No. 25-442

IN THE
# Supreme Court of the United States

JOSEPH J. ROYBAL, SHERIFF, EL PASO COUNTY, COLORADO, ET AL.,

*Petitioners,*

v.

DARLENE GRIFFITH,

*Respondent.*

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

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether, at the Rule 12(b)(6) stage, the Tenth Circuit erred by applying the level of scrutiny that Petitioners conceded applied, thus declining to address a novel theory not presented by Petitioners and not embraced by any courts of appeals.

2. Whether, at the Rule 12(b)(6) stage, the Tenth Circuit erred in its fact-specific application of this Court's well-settled balancing test for resolving prison-search claims.

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## INTRODUCTION

Nothing about the decision below imperils prisons' or jails' abilities to segregate facilities based on sex, as the Petition dramatically claims. Pet. 3. The Tenth Circuit simply applied intermediate scrutiny to the claims at hand because Petitioners conceded that intermediate scrutiny applied, Pet. App. 37a, and never raised the novel *Turner*-wins theory inserted into this case for the first time by the dissent. Future defendants are free to raise and litigate this issue—including in the Tenth Circuit. At that point, it's possible a circuit split will develop; there isn't one now. As for *this case*, all the Tenth Circuit held is that, under the generous standards of Rule 12(b)(6), Ms. Griffith plausibly alleged an equal protection claim and claims relating to an abusive cross-gender search. Petitioners invoke their penological interests and the need for deference before this Court, but this is not the venue for doing so; they will have a chance to raise these arguments on remand as this case proceeds to discovery. The Court should deny certiorari.

## STATEMENT OF THE CASE

Respondent Darlene Griffith is transgender. Pet. App. 7a. She has been living openly as a woman for over twenty years, and has been diagnosed with gender dysphoria. *Id.*[1] As part of her medically-supervised treatment, Ms. Griffith changed her name and altered her physical appearance to conform with

[1] Gender dysphoria is a medical condition recognized by the American Psychiatric Association; it is characterized by "significant distress that may accompany the incongruence between a transgender person's identity and assigned sex." Pet. App. 7a.

her female gender identity. *Id.* She dresses in feminine attire, and takes feminizing hormones, which caused her to develop female secondary sex characteristics, including breasts. Pet. App. 7a-8a.

Ms. Griffith entered the El Paso County Jail ("County" and "Jail," respectively) as a pretrial detainee in July of 2020. Pet. App. 8a; Pet. App. 138a ¶ 47. During her intake screening, she stated that she was a transgender woman and, as her medical records confirmed, has been diagnosed and has received treatment for gender dysphoria. Pet. App. 8a; Pet. App. 138a ¶¶ 48-49. She explained that she feared being sexually abused and assaulted in a male facility by both guards and other detainees, along with the humiliation of being constantly searched, both visually and through pat-downs, by male guards in a male unit. Pet. App. 8a; Pet. App. 138a ¶ 48. For these reasons, she requested placement in a female housing unit. Pet. App. 8a; Pet. App. 138a ¶ 48.

The County maintains an official policy of assigning Jail detainees, solely and without exception, "on the basis of the individual's genitalia." Pet. App. 8a; Pet. App. 136a ¶ 42.[2] The County thus refuses to house any transgender woman who has not undergone surgical interventions to her genitals in a female facility and instead always places these transgender women in male units within the Jail. Pet. App. 8a.

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[2] The Petition states that "the County *generally* makes custodial assignments based on an inmate's or detainee's genitals," Pet. 6 (emphasis added), but this is inconsistent with the Complaint's repeated allegations that the policy assigns people "solely" based on genitalia. *See* Pet. App. 136a ¶ 42; *see also* Pet. App. 138a ¶ 51 (alleging the County "refuses to house transgender women in female housing facilities").

Consistent with this policy, Ms. Griffith was assigned to a male housing unit. *Id*.

Upon entering the Jail, Ms. Griffith underwent a visual body-cavity inspection. *Id*. The County's policy dictates that all transgender women—including those, like Ms. Griffith, who have been diagnosed with gender dysphoria—be strip searched by a male staff member. *Id*. Deputy Dawne Elliss, a woman, and Petitioner Deputy Andrew Mustapick, a man, searched Ms. Griffith. Pet. App. 8a-9a. Before the search started, Ms. Griffith asked repeatedly for Petitioner Mustapick to leave the room, but she was told that a male deputy would have to search her per the Jail's policy because "she was 'still a male' in" the system. Pet. App. 9a.

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

A few days later, Ms. Griffith again asked to be transferred into the female housing unit, and the request was denied. *Id*. While in the male unit, Ms.

Griffith was repeatedly sexually assaulted by a male detainee in her housing unit. Pet. App. 10a. She was also continuously subjected to cross-gender pat-down searches without a female deputy present, during which male deputies regularly touched her breasts and groin. *Id*. The Jail would also not allow Ms. Griffith to have a sports bra, women's underwear, and other products that were provided to cisgender women at the Jail—citing Jail policy. Pet. App. 10a-11a.

