiss (Dkt. #132) be **GRANTED**, and that Plaintiff's Third Amended Complaint (Dkt. #124) be **DISMISSED**.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14)

days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge, *Thomas v. Arn*, 474 U.S. 140, 148–53 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412–13 (10th Cir. 1996).

BY THE COURT

Date: February 27, 2023

Denver, Colorado

N. Reid Neureiter

N Reid Neureiter

United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00387-NRN-CMA

DARLENE GRIFFITH,

Plaintiff,

v.

EL PASO COUNTY, COLORADO, BILL ELDER, in his individual and official capacities, CY GILLESPIE, in his individual capacity, ELIZABETH O'NEAL, in her individual capacity, ANDREW MUSTAPICK, in his individual capacity, DAWNE ELLISS, in her individual capacity, TIFFANY NOE, in her individual capacity, BRANDE FORD, in her individual capacity,

Defendants.

FILED March 27, 2023

ORDER AFFIRMING AND ADOPTING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on the February 27, 2023 Recommendation of United States Magistrate Judge (Doc. # 165), wherein Judge N. Reid Neureiter recommends this Court grant Defendants' Motion to Dismiss the Third Amended Complaint (Doc. # 132). Plaintiff timely filed an Objection to the

Recommendation. (Doc. # 169.) For the following reasons, the Court overrules Plaintiff's Objection and affirms and adopts the Recommendation as an order of this Court.

I. BACKGROUND

The factual background of this case is set out at length in Judge Neureiter's Recommendation, which the Court incorporates herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). Accordingly, the Court will provide only a brief summary of the relevant facts of this case.

Plaintiff Darlene Griffith is a transgender woman who has been diagnosed with gender dysphoria.[1] (Doc. # 124 at ¶ 2.) She has been living as a transgender woman for more than 20 years. (*Id.* at ¶ 25.) As part of her treatment, Plaintiff has "changed her name and altered her physical appearance to conform to her female gender identity, including dressing in feminine attire and taking feminizing hormones, which caused her to develop female secondary sex characteristics such as breasts, soft skin, a lack of facial hair, and other characteristics typically associated with women." (*Id.*)

Plaintiff arrived at El Paso County Jail as a pretrial detainee on July 20, 2020. (*Id.* at ¶¶ 47, 141.) At that time, Plaintiff was an openly transgender woman with a feminine appearance. (*Id.* at ¶ 47.) During Plaintiff's intake she notified jail personnel

[1] Gender dysphoria is "the significant distress that may accompany the incongruence between a transgender person's gender identify and assigned sex." (Doc. # 124 at ¶ 22.)

that she is a transgender woman with a diagnosis of gender dysphoria and explicitly requested placement in a women's facility. (*Id.* at ¶ 48.) Plaintiff also informed jail officials that she is legally blind. (*Id.* at ¶ 50.)

Plaintiff alleges that when she was booked into the jail, Defendant Andrew Mustapick sexually harassed her during an unconstitutional cross-gender, visual body-cavity search while Defendant Dawne Elliss stood by and did nothing to intervene. (*Id.* at ¶¶ 71–83.) When Plaintiff saw that both a male and female deputy would be conducting her search, Plaintiff protested and asked that only Elliss, a female deputy, conduct the search. (*Id.* at ¶ 74.) However, Elliss left Plaintiff alone in the room with Mustapick and intentionally mis-gendered Plaintiff on her way out, telling Mustapick "*he* is all yours now to strip out." (*Id.* at ¶ 76.) Mustapick then ordered Plaintiff to take off her socks, pants, and panties, place her hands on the wall, bend over, and "spread [her] sexy cheeks." (*Id.* at ¶ 77.) He told Plaintiff that he was "going to go balls deep in that ass" while grabbing his own penis in view of Plaintiff. (*Id.* at ¶ 78.) Mustapick was "extremely aggressive" while conducting the search and threatened Plaintiff that if she told anyone, she would be brutalized by the guards at the jail. (*Id.* at ¶ 79.)

