No. 25-442

In the Supreme Court of the United States

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

v.

DARLENE GRIFFITH,
Respondent.

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Once again, a circuit court has decided a sharply debated social issue to reimagine sex-based distinctions under the Equal Protection Clause as including "gender identity." Only this time, the circuit had to do so over this Court's express mandate that prison policies affecting constitutional rights receive deferential review. The result is an 81-page majority decision that deepens an acknowledged circuit split and threatens the operational integrity of jails and prisons.

Despite the win below, Griffith contends the Tenth Circuit "did not decide" the level-of-scrutiny question. That is impossible. Griffith lost before the district court under rational-basis review. To prevail on appeal, she had to—and did—convince the majority that heightened scrutiny applies to her claims. In doing so, the majority joined the circuits choosing *VMI* over *Turner* for sex-based prison classifications.

The circuit split is real, acknowledged, and deepening. The Eighth, Ninth, and Tenth Circuits now apply heightened scrutiny to sex-based prison classifications, while other circuits adhere to *Turner*. The majority itself acknowledged that "courts are split" on this issue. This acknowledged disagreement among circuits on a recurring and intensifying question of constitutional law requires immediate review.

Equally problematic, the majority's equal-protection ruling was based on the Tenth Circuit's earlier decision in *Fowler v. Stitt*—a decision this Court vacated after *Skrmetti*. While full review of the questions presented is desperately needed—as lower courts openly call for—at a minimum the Court should grant, vacate, and remand, or hold the case pending

West Virginia v. B.P.J. Litigants are already citing the majority's erroneous constitutional standards in transgender cases raising equal-protection claims and using the decision to end-run the Court's grant-vacate-remand in *Fowler* (*see* III, *infra*).

The Court should grant review and reverse.

REPLY TO BRIEF IN OPPOSITION

I. Griffith Presented—and the Tenth Circuit Wrongly Decided—the Level-of-Constitutional-Scrutiny Question

The majority below of course decided what level of constitutional scrutiny applies to Griffith's equal-protection claims—it had to for Griffith to prevail on appeal. Griffith lost at the district court under rational-basis review. Following circuit precedent in *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (holding "transsexuals are not a protected class" for purposes of the Fourteenth Amendment), the district court applied rational-basis review and held that the County had "a rational basis for housing [Griffith] in an all-male unit and declining to give her feminine clothing and grooming products." (Pet. App. 261a–62a.) In doing so, the court rejected Griffith's contention that heightened scrutiny applied to her equal-protection claims because *Brown* foreclosed it. (*Id.* at 261a.)

On appeal, Griffith therefore had to both present and convince the circuit that heightened scrutiny applied to her equal-protection claims. And she succeeded: the majority (wrongly) applied heightened scrutiny in response to Griffith's arguments, reversed the district court's dismissal order, and remanded to allow Griffith's equal-protection claims to be adjudicated under an erroneous constitutional standard.

Griffith now disavows this success and contends the majority in fact "did not decide the level-of-scrutiny question presented." (BIO 10.) That is legally impossible and factually wrong.

The majority's reasoning for applying heightened scrutiny consisted of two parts, both of which are infirm and require this Court's intervention. *First*, the majority concluded that a distinction based on transgender identity is classification or discrimination based on sex. (Pet. App. 17a.) The majority cited a single case to support its conclusion: *Fowler v. Stitt*, 104 F.4th 770, 789 (10th Cir. 2024), *cert. granted, judgment vacated*, 145 S. Ct. 2840 (2025).[1] (*See* Pet. App. 24a–26a (citing *Fowler* a dozen times and stating "[o]ur decision in *Fowler* confirms the Housing and Commissary Policies are sex classifications subject to heightened scrutiny").) This Court has already vacated *Fowler* after *United States v. Skrmetti*, 605 U.S.

[1] Griffith is wrong that Petitioners "affirmatively *conceded*" intermediate scrutiny applies to the equal-protection claims. (BIO 10 (citing Pet. App. 37a and purporting to quote Petitioners' Rule 28(j) response letter).) Petitioners made no such concession; they only acknowledged *Fowler*'s now-vacated ruling, which was issued after the case was briefed and argued, in response to Griffith's Rule 28(j) letter citing *Fowler*.

Nor could a party "stipulate or bind [courts] to the application of an incorrect legal standard." *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) (McConnell, J.); *see e.g.*, *Moody v. NetChoice, LLC*, 603 U.S. 707, 779–80 (2024) (Alito, J., concurring) (quoting *Gardner*, 568 F.3d at 879); *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.").

495 (2025); at a minimum, a grant-vacate-remand is warranted in this case.

Second, the majority held that *all* sex-based classifications warrant heightened scrutiny. (Pet. App. 17a.) But, as both the majority and Judge Tymkovich in dissent acknowledged, that is an unsettled issue. (*Id.* at 42a (majority recognizing "courts are split" on the issue); *id.* at 41a (stating the purported tension between *Turner* and *VMI* "is not *obviously resolvable in favor of applying Turner* to foreclose heightened scrutiny" (emphasis added)); *id.* at 42a n.20 (distinguishing *Barney v. Pulsipher*, 143 F.3d 1299 (10th Cir. 1998), which applied *Turner* to equal-protection claim asserting sex-based discrimination in prison after *VMI*); *id.* at 86a (Judge Tymkovich in dissent stating majority's categorical rule "ignores the Court's decision in [*Turner*] which compels our application of rational basis review to sex-based classifications in prisons and jails").) While the majority may have been coy in *how* it decided which side of the circuit split to join, there is no doubt it decided the *Turner*-versus-*VMI* question in this case—four pages in the Federal Reporter prove as much. Nor could the majority just ignore *Turner* in the name of party-presentation principles. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) ("'If a precedent of this Court has direct application in a case,' … a lower court 'should follow the case which directly controls[.]' This is true even if the lower court thinks the precedent is in tension with 'some other line of decisions.'" (citations omitted)).