During her time at the Jail, Ms. Griffith experienced anxiety and exacerbated symptoms of gender dysphoria. Pet. App. 10. She filed numerous grievances in which she described these issues, and repeatedly requested exceptions from the Jail policies. Ms. Griffith specifically informed the Jail that she "had previously been housed in female units in other correctional facilities," but was informed that she would continue to be housed in a male unit at the Jail pursuant to County policy. Pet. App. 11a n.6. The County's policies caused Ms. Griffith to suffer significant emotional distress, which led her to attempt self-castration. Pet. App. 11a-12a.

Ms. Griffith filed suit under 42 U.S.C. § 1983, alleging a number of claims under federal and state law. Pet. App. 12a. As relevant here, Ms. Griffith brought a Fourteenth Amendment equal protection claim challenging the County's policies that required housing her in an all-male unit and denying her clothing and products available to cisgender female detainees; and Fourth and Fourteenth Amendment claims relating to the abusive cross-gender strip search. Pet. App. 13a.

The defendants—Petitioners here—moved to dismiss Ms. Griffith's complaint in its entirety. Pet.

App. 13a.[3] A magistrate judge reviewed the complaint and recommended dismissal in full based on a misreading of Tenth Circuit precedent. *Id.*; *see* Pet. App. 196a-242a. The district court adopted the magistrate judge's recommendation, over Ms. Griffith's objections, and dismissed the entirety of her complaint, based on the same misreading of Tenth Circuit precedent. Pet. App. 243a-265a.

The Tenth Circuit (Judges Rossman and Ebel) affirmed in part, vacated in part, and reversed and remanded in part. Pet. App. 5a.-6a. Relevant here, the court of appeals reversed and remanded for further proceedings on Ms. Griffith's Fourteenth Amendment equal protection claim against the Sheriff in his official capacity based on the Jail's housing and commissary policies; Fourth and Fourteenth Amendment cross-gender search claims against the Sheriff in his official capacity; and a Fourth Amendment abusive search claim against Petitioner Mustapick. Pet. App. 5a.

The court of appeals concluded that the County's housing and commissary policies are sex classifications, since they use a detainee's biological sex to determine where they will be housed and whether they will be allowed to purchase certain items from the commissary. Pet. App. 16a, 24a. The Tenth Circuit then held, based on preexisting circuit precedent, that heightened scrutiny applied to these claims, Pet. App. 18a-19a, 27a-28a, and concluded that Ms. Griffith stated a plausible equal protection claim, Pet. App. 33a. The court pointed out it was "not

[3] The El Paso County Sheriff, Petitioner here, was sued in his official capacity on Ms. Griffith's claims relating to the County's policies. *See* Pet. ii.

speculat[ing] about the ultimate outcome of Ms. Griffith's Equal Protection claim," concluding only that "[a]t this early stage of the litigation," Ms. Griffith's claims passed the "low bar" for surviving a Rule 12(b)(6) motion to dismiss. *Id*. The court of appeals further noted that "[t]he Policies might ultimately survive heightened scrutiny," once there is "a developed record on the justification for the policies," "but that issue is not before [the court]." Pet. 17a, 32a-33a. "That is," the court explained, "we do not opine on whether they are constitutional whatsoever." Pet. App. 27a. n.13.[4]

The court of appeals also noted that Ms. Griffith separately alleged that the County violated the Equal Protection Clause because transgender status is a suspect class, but explained that it "need not consider the quasi-suspect class issue to resolve this appeal." Pet. App. 20a; *see also* Pet. App. 29a.

The majority opinion also responded to the arguments asserted by the dissent. Relevant here, it noted that the dissent's argument—that the deference owed to prison administrators under *Turner v. Safley*, 482 U.S. 78 (1987), applies notwithstanding the heightened scrutiny required by this Court's equal protection jurisprudence—fails in this case because of the party presentation principle: The County never raised it. Pet. App. 35a-36a. More than that, the County affirmatively acknowledged that "intermediate scrutiny . . . appl[ies] to their" equal protection claims. Pet. App. 37a. So "the dissent

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[4] *See also* Pet. App. 33a ("We do not speculate about the ultimate outcome of Ms. Griffith's Equal Protection claim."); Pet. App. 46a ("[W]e do not opine on the ultimate merits of [her equal protection] claim.").

raise[d] and resolve[d] for Appellees an argument they never made." *Id*.

And the majority rejected the dissent's contention that under its decision "housing inmates based on their biological sex is presumptively unconstitutional," Pet. App. 80a; in part because the majority had "not considered at this procedural stage whether the constitutional policies before [it] *withstand* heightened scrutiny." Pet. App. 27a n.13.

Turning to Ms. Griffith's claims relating to the cross-gender nature of her strip search, the court of appeals granted qualified immunity to Petitioner Mustapick, Pet. App. 57a, but reversed the dismissal of her Fourth and Fourteenth Amendment claim against the Sheriff in his official capacity, Pet. App. 62a. The Tenth Circuit observed that "cross-gender searches are 'universally frowned upon . . . in the absence of an emergency.'" Pet. App. 59a (quoting *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1143 (9th Cir. 2011)). The court noted that Ms. Griffith alleged that there was no "legitimate penological purpose" for Petitioner Mustapick to search her; she is transgender, requested to be searched by a female deputy, and a female deputy was available to conduct the search—"[i]ndeed, Deputy Elliss had *just* helped with the search." Pet. App. 59a. As with Ms. Griffith's equal protection claim, the Tenth Circuit took pains to point out that it was "tak[ing] no position on the merits" of her cross-gender strip search claims, and said "no more than the district court's stated reasons for dismissal were erroneous." Pet. App. 62a.