Despite Plaintiff's request on intake, Defendant Tiffany Noe placed Plaintiff into an all-male unit. (*Id.* at ¶ 54.) On July 29, 2020, Defendant Brande Ford conducted an Americans with Disabilities Act ("ADA") interview of Plaintiff and wrote in Plaintiff's records that there were no disability concerns related to Plaintiff's housing. (*Id.* at ¶ 55.) Ford did not reclassify Plaintiff or place her into a unit that corresponded

with her gender identity. (*Id.*) Over the next several months, Plaintiff repeatedly requested to be moved to a female unit by filing inmate grievances and reporting to jail mental health officials. (*Id.* at ¶¶ 57–66.) In response to one grievance, Defendant Elizabeth O'Neal stated that El Paso County had reviewed Plaintiff's request and denied her the accommodation of housing her in a facility that corresponded with her gender identity. (*Id.* at ¶ 57.) Plaintiff alleges that Defendants Ford, O'Neal, Noe, Gillespie, and Elder violated her constitutional and statutory rights by intentionally disregarding her repeated requests to be housed in a female unit despite knowing that Plaintiff suffered from gender dysphoria and was at risk of sexual harassment and assault. (*Id.* at ¶¶ 47–70.)

Plaintiff further alleges that Defendants Elder, Gillespie, Ford, O'Neal, and Noe failed to protect Plaintiff by housing her in an all-male unit. (*Id.* at ¶¶ 84–88.) On November 18, 2021, after Plaintiff had been housed in the all-male unit for over a year, she was sexually assaulted by another male inmate. (*Id.* at ¶ 84.) The inmate approached Plaintiff while she was laying in her bunk, groped Plaintiff's right breast, and said, "you know you want this dick." (*Id.* at ¶ 85.) Defendants did not move Plaintiff to a unit that corresponded to her gender identity after this incident. (*Id.* at ¶ 88.)

Plaintiff also alleges that she was subject to continuous cross-gender pat-down searches. (*Id.* at ¶¶ 89–96.) Male deputies repeatedly touched Plaintiff's breasts and groin when patting her down. (*Id.* at ¶ 90.) El Paso County officials also regularly mis- gendered Plaintiff throughout her incarceration, including by calling her "Sir." (*Id.* at ¶¶ 97–109.) In one instance,

on September 16, 2020, Plaintiff complained to a deputy about male inmates not wearing shirts, and the deputy responded by loudly yelling at the inmates, "the blind faggot said you need to put your shirts on." (*Id.* at ¶ 100.) Plaintiff wrote grievances and complained to jail officials several times about the pat-down searches, mis-gendering, and verbal harassment she was experiencing. In addition, despite Plaintiff's repeated requests for gender affirming clothing, jail officials denied Plaintiff the ability to dress in accordance with her gender identity, including prohibiting her from purchasing panties or lipstick at the commissary. (*Id.* at ¶¶ 110–122.)

Plaintiff reported to mental health providers that she was suffering severe anxiety and depression as a result of being placed in the all-male unit and experiencing harassment and mis-gendering. (*Id.* at ¶¶ 60, 62.) On July 1, 2021, Plaintiff told a mental health provider that due to the constant mistreatment, she would remove her own penis. (*Id.* at ¶ 31.) Plaintiff attempted to self-castrate by wrapping a rubber band around her genitals. (*Id.* at ¶ 32.) Plaintiff has a history of self-harm, including self-castration behavior, when her gender dysphoria has not been accommodated and treated. (*Id.* at ¶ 38.)

In her Third Amended Complaint (Doc. # 124), Plaintiff asserts 16 constitutional and statutory claims against Defendants. Her claims under federal law are:

- **First Claim**: Fourteenth Amendment equal protection discrimination, against all Defendants;

- **Second Claim**: Fourteenth Amendment conditions of confinement, against all

Defendants;

- **Third Claim**: Fourth Amendment unreasonable search, against El Paso County, Elder, Mustapick, and Elliss;

- **Fourth Claim**: Fourteenth Amendment substantive due process claim for invasion of bodily privacy and integrity, against El Paso County, Elder, Gillespie, Mustapick, and Elliss;

- **Tenth Claim**: Disability discrimination pursuant to the ADA, 42 U.S.C. § 12101, *et. seq.*, against El Paso County;

- **Eleventh Claim**: Disability discrimination pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et. seq*., against El Paso County; and

- **Fourteenth Claim**: Fourteenth Amendment failure to protect, against El Paso County, Elder, Gillespie, O'Neal, Noe, and Ford.

Plaintiff's remaining claims for relief constitute parallel or similar claims under the Colorado Constitution and Colorado state laws.