Finally, the Tenth Circuit reversed the district court's grant of qualified immunity to Petitioner

Mustapick on Ms. Griffith's Fourth Amendment claim related to the abusive way in which he executed the search. Pet. App. 65a. The court echoed the magistrate judge's characterization of Petitioner Mustapick's behavior as "sickening," "reprehensible," and "abhorrent." Pet. App. 64a. It observed that "sexual harassment or abuse of an inmate by a correctional officer can never serve a legitimate penological purpose," Pet. App. 65a (cleaned up), and therefore concluded that "[a] reasonable officer in Deputy 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." Pet. App. 69a-70a.

Judge Ebel concurred. He noted the preliminary posture of this case, which "comes to [the court] at the motion to dismiss stage," without "a developed factual record." Pet. App. 78a. He also complimented his colleagues for their thoughtful opinions, which he was "confident . . . will contribute to the further evolution of the law in this case." Pet. App. 79a.

Judge Tymkovich dissented. Pet. App. 80a-107a. In his view, *Turner*'s rational basis review should displace the heightened scrutiny that would otherwise apply to sex-based equal protection claims under *United States v. Virginia*, 518 U.S. 515 (1996) (*VMI*). Pet. App. 86a. He acknowledged that this Court applied strict scrutiny to the prison racial-classification claim in *Johnson v. California*, 543 U.S. 499, 510 (2005), but believed the reasoning should not apply to sex-based claims. Pet. App. 87a-88a. The dissent acknowledged the *VMI*/*Johnson*-or-*Turner* issue was not raised by the Petitioners, but did not consider that to be an impediment to the court itself

raising and addressing the question. Pet. App. 86a n.37.

The full Tenth Circuit denied the petition for rehearing *en banc*. Pet. App. 114a-115a. Judge Tymkovich dissented. Pet. App. 119a. He chastised the court for failing to "face the hard question" he believes is presented by the *VMI/Johnson*-or-*Turner* issue. Pet. App. 119a.[5] Judge Rossman concurred in the denial, responding that the court simply "adjudicated the arguments the parties actually raised." Pet. App. 116a. She noted that the fact "that the entire *Turner/VMI* tension is one 'the dissent raised and resolved for [the Sheriff]' makes this case a particularly poor vehicle for further review." Pet. App. 117a.

Petitioners now seek certiorari.

## REASONS FOR DENYING THE PETITION

Petitioners ask this Court to weigh in on a bespoke legal issue that was not adjudicated by the Tenth Circuit below because—consistent with party presentation principles—Petitioners didn't raise, brief, or argue it. And no wonder that they didn't present the argument below: not a single court of appeals has embraced the position they would have the Court adopt. The Petition boils down to a plea for "administrative flexibility and deference," Pet. 17, but prisons receive that regardless of the level of scrutiny applied to equal protection claims; deference in the unique context of prisons is baked into the analysis. Indeed, if the scrutiny question were make-or-break

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[5] *See also* Pet. App. 119a ("Had we properly wrestled with the question…"); *id.* at 121a ("The panel majority avoided the central question.").

in these cases, one would expect the *Turner*-over-*VMI*/*Johnson* argument to have created a circuit split by now, calling out for this Court's review. It has not.

Petitioners' quest for certiorari on the cross-gender search claim fares no better. The court of appeals did *not* hold that cross-gender searches are categorically unconstitutional, and Petitioners do not even attempt to manufacture a circuit split on the issue. The decision below was factbound, correct, and preliminary.

Intervention now is both premature and unnecessary, even as to this particular case, making it a poor vehicle. This Court's decisions from this- and last-term regarding equal protection claims relating to transgender plaintiffs may impact how this case proceeds, and it will do so without this Court granting certiorari in this particular case. Additionally, since this case arises in a motion to dismiss posture, there is plenty of ballgame left, and Petitioners remain free to assert their penological justifications on remand.

The Court should deny the petition.

## I. The Tenth Circuit did not decide the level-of-scrutiny question presented.

The first question presented was not decided in this case at the district or appellate level. That is because the *Turner*-beats-*VMI*/*Johnson* argument wasn't raised, briefed, or argued by Petitioners to the panel. Pet. App. 36a-38a. Not only did Petitioners "never ma[k]e th[at] argument"—either before the panel or the district court, Pet. App. 36a, they affirmatively *conceded* on appeal that "intermediate scrutiny applies" to Ms. Griffith's claims. Pet. App.

37a (cleaned up) (quoting Petitioners' Rule 28(j) response letter).