Defendants filed a Motion to Dismiss the Third Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Doc. # 132), which the Court referred to Judge Neureiter (Doc. # 135). Judge Neureiter heard argument on the Motion in a hearing on October 11, 2022. *See* (Doc. # 163). On February 27,

2023, Judge Neureiter issued his Recommendation. (Doc. # 165.) Plaintiff filed an Objection (Doc. # 169), and Defendants submitted a Response (Doc. # 172). The matter is now ripe for review.

II. LEGAL STANDARDS

A. REVIEW OF A RECOMMENDATION

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine de novo any part of the magistrate judge's [recommended] disposition that has been properly objected to." In conducting the review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). "In the absence of timely objection, the district court may review a magistrate [judge's] report under any standard it deems appropriate." Summers v. Utah, 927 F.2d 1165, 1167 (10th Cir. 1991) (citing Thomas v. Arn, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings.")).

In order to be properly made and, therefore, to preserve an issue for de novo review by the district judge, an objection must be both timely and specific. United States v. One Parcel of Real Property Known As 2121 East 30th Street, 73 F.3d 1057, 1059– 60 (10th Cir. 1996). An objection is proper if it is specific enough to enable the "district judge to focus attention

on those issues—factual and legal—that are at the heart of the parties' dispute." Id. at 1059 (internal quotation marks omitted).

B. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) permits a party to move to dismiss a complaint for "lack of subject matter jurisdiction." A Rule 12(b)(1) challenge generally takes one of two forms: (1) a facial attack, where the moving party may "attack the complaint's allegations as to the existence of subject matter jurisdiction"; or (2) a factual attack, where the moving party may "go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests." Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 363 F.3d 1072, 1074 (10th Cir. 2004) (quoting Maestas v. Lujan, 351 F.3d 1001, 1013 (10th Cir. 2003)).

When reviewing a facial attack, the Court must accept the allegations in the complaint as true. Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995). By contrast, in reviewing a factual attack, the district court has "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule (12)(b)(1)." Id.

C. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." "The court's function on a Rule 12(b)(6)

motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." Dubbs v. Head Start, Inc., 336 F.3d 1194, 1201 (10th Cir. 2003) (internal quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of [a] plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). "To survive a motion to dismiss, a complaint 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 Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. However, the Court need not accept conclusory allegations without supporting factual averments. Southern Disposal, Inc. v. Tex. Waste Mgmt., 161 F.3d 1259, 1262 (10th Cir. 1998). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. "Nor does the complaint suffice if it tenders naked assertions devoid of further factual enhancement." Id. (internal quotation marks and brackets omitted).

D. QUALIFIED IMMUNITY

The doctrine of qualified immunity protects government officials from individual liability in the course of performing their duties so long as their conduct does not violate clearly established

constitutional or statutory rights. Washington v. Unified Gov't of Wyandotte Cnty., 847 F.3d 1192, 1197 (10th Cir. 2017). To overcome the defense of qualified immunity, a plaintiff must present enough facts in the complaint, taken as true, to show (1) a violation of a constitutional or statutory right, and (2) that the right was clearly established when the alleged violation occurred. Olsen v. Layton Hills Mall, 312 F.3d 1304, 1312 (10th Cir. 2002). The bar is higher for Defendants because they assert a qualified immunity defense in a Rule 12(b)(6) motion instead of a Rule 56 motion. See Peterson v. Jensen, 371 F.3d 1199, 1201 (10th Cir. 2004) ("Asserting a qualified immunity defense via a Rule 12(b)(6) motion . . . subjects the defendant to a more challenging standard of review than would apply on summary judgment."). To determine whether a right was "clearly established," courts ask "whether the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014) (internal quotation marks omitted).

III. DISCUSSION

This is a challenging case. It raises sensitive and important constitutional issues during a time period of shifting jurisprudence among the circuit courts. As she states in her Objection, Plaintiff brought this case to protect the rights of transgender people in public spaces. (Doc. # 169 at 1.) She asserts that this is a case that is, at its core, "about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity." (Id.) (quoting G.G. v. Gloucester Cnty. Sch. Bd., 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring)).

The Court is sympathetic to Plaintiff and cognizant of the harms that she has suffered during her detention at the El Paso County Jail. However, the Court agrees with Judge Neureiter that existing Tenth Circuit precedent binds the Court's hands in this case. Regretfully, Plaintiff's claims must be dismissed.

A. THE RECOMMENDATION

In a thoughtful and well-reasoned Recommendation, which the Court adopts in full, Judge Neureiter carefully analyzed each of Plaintiff's federal claims. First, Judge Neureiter determined that Plaintiff's claims against El Paso County should be dismissed because (1) Plaintiff failed to properly name the Board of County Commissioners of El Paso County as the defendant pursuant to Colo. Rev. Stat. § 30-11-105; and (2) the Complaint alleges misconduct only on the part of employees of the El Paso County Sheriff's Office, a separate and distinct entity from the County. (Doc. # 165 at 14).

However, because Plaintiff asserted claims against Sheriff Bill Elder and Commander Cy Gillespie in their official capacities, Judge Neureiter considered Plaintiff's municipal liability claims as asserted against the El Paso County Sheriff's Office. (Id.) Next, Judge Neureiter evaluated whether the Complaint adequately alleges Gillespie's personal participation. (Id. at 15–16.) Judge Neureiter concluded that the Complaint sufficiently alleges that Gillespie was personally responsible for denying Plaintiff female clothing and grooming products, with respect to her equal protection claim, but Judge Neureiter found that the allegations were insufficient to establish Gillespie's role in Plaintiff's housing assignments or as a final policymaker. (Id. at 16.)

Moving to Plaintiff's Fourteenth Amendment claims, Judge Neureiter considered whether discrimination against transgender people should be subject to heightened scrutiny or rational basis analysis. (Id. at 17–24.) Judge Neureiter determined that despite the "growing consensus" in courts around the country that transgender people constitute at least a quasi-suspect class, district courts in this circuit remain bound by the Tenth Circuit's decision in Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995), in which the court held that a transgender plaintiff "is not a member of a protected class" for purposes of an equal protection claim.2 (Doc. # 165 at 19–20.) Although Judge Neureiter expressed strongly that the Tenth Circuit should revisit Brown, he acknowledged that Brown remains "if not good in the normative sense, at least binding law on district courts in this district." (Id.) Thus constrained to apply rational basis review, Judge Neureiter concluded that Plaintiff has not adequately alleged that there is no rational reason for Defendants to house transgender women in all-male units and not provide them with feminine clothing and grooming products. (Id. at 24.) Accordingly, he found that Plaintiff's equal protection claim must be dismissed for failure to state a claim.

Judge Neureiter next considered Plaintiff's conditions of confinement and substantive due process claims. (Id. at 25–26.) He first found that the Complaint fails to state a claim against Defendant O'Neal, for lack of allegations establishing personal participation, and against Defendants Noe and Ford, for lack of allegations showing deliberate indifference.

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[2] The *Brown* court used the older term "transsexual" instead of "transgender." 63 F.3d at 971.

(Id. at 26.) Further, Judge Neureiter found that all of these Defendants were entitled to qualified immunity because Plaintiff did not demonstrate that her right to be placed in a female unit was clearly established. (Id.) As to Defendant Elliss, Judge Neureiter found that "one instance of misgendering, although no light matter, is not sufficient to state a claim for unconstitutional conditions of confinement." (Id.) With respect to Defendant Mustapick, Judge Neureiter noted that Mustapick's alleged behavior during the visual body-cavity search was "sickening," but Judge Neureiter concluded that Plaintiff had not met her burden of showing that it is "clearly established that cross-gender searches of transgender women, even ones accompanied by odious verbal harassment, violate a clearly established constitutional right, nor is the conduct so egregious and the right so obvious that it could be deemed clearly established even without materially similar cases." (Id. at 28.)

Judge Neureiter next determined that the Complaint fails to state a claim for failure to protect because (1) the Complaint alleges personal participation only of Noe and Ford in Plaintiff's housing assignment, and (2) the allegations that Noe and Ford knew of Plaintiff's disabilities, alone, are insufficient to show that they had reason to suspect that Plaintiff was in substantial and immediate danger, particularly given that Defendants made their decisions regarding Plaintiff's housing in July 2020 and the alleged assault by another inmate did not occur until November 18, 2021. (Id. at 30.)