The Tenth Circuit was clear that party presentation principles were "decisive in this case." Pet. App. 38a; *see also* Pet. App. 36a ("[T]hat failure of party presentation is decisive *in this case*."). Indeed, when Judge Tymkovich dissented from the Tenth Circuit's denial of the *en banc* petition, he repeatedly acknowledged that the panel did *not* decide the issue. *See* Pet. App. 119a ("Rather than face the hard question. . . ."); *id.* ("Had we properly wrestled with the question . . . ."); *id.* at 121a ("The panel majority avoided the central question."). So, as recognized by both the Tenth Circuit majority and dissent, the panel did not actually address the merits of the *VMI/Johnson*-v.-*Turner* question.[6] In other words, because Petitioners did not *present* QP1 to the panel, the court of appeals did not resolve it.

"In our adversarial system of adjudication," courts "follow the principle of party presentation." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). That is, courts "rely on the parties to frame the issues for decision"; courts are "assig[ed] . . . the role of neutral arbiter of matters the parties present." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). Under this system, courts are "passive instruments" that "do not, or should not, sally forth each day looking for wrongs to right." *Id.* at 376; *see*

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[6] Counsel has reviewed every case available on Westlaw that cites to the Tenth Circuit opinion in this case (published in February) and found *zero* citations related to the level of scrutiny applicable to an equal protection claim. The decision is cited most frequently for the standard for surviving a 12(b)(6) motion to dismiss.

*also NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011) ("[A]ppellate courts do not sit as self-directed boards of legal inquiry and research."). As such, courts act "essentially as arbiters of legal questions presented and argued by the parties before them." *Id.*; *see also Sineneng-Smith*, 590 U.S. at 376 (courts "normally decide only questions presented by the parties").

In short, because "[n]o party" advanced the *Turner*-trumps-*VMI/Johnson* argument—"and given all parties apparently ha[d] a contrary reading"—the panel appropriately "adjudicated the arguments the parties actually raised" and "declined" to decide the issue *sua sponte*. Pet. App. 42a-43a, 116a. Petitioners do not dispute this litigation history, or assert that this question arose in this case before "*the dissent* raised and resolved" the issue "*sua sponte*." Pet. App. 116a. And they do not explain why party presentation issues should be excused here, or why this Court should deviate from its practice of "not ordinarily decid[ing] questions that were not passed on below." *City & Cty. of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015).

## II. There is no circuit split.

1. In addition to not being passed on by the court of appeals, certiorari is not warranted because there is no circuit split on the level of scrutiny that applies to equal protection challenges to sex-based classifications in prisons. Indeed, the panel dissent, which "raised and resolved the *Turner/VMI* tension *sua sponte*," Pet. App. 116a, did not allege one, *see* Pet.

App. 86a-98a. Petitioners have not unearthed any caselaw that the dissent overlooked.[7]

To start, as explained above, the Tenth Circuit is not "[f]irmly entrenched on the heightened-scrutiny side" of the issue, as Petitioners claim, Pet. 22-23, since the panel resolved the case based on party presentation principles, *see supra* Section I.

More broadly, Petitioners argue that the courts that apply intermediate scrutiny are "disregarding long-standing deference to legitimate penological interests." Pet. 18. But the two circuits that have decided some heightened level of scrutiny applies to such claims have done no such thing. In *Harrison v. Kernan*, 971 F.3d 1069 (9th Cir. 2020), the Ninth Circuit concluded that intermediate scrutiny applied to gender-based prison cases. *Id.* at 1078. But it also made clear that "the special difficulties that arise in the prison context" are very much part of the merits inquiry. *Id.* at 1079. That is, under heightened scrutiny, "the deference owed to judgments made by prison officials is factored into the importance of the government's asserted interest." *Id.* "Indeed," the court of appeals continued, "there is no reason to think that intermediate scrutiny will prove fatal to gender-based prison" policies, and it cited "numerous examples of prison officials successfully crafting constitutionally-sound gender-based policies." *Id.* As such, "it [wa]s not a foregone conclusion" that the challenged regulations were unconstitutional, and the

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[7] Petitioners do not attempt to allege a circuit split on the strip-search claim, *see* Pet. 27, and before the Tenth Circuit admitted that the issue "has yet to be adequately addressed by . . . any Circuit Court." Defendants'-Appellees' Petition for Rehearing En Banc, ECF 136, at 7 (Mar. 20, 2025).

court noted that the defendant "may ultimately be able to show that" the policies were "substantially related to the achievement of important penological objectives." *Id.* at 1080. The Ninth Circuit remanded the case to the district court to apply heightened scrutiny in the first instance, *id.*, and, in fact, the district court granted qualified immunity to the individual defendants, *Harrison v. Kernan*, No. 16-cv-07103, 2021 WL 4295303 (N.D. Cal. Sept. 21, 2021), and ultimately dismissed the remaining claims as moot after defendants changed the challenged regulations. *Harrison v. Kernan*, No. 16-cv-7103, Doc. 105 (N.D. Cal. Feb. 23, 2024).

The Eighth Circuit also has recognized that while intermediate scrutiny applies to such claims, the prison context in which they arise is a meaningful component of the equal protection analysis. *See Roubideaux v. N.D. Dep't of Corr. & Rehab.*, 570 F.3d 966, 974 (8th Cir. 2009) (noting it was "mindful that this claim arises in a prison housing context where . . . it is appropriate to segregate male and female inmates on the basis of gender" and quoting *Turner*, noting that generally "[c]ourts are ill equipped to deal with" many issues of prison administration).[8]

2. Petitioners incorrectly claim the Second, Fourth, and D.C. Circuits fall "[o]n the *Turner* side of the

[8] This case, too, did not result in liability for the defendants. The court of appeals concluded that the plaintiffs failed to allege gender discrimination (and other claims were moot), and affirmed the grant of summary judgment to the defendants. *See* 570 F.3d at 974-75. Nor does it seem to have blown the doors open for such claims. *See, e.g.*, *Beard v. Falkenrath*, 97 F.4th 1109, 1116 (8th Cir. 2024) (granting qualified immunity to defendants for equal protection claim brought by a transgender prisoner).

split." Pet. 24. Most fundamentally, the published circuit precedent Petitioners cite were all decided well before *Johnson*, so could not possibly have grappled with whether *Johnson*'s "carve out"—as the dissent in this case put it—from *Turner* when it comes to race should also apply to sex-based claims. Pet. App. 93a; *see Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990); *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996).[9]

The two cases Petitioners cite from the Second Circuit are off-base for additional reasons. Not only was *Benjamin v. Coughlin* (from 1990) decided before *Johnson*, it was decided before *VMI*, so is doubly out-of-date. And the Petition's citation to *Williamson v. Maciol*, 839 F. App'x 633 (2d Cir. 2021), is puzzling, given that there—as here—the court applied intermediate scrutiny because the parties conceded that was the appropriate standard of review for such claims. *Id.* at 636 n.2.

As for the Fourth Circuit, it remains to be seen whether that court would adhere to its pre-*Johnson* decision on this question, as noted by district courts within the circuit. *See e.g., Munday v. Beaufort Cnty.*,

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[9] One 2012 academic comment notes that "individual circuit and district courts have divided on the appropriate standard of review" in such cases, but the cases to which it cites for the "strictly *Turner*-reliant approach" are all pre-*Johnson*. Grace DiLaura, *"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, 516-18 (2012); *see also* Pet. App. 42a (citing same). Indeed, the piece notes that "the applicable standard of review" is "the most common source of argument about *Johnson*'s future." DiLaura, 60 UCLA L. Rev. at 518.

No. 9:20-cv-02144, 2023 WL 9188398, *6 (D.S.C. Mar. 31, 2023) ("To date, the Fourth Circuit has not explained which prison contexts receive intermediate or strict scrutiny."); *see also Harrison*, 971 F.3d at 1079 n.12 (describing the Fourth Circuit in *Veney* as "apply[ing] *Turner*'s reasonableness standard . . . before the Supreme Court decided *Johnson*").

Finally, in *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, the D.C. Circuit did not apply any particular level of scrutiny, or address whether the programming in question survived, because the resolution of the case depended on "[t]he threshold inquiry" requirement of identifying similarly-situated comparators. 93 F.3d at 924. Indeed, the court favorably cited its earlier precedent, *Pitts v. Thornburgh*, *see id.* at 926, which held that "heightened scrutiny," not rational-basis review, applied when reviewing equal protection claims brought by a class of female prisoners, 866 F.2d 1450, 1453 (D.C. Cir. 1989).[10]

In short, there are at maximum two circuits—the Eighth and Ninth—to have considered the appropriate standard for equal protection claims after *Johnson*, and so far there is no circuit split on the issue. Since this is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), further (or any) percolation on this issue is warranted.

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[10] The "[]other vein of the split" that Petitioners allege is based on two unpublished district court orders. Pet. 25. These decisions both seem to have come out in defendants' favor, and not been addressed on appeal, so this is—to put it mildly—not an issue desperately calling out for this Court's review. *See generally* S. Ct. Rule 10.

## III. The Tenth Circuit opinion was correct.

1. The closest to an argument on the merits Petitioners present is a generalized plea for "administrative flexibility and deference." Pet. 17. But applying *Turner* isn't necessary; this deference is baked into the application of intermediate scrutiny in the prison context. That is, "[t]he necessities of prison security and discipline" are *themselves* "compelling government interest[s]." *Johnson*, 543 U.S. at 512. Indeed, this Court has been clear that the concerns for "institutional safety and security" that Petitioners raise (at 17) "can be considered in applying" heightened scrutiny, "which is designed to take" "[s]uch circumstances . . . into account." *Johnson*, 543 U.S. at 515. "Heightened scrutiny does not eliminate appreciation of both the difficulties confronting prison administrators and the considerable limits of judicial competency." *Pitts*, 866 F.2d at 1455. So application of intermediate scrutiny "should not be read to mean that deference to prison officials plays no role in [assessing] prisoners' constitutional claims." *Harrison*, 971 F.3d at 1079 (cleaned up).