Regarding Plaintiff's Fourth Amendment unreasonable search claim and Fourteenth Amendment substantive due process claim arising

from the visual strip search conducted by Defendants Mustapick and Elliss, Judge Neureiter carefully balanced Plaintiff's right to bodily privacy and right to be free from unreasonable searches against the requirements of prison administration. (Id. at 30–34.) Although he acknowledged that Mustapick's alleged comments and behavior during the search were "reprehensible," Judge Neureiter concluded that, on balance, the Complaint did not state a plausible violation of the Fourth or Fourteenth Amendment in relation to the search. (Id. at 33.) Moreover, Judge Neureiter observed that both claims would necessarily fail based on the "clearly established" prong of qualified immunity because Plaintiff offers no binding precedent clearly establishing that a visual strip search by a male and female deputy of a transgender inmate, even with harassing comments, violates the inmate's constitutional rights. (*Id.* at 34.) Having determined that the Complaint fails to plausibly allege any constitutional violation, Judge Neureiter determined that Plaintiff could not establish municipal liability and that her claims against Defendant Elder in his official capacity as Sheriff must be dismissed. (Id. at 35.)

Judge Neureiter next evaluated Plaintiff's ADA and Rehabilitation Act claims. (Id. at 35–41.) He acknowledged that there is significant disagreement amongst district courts across the country regarding whether gender dysphoria is a "gender identity disorder" and categorically excluded from the ADA's definition of "disability." (Id. at 37.) In the absence of any controlling Tenth Circuit authority, Judge Neureiter followed the approach of the Fourth Circuit in Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022), and determined that, as a matter of statutory construction, gender dysphoria is not excluded from

the ADA's protections. (Doc. # 165 at 37.) Judge Neureiter further found that Plaintiff plausibly alleges that her gender dysphoria was the "but for" cause of the alleged discrimination. (Id. at 38–39.) Judge Neureiter concluded, however, that Plaintiff's ADA and Rehabilitation Act claims are subject to dismissal because the Complaint fails to make a showing of intentional discrimination such that Plaintiff would be able to recover compensatory damages for mental or emotional injury. (Id. at 40.) Stated differently, Judge Neureiter found that because the law is unsettled as to whether discrimination based on gender dysphoria violates the ADA and Rehabilitation Act, the Complaint could not plausibly allege that Defendants were "deliberately indifferent" in that they knew that a harm to a federally protected right was substantially likely. (Id. at 40–41.) Given that Plaintiff could not obtain compensatory damages and that any injunctive relief is moot because Plaintiff has been moved to a female facility, Judge Neureiter determined that her ADA and Rehabilitation Act claims must be dismissed.

Lastly, Judge Neureiter recommended that because all of Plaintiff's federal claims are subject to dismissal, this Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claims and should dismiss those claims without prejudice. (Id. at 42.)

B. THE OBJECTION

Plaintiff timely filed a 30-page Objection to Judge Neureiter's Recommendation. (Doc. # 169.) The Court has carefully reviewed Plaintiff's Objection and finds that it is largely a restatement—often verbatim—of Plaintiff's arguments presented in her Response to

the Motion to Dismiss (Doc. # 147) and elsewhere in the record of this case (Docs. ## 124, 156, 163). Rather than identifying specific legal or factual errors in the Recommendation, Plaintiff merely reargues her positions and asks the Court to interpret the facts and authorities differently in order to arrive at a more favorable result. Although the Court understands Plaintiff's intention to preserve her objection to the entirety of the Recommendation, such an objection does not enable the Court "to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." Thomas, 474 U.S. at 147; see also One Parcel of Real Property Known as 2121 East 30th St., 73 F.3d at 1060 (observing that "the filing of objections" is meant to "advance[] the interests that underlie the Magistrate's Act, including judicial efficiency").

Nonetheless, the Court has carefully reviewed de novo the applicable law and the relevant materials in this case, including the Objection, the Recommendation (Doc. # 165), the Motion to Dismiss (Doc. # 132) and associated briefing (Docs. # 147, 155, 156, 163), and Plaintiff's Third Amended Complaint (Doc. # 124). See Fed. R. Civ. P. 72(b). Having reviewed the issues de novo, the Court is satisfied that it would reach the same conclusions as Judge Neureiter and that there is little to add to Judge Neureiter's comprehensive and correct analysis. See, e.g., In re Griego, 64 F.3d 580, 584 (10th Cir. 1995) (affirming the "common practice among district judges in this circuit" to "adopt the magistrate judges' recommended dispositions when they find that magistrate judges have dealt with the issues fully and accurately and that they could add little of value to that analysis"); see also Northington v. Marin, 102 F.3d 1564, 1570 (10th Cir. 1996) (observing that "a

brief order expressly stating the court conducted de novo review is sufficient"). The Court therefore will address only a few points raised in the Objection.