As to the merits of the actual question presented, in their single paragraph on the topic, *see* Pet. 18, Petitioners do not attempt to explain why *Turner*'s application to "all circumstances in which the needs of prison administration implicate constitutional rights," *Washington v. Harper*, 494 U.S. 210, 224 (1990), would necessarily displace *VMI*'s (later) directive that "all" sex-based classifications "warrant heightened scrutiny," 518 U.S. at 555 (cleaned up). Nor do they explain why heightened scrutiny would not apply to *this* species of equal protection claim, just as it did for the race-based prison-classification claim in *Johnson*.

In short, *Turner* deference is neither appropriate nor needed here, because "there is no reason to think that intermediate scrutiny will prove fatal to gender-based prison regulations"—including the one in this case. *Harrison*, 971 F.3d at 1079. The panel, for its part, made clear it was "not opin[ing] on the ultimate merits of th[is] claim," and "conclude[ed] only that the district court's reason for dismissal was erroneous." Pet. App. 46a.[11]

2. The Tenth Circuit's ruling regarding Ms. Griffith's cross-gender strip-search claim was limited to the facts and circumstances presented in this case. As the Tenth Circuit explained, "[a]t this procedural stage," and "[a]ccording to the allegations in Ms. Griffith's complaint," there was no legitimate penological purpose "in *this* case" for *this* search. Pet. App. 59a.[12] This is because: 1) "Deputy Mustapick knew Ms. Griffith is a transgender woman and that she lived with gender dysphoria"; 2) "[h]e also knew Ms. Griffith asked to be searched by a female deputy; 3) "a female deputy was available to conduct the search," having "*just* helped with the search"; and 4) "[n]othing in the complaint suggests there was an emergency or other justification requiring Deputy Mustapick to participate." Pet. App. 59a. As with Ms. Griffith's equal protection claim, the Tenth Circuit took "no position on the merits" of this claim, and said

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[11] Petitioners' prognostication about factfinders running amok with these cases is notably devoid of any support, Pet. 26, despite the "dizzying array" of litigation they cite, *id.* 19.

[12] Contrary to Petitioners' assertion, the court of appeals did *not* definitively hold that "absent emergency circumstances, there can be *no* legitimate penological purpose" for a cross-gender search. Pet. 28 (cleaned up).

"no more than the district court's stated reasons for dismissal were erroneous." Pet. App. 62a.

To the extent Petitioners have penological interests in the search as-executed, *see* Pet. 29-30, they will have a chance to raise them before the district court. *See* Pet. App. 78a (Ebel, J., concurring) ("[T]his case comes to us at the motion to dismiss stage, where we do not have a developed factual record."); *cf.* Pet. App. 32a-33a ("The absence of a developed record on the justification for the policies make sense at the motion-to-dismiss stage."). At that point, consistent with this Court's precedent, the district court will "balance . . . the need for the particular search against the invasion of personal rights the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), which means taking into account "the undoubted security imperatives involved in jail supervision," *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 330 (2012). The motion-to-dismiss decision below does not conflict with this Court's precedent or require this Court's intervention.

## IV. The issues presented do not warrant this Court's review, and this case is a poor vehicle.

1. The issues (belatedly) raised in this case do not require an extension of this Court's limited resources. Big picture—the scrutiny question is not an outcome-determinative issue. To illustrate, *not a single one* of the proclaimed "dizzying array" of litigation Petitioners point to has resulted in liability for

defendants. *See* Pet. 19-20.[13] Indeed, some courts have avoided deciding the issue by concluding that under either level of scrutiny the plaintiff's claims fail. *See, e.g.*, *Sabbats v. Clark*, No. 7:21-cv-00198, 2022 WL 4134771, at *9 n.9 (W.D. Va. Sept. 12, 2022) ("If I were to apply the intermediate scrutiny standard to the equal protection claim . . . I would [still] find for the [defendant prison officials]."); *cf. Doe v. McHenry*, 763 F. Supp. 3d 81, 88 (D.D.C. 2025) (concluding "the Court need not reach any firm conclusion about *Turner*'s effects on plaintiffs' equal protection claims," and granting preliminary injunction on Eighth Amendment claims). No wonder, then, that no circuit split has developed on this question in the twenty years since *Johnson*. In other words, as noted above, Petitioners' need for "administrative flexibility and deference" due to "operational difficulties," Pet. 17, are well-addressed under *any* equal protection analysis, *see supra* at 17.

What is more, any equal protection challenge is necessarily fact-specific under *either* level of scrutiny. *Compare Harper*, 494 U.S. at 224-25 (listing relevant *Turner* considerations as "the legitimate government interest put forward," "the impact" the requested "accommodation . . . will have on guards and other inmates," and "the absence of ready alternatives"),

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[13] *See, e.g.*, *Carter-el v. Boyer*, No. 1:19-cv-234, 2020 WL 939289, at * 3-4 (E.D. Va. Feb. 25, 2020) (granting defendant's motion for summary judgment); *Jones v. Union County Sheriff's Office*, No. 3:18-CV-00509, 2019 WL 5692753, at *4-5 (W.D.N.C. Nov. 4, 2019) (granting defendants' motion to dismiss), *aff'd sub nom. Jones v. Cathey*, 854 F. App'x 543 (4th Cir. 2021); *Guy v. Espinoza*, No. 1:19-cv-00498, 2020 WL 309525, at *5-8 (E.D. Cal. Jan 21, 2020) (dismissing action with prejudice on pre-complaint screening).

*with Johnson*, 543 U.S. at 507 (heightened scrutiny requires consideration of the "*particularized circumstances*" in a given facility). The individual nature of these claims, regardless of how they are analyzed, suggests that an answer to the scrutiny question will not meaningfully decrease litigation costs—the main real-world gripe that Petitioners assert. Pet. 26.[14] And if a transgender prisoner-plaintiff were to actually prevail on such a claim—despite the fact that apparently none have before, according to Petitioners' research, *see supra* at 19-20—any relief would be targeted to that plaintiff only. *See VMI*, 518 U.S. at 547 ("A remedial decree . . . must closely fit the constitutional violation."); *cf. Trump v. CASA, Inc.*, 606 U.S. 831, 843-44 (2025) (noting historical tradition of "rebuff[ing] requests for relief that extended beyond the parties").

Nor is this case worth taking on for the sake of defendants in the Tenth Circuit. Since the court of appeals' equal protection ruling in this case was based on the arguments presented by the parties—and did not decide the issue for all time, *see supra* Section I—

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[14] Petitioners cite to a federal regulation that similarly requires "individualized determinations" relating to prisoner safety, and require the BOP to "consider on a case-by-case basis" "whether to assign a transgender" individual "to a facility for male or female inmates," taking into account "management or security problems." 28 C.F.R. § 115.42(b), (c). Petitioners cite this regulation to support their "inherent need for penological deference," Pet. 27 n.4, but the regulation says nothing of the sort. To the contrary, it notes that "[a] transgender . . . inmate's own views with respect to his or her own safety shall be given serious consideration," 28 C.F.R. § 115.42(e), something precluded by the Jail's policy of always housing people exclusively based on their genitalia.

defendants in that circuit are free to raise and litigate the issue in future cases.

2. Intervention is not even necessary for the outcome of *this particular case*. The Tenth Circuit went out of its way to repeatedly state that it was only deciding that the complaint stated a few plausible claims under the "low bar" set out for surviving a 12(b)(6) motion, and refused to "speculate about the ultimate outcome" of Ms. Griffith's claims. Pet. App. 33a; *see also* Pet. App. 78a (Ebel, J., concurring) (noting "high burden that must be met by a defendant who moves to dismiss at the pleading stage"). Making this point explicit, the court of appeals noted that it "ha[d] not considered at this procedural stage whether the challenged policies before [it] *withstand* heightened scrutiny." Pet. App. 27a n.13. Similarly, the Tenth Circuit took "no position on the merits of Ms. Griffith's Fourth and Fourteenth Amendment claims" relating to the cross-gender search. Pet. App. 62a.

In other words, since this case arises in a motion to dismiss posture, it remains to be seen whether the scrutiny issue will make a difference in the ultimate outcome of this case. Indeed, Petitioners will be free to present to the district court their "obvious" arguments about operational difficulties; safety, privacy, and security issues; and infrastructure, staffing, and financial constraints to support any claim that a compelling government interest justifies their actions. Pet. 13, 17, 26; *accord Johnson*, 543 U.S. at 514 ("Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety."). It is at the summary judgment stage that Petitioners can assert these interests and the courts will have the benefit of "a developed factual

record." Pet. App. 78a (Ebel, J., concurring). As the Tenth Circuit put it: "The Policies might ultimately survive heightened scrutiny, but that issue [wa]s not before" the court. Pet. App. 17a.

And even aside from the two issues on which Petitioners seek certiorari, it's not as if this Court granting the case would end this litigation. In addition to the two issues on which Petitioners now seek review, the Tenth Circuit *also* reversed and remanded the district court's dismissal of Ms. Grifith's claim against Petitioner Mustapick relating not to the existence of the cross-gender search *per se*, but the "sickening," "reprehensible," and "abhorrent" manner in which it was conducted. Pet. App. 64a; *see also* Pet. App. 56a-57a (separating out claims). He does not seek review of that claim, which will require resolution in the district court regardless of the disposition of the petition. *See* Pet. 8 n.1.

3. Percolation on this issue is warranted—aside from the glaring lack of a circuit split on the issue—to give this Court's recent and upcoming decisions touching on transgender and equal protection issues a chance to work their way into the doctrine—both in this case and beyond. Petitioners cite to this Court's decision to grant, vacate, and remand the Tenth Circuit's opinion in *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024), in light of *United States v. Skrmetti*, 145 S. Ct. 1816, 1837 (2025), and argue for the same result here. Pet. 5. But the chronology of the cases show the opposite result should yield; this issue will work itself out in this case and more broadly after this Court declines certiorari.

A brief historical tour explains why: The court of appeals in this case determined that its 2024 decision

in *Fowler* "confirms the . . . [Jail's] Policies are sex classifications subject to heightened scrutiny." Pet. App. 25a. *Fowler*, in turn, relied on "*Bostock*'s reasoning" to conclude that Oklahoma's policy of barring transgender people from obtaining a birth certificate reflecting their gender identity constituted sex discrimination that was subject to heightened scrutiny. 104 F.4th at 789, 793-94. The *Fowler* decision issued after oral arguments in the present case and, in a post-argument letter, Petitioners conceded that, under *Fowler*, "intermediate scrutiny . . . appl[ies]" to Ms. Griffith's claims. Pet. App. 37a.