1. Fourteenth Amendment Equal Protection

Plaintiff argues that Judge Neureiter erred by determining that this Court is bound to apply rational basis review by the Tenth Circuit's decision in Brown. (Doc. # 169 at 7– 13.) In Brown, the Tenth Circuit followed the Ninth Circuit's decision in Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977), and held that "transsexuals are not a protected class" for purposes of the Fourteenth Amendment. Brown, 63 F.3d at 971. The Tenth Circuit therefore applied rational basis review to the plaintiff's equal protection claim. Id. Since Brown, the Tenth Circuit has not disturbed this holding. See, e.g., Druley v. Patton, 601 F. App'x 632, 635 (10th Cir. 2015) (unpublished) ("To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims."). Now, nearly 28 years after Brown was issued, Plaintiff contends that Brown is not controlling for several reasons.

First, Plaintiff argues that the Brown court did not address whether discrimination against transgender individuals constitutes sex- or gender-based discrimination.

Accordingly, she avers that Brown has been overruled by the Supreme Court's decision in Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1741 (2020), in which the Supreme Court analyzed the statutory language of Title VII and held that, within the meaning of Title VII, "it is impossible to discriminate

against a person for being homosexual or transgender without discriminating against that individual based on sex." While the Court agrees with Plaintiff that Bostock plainly calls into question whether discrimination against transgender individuals is sex-based discrimination in the equal protection context, the Court cannot conclude that Bostock clearly overruled Brown. The Bostock opinion was expressly focused on interpreting the text of Title VII—nowhere did the Supreme Court address equal protection, rational basis review versus heightened scrutiny, or whether transgender individuals constitute a protected class for purposes of the Fourteenth Amendment. Given these differences, it would be too great a leap for this Court to conclude that Bostock constitutes "an intervening Supreme Court decision" justifying this Court's departure from Brown. See Lincoln v. BNSF Railway Co., 900 F.3d 1166, 1183 (10th Cir. 2018) (stating that a decision by a panel of the Tenth Circuit is binding precedent and cannot be overruled "[a]bsent an intervening Supreme Court or en banc decision justifying such an action").

Plaintiff next argues that Brown itself failed to apply binding precedent because it did not engage in the requisite four-factor analysis for determining whether transgender individuals are a suspect or quasi-suspect class. (Doc. # 169 at 12–13); see, e.g., Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 611 (4th Cir. 2020) (describing the four-factor analysis). As such, Plaintiff argues that Brown is "inapplicable." (Doc. # 169 at 13.) However, Plaintiff cites no authority for her proposition that a district court may find error in a binding decision of a federal court of appeals and decline to follow it.

Finally, Plaintiff contends that Brown is "no

longer applicable" because Holloway, the Ninth Circuit decision upon which Brown rests, has been overruled. (Id.); see Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000). Similarly, Plaintiff argues that Brown is "inapposite to nearly every single case that has been decided since, which 'have analyzed the relevant factors for determining suspect class status and held that transgender people are at least a quasi-suspect class.'" (Doc. # 169 at 13) (quoting Grimm, 972 F.3d at 610). As such, Plaintiff asserts that Brown "should be discarded on the scrap heap of past decisions, like Plessy, Korematsu, and Bowers, that allowed for state-sanctioned discrimination." (Id.) Although the Court agrees with Plaintiff that Brown should be reconsidered based on the overruling of Holloway, the weight of authority from other circuits, and the Supreme Court's decision in Bostock, this Court lacks the authority to make that determination. Bound by Brown, the Court must apply rational basis review to Plaintiff's equal protection claim.

If the Court were to consider the issue untethered by Brown, the Court would not hesitate to find that heightened scrutiny is warranted for Plaintiff's equal protection claim because transgender-based discrimination constitutes sex-based discrimination triggering intermediate scrutiny. See, e.g., Grimm, 972 F.3d at 608. Moreover, applying the four-factor test for determining whether a group constitutes a protected class, the Court would find it "apparent that transgender persons constitute a quasi-suspect class." Id. at 611. Transgender people (1) have "historically been subject to discrimination"; (2) have "a defining characteristic that bears a relation to [their] ability to perform or contribute to society"; (3) are "a discrete group by obvious, immutable, or distinguishing characteristics"; and (4) are "a minority lacking

political power." Id.; see also Flack v.Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018) ("[O]ne would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people."). Applying heightened scrutiny, the Court would find that the Complaint plausibly alleges that Defendants' actions in placing Plaintiff in an all-male unit constituted discrimination not substantially related to an important government interest.