In June of this year, the Court decided *United States v. Skrmetti*. 145 S. Ct. 1816. There, the Court held that "a Tennessee law banning certain medical care for transgender minors" was not subject to heightened scrutiny under the Equal Protection Clause. *Id.* at 1824, 1829. The Court concluded that the law relied on classifications on the basis of age and medical use, not sex. *See id.* at 1829. Shortly after issuing the *Skrmetti* decision, the Court granted, vacated, and remanded the Tenth Circuit's decision in *Fowler* "for further consideration in light of" *Skrmetti*. *Stitt v. Fowler*, 145 S. Ct. 2840 (2025).

Now, on remand, the Tenth Circuit is in the process of reconsidering *Fowler* in light of *Skrmetti*. Specifically, the court of appeals asked for supplemental briefing on whether the Oklahoma law in question in *Fowler* "involved classifications based on transgender status," the "proper level of scrutiny under the Equal Protection Clause" and "[w]hether the allegations in the complaint meet that standard." Order Requesting Supplemental Briefing, *Fowler v. Stitt*, No. 23-5080, ECF 119 (Aug. 6, 2025). The briefs, including one from the United States as *amicus*

*curiae*, are on file and awaiting a decision from the Tenth Circuit. Whatever the court of appeals says in a new opinion in *Fowler* may have relevance to the issues in this case, and the district court will be well-positioned to address them.[15] There is absolutely no need for this Court to grant, vacate, and remand, as Petitioners request (at 5, 15); the lower courts will incorporate newer decisions from this Court and the court of appeals as they come down without this Court's intervention.

So too with whatever the result in *West Virginia v. B.P.J.*, No. 24-43, to be argued later this term. One of the questions presented in that case is "[w]hether the Equal Protection Clause prevents a State from designating boys' and girls' sports teams based on biological sex determined at birth." Br. for Petitioners at i, No. 24-43. Whatever the Court ultimately decides in *B.P.J.* may be relevant to the question of the proper level of scrutiny for Ms. Griffith's claims and—again—the district court and Tenth Circuit can and will address those issues on remand as this case progresses below.

It would be particularly counterproductive to the goals of letting the issue percolate to wipe out the contrasting views of the law expressed by the panel and dissent—in only the third appellate decision touching on this issue in the two decades since *Johnson*. As Judge Ebel noted in his concurrence, his colleagues' "careful and thorough analysis of these

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[15] This case is currently stayed pending the disposition of the petition for certiorari. Minute Entry Reflecting Stay Pending Determination of Petition for Certiorari, *Griffith v. El Paso Country, Colo., et al.*, No. 1:21-cv-387, ECF 185 (D Colo. Aug. 11, 2025).

issues . . . will contribute to the further evolution of the law." Pet. App. 79a. Vacating these opinions would do nothing helpful for the Petitioners in this case, as explained above, but would have detrimental effects when it comes to the nascent caselaw on the question. Should this Court want to grant this issue if and when a circuit split actually develops, it will then have multiple "[o]pinions from other Courts of Appeals [that] should assist this Court's ultimate decisionmaking." *Snope v. Brown*, 605 U.S. __, 145 S. Ct. 1534, 1534 (2025) (statement of Kavanaugh, J., respecting the denial of certiorari).

4. In addition to the several reasons above why the Court should deny review, this case is a particularly poor vehicle for answering the questions presented. Recall, the court of appeals applied intermediate scrutiny because Petitioners conceded it as the proper standard of review and never raised the *Turner* issue. *See supra* Section I. As a result, party presentation principles were "decisive in this case." Pet. App. 38a.

But more than that—and aside from the fact that this case will proceed against Petitioner Mustapick for his abusive search regardless, *see supra* at 23—the unraised *Turner* issue would (if properly presented) not be outcome-dispositive in this case, as it is relevant only to *one* alternative theory under which Ms. Griffith's claim is subject to intermediate scrutiny. That is, if this Court grants certiorari it will likely need to reach this alternative argument, not passed on by the court of appeals: that transgender status is itself a protected class. *See* Pet. App. 29a. That lurking issue makes this case unwieldy.

On the cross-gender search question presented, the facts as alleged make this a strange vehicle for

resolving the issue, and make Petitioner Mustapick an unlikely recipient of this Court's certiorari grace. That is, the facts alleged make plain why cross-gender searches are "universally frowned upon . . . in the absence of emergency." Pet. App. 59a (quoting *Byrd*, 629 F.3d at 1143). As the opinion recounted, "Deputy Mustapick searched Ms. Griffith in a 'sickening' and 'reprehensible' way and made 'abhorrent statements that accompanied the search.'" Pet. App. 64a. Petitioner Mustapick, who behaved in a way that "appears calculated to inflict psychological pain on a vulnerable individual," now asks for this Court to sanction his right to search Ms. Griffith. Pet. App. 64a-65a. The facts make this an unappealing case for review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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