Regretfully, the Court is unable to engage in that analysis or arrive at those conclusions. Directed by binding precedent in Brown, the Court agrees with Judge Neureiter that the Complaint fails to plausibly allege that the El Paso County Jail lacked a rational basis for housing Plaintiff in an all-male unit and declining to give her feminine clothing and grooming products. Plaintiff's equal protection claim must be dismissed.

2. Sexual Harassment as an Equal Protection Claim

Plaintiff also objects that Judge Neureiter erred by not considering the second basis for Plaintiff's equal protection claim: that she was subjected to significant verbal and physical harassment by staff and other inmates. (Doc. # 169 at 16.)

Sexual harassment can constitute unlawful sex discrimination in violation of the Fourteenth Amendment's Equal Protection Clause. *See Shepherd v. Robbins*, 55 F.4th 810, 816–17 (10th Cir. 2022) (observing that the Tenth Circuit has "discussed

Fourteenth Amendment equal protection claims involving sexual harassment a handful of times" in the employment and education contexts). However, as noted by *Barney v. Pulsipher*, 143 F.3d 1299, 1312 n.15 (10th Cir. 1998), the Tenth Circuit opinions addressing sexual harassment as an equal protection violation have primarily dealt with charges of sexual harassment "in the *employment* context." *Cf. Shepherd*, 55 F.4th at 818 (observing that the Tenth Circuit has also extended such claims to the educational context and to situations where state agents abused their permit or licensing authority to attempt to derive sexual favors). In declining to consider two inmates' sexual harassment claims as violations of the equal protection clause, the *Barney* court stated that claims "of sexual harassment and assault of inmates by prison guards are more properly analyzed under the Eighth Amendment." Similarly, in *Women Prisoners v. District of Columbia*, cited by *Barney*, the court declined to analyze sexual harassment claims brought by pretrial detainees and inmates as equal protection violations because the court found that the harassment violates the Eighth Amendment and, "*a fortiori* . . . the Fifth Amendment rights of pretrial detainees." 877 F. Supp. 634, 664 n.38 (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.C. 1995), *vacated in part and remanded* 93 F.3d 910 (D.C. Cir. 1996).[33]

In line with the above logic, Judge Neureiter appropriately analyzed Plaintiff's allegations of

[3] On appeal, the Federal Circuit considered the sexual harassment claims as asserting violations of the Eighth Amendment and did not address sexual harassment through the lens of equal protection. *See Women Prisoners v. District of Columbia*, 93 F.3d 910, 927, 929 (D.C. Cir. 1996).

sexual harassment she experienced as a pretrial detainee as a violation of her due process rights. (Doc. # 165 at 27); see Porro v. Barnes, 624 F.3d 1322, 1326 (10th Cir. 2000). Plaintiff has provided no authority from within this Circuit, and the Court has found none, demonstrating that it is clearly established that a pretrial detainee may assert a cognizable equal protection claim on the basis of sexual harassment. The Court is satisfied that Judge Neureiter adequately addressed Plaintiff's sexual harassment allegations elsewhere in the Recommendation via her other claims.

IV. CONCLUSION

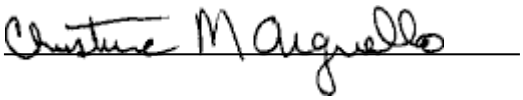
In sum, the Court finds Judge Neureiter's Recommendation to be thorough, well- reasoned, and correct. For the reasons stated above, the Court ORDERS as follows:

- The February 27, 2023 Report and Recommendation (Doc. # 165) is AFFIRMED and ADOPTED as an Order of this Court;
- Defendants' Motion to Dismiss Third Amended Complaint (Doc. # 132) is GRANTED; and
- Plaintiff's Third Amended Complaint (Doc. # 124) is DISMISSED WITHOUT PREJUDICE.

The Clerk of Court is directed to close this case.

DATED: March 27, 2023

BY THE COURT:



CHRISTINE M. ARGUELLO
Senior United States District Judge