Petitioners' first question is therefore cleanly presented for review. Two judges thoroughly debated a purely legal issue in a published decision and arrived at different views of the law that would have resulted

in opposite outcomes. Judge Tymkovich would have applied *Turner* and affirmed the district court's dismissal; the majority instead applied *Fowler* and *VMI* and reversed the dismissal.

II. The Tenth Circuit's Level-of-Constitutional-Scrutiny Ruling Presents an Acknowledged and Important Circuit Split

The majority recognized that "courts are split on whether intermediate scrutiny applies" to sex-based equal-protection claims in prisons. (Pet. App. 42a.) Despite this concession, Griffith presses that "there is no circuit split on the level of scrutiny that applies to equal protection challenges to sex-based classifications in prisons." (BIO 12.) Griffith's refusal to accept this recognized split gives away the game.

The Eighth, Ninth, and Tenth Circuits subject prison officials to heightened scrutiny when an inmate alleges a sex-based equal-protection claim (Pet. 22–23), and this standard cannot be reconciled with strict application of *Turner*-deference, which these circuits readily admit, *see, e.g.*, *Harrison v. Kernan*, 971 F.3d 1069, 1078, 1080 (9th Cir. 2020) (joining the Eighth Circuit by holding "that intermediate scrutiny, rather than the deferential *Turner* standard, must be applied to decide Harrison's equal protection challenge"). (*See also* Pet App. 43a n.22 ("The dissent's particular arguments for why *Turner* trumps *VMI* in this case do not change our view.").) Commentators also confirm these circuits' departure from *Turner*. *See, e.g.*, Justin Drivera & Emma Kaufman, *The Incoherence of Prison Law*, 135 Harv. L. Rev. 515, 584 n.171 (2021) (stating the Ninth Circuit in *Harrison* rejected *Turner* deference "and thereby creat[ed] a circuit split … in an equal protection case concerning gender-based

policies"); Rebecca Barrett, *The Implications of New York's Gender Expression Non-Discrimination Act for Transgender Housing in Prisons*, 44 Cardozo L. Rev. 767, 780 (2022) (noting Eighth and Ninth Circuits).

Griffith next denies the *Turner*-deference side of the split exists. Wrong again. Griffith initially concedes (as she must) that the Second, Fourth, and D.C. Circuits *have* applied *Turner*: "when equal protection challenges arise in a prison context … courts must adjust the level of scrutiny to ensure that prison officials are afforded the necessary discretion to operate their facilities in a safe and secure manner." *E.g.*, *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002). But then she discounts the decisions because they are pre-*Johnson v. California*, 543 U.S. 499 (2005). (BIO 14–15.) Courts in these circuits, however, continue to respect them as binding. *See, e.g.*, *Gilliam v. Dep't of Pub. Safety & Corr. Servs.*, 2024 WL 5186706, at *19 (D. Md. Dec. 20, 2024) (quoting *Veney* and stating "[w]hen equal protection challenges arise in the prison context, courts must apply rational basis review so as to give prison officials the space necessary to act in ways 'reasonably related to legitimate penological interests'"); *Jones v. Union Cnty. Sheriff's Off.*, 2019 WL 5692753, at *4 (W.D.N.C. Nov. 4, 2019) (quoting *Veney* and stating, "'[i]n a prison context,' disparate treatment passes muster so long as 'the disparate treatment is reasonably related to [any] legitimate penological interests'" (cleaned up)), *aff'd sub nom. Jones v. Cathey*, 854 F. App'x 543 (4th Cir. 2021);[2] *Doe v.*

[2] The only district court case Griffith cites from the Fourth Circuit (BIO 15–16), is not to the contrary. *See Munday v. Beaufort Cnty.*, 2023 WL 9188398 (D.S.C. Mar. 31, 2023). If anything, *Munday* begs for this Court's review. After surveying the state of the law, the court concluded, "if a consensus exists[,] it is one of

McHenry, 763 F. Supp. 3d 81, 88 (D.D.C. 2025) ("There is good reason to doubt that *Johnson*'s cabining of *Turner* applies to laws that discriminate among inmates on the basis of sex[.]"); *Williamson v. Maciol*, 839 F. App'x 633, 636 n.2 (2d Cir. 2021) ("Accordingly, our cases apply this *Turner* standard 'to the assessment of equal protection claims in the prison setting.'" (quoting *Benjamin v. Coughlin*, 905 F.2d 571, 575 (2d Cir. 1990))).[3]

The majority—and every other court in the nation—admit there is a meaningful difference between the levels of constitutional scrutiny. *E.g.*, *United States v. Skrmetti*, 605 U.S. 495, 585 (2025) (Sotomayor, J., dissenting) ("The level of constitutional scrutiny courts apply in reviewing state action is enormously consequential."). Here, the difference between rational-basis review under *Turner* and heightened scrutiny was outcome determinative to the dismissal. Under heightened scrutiny, "[s]ex classifications are … only constitutional if they serve 'important governmental objectives' through means 'substantially related to' achieving those objectives." (Pet. App. 19a (quoting *United States v. Virginia* (*VMI*), 518 U.S. 515, 533 (1996)).) And it is the prison official's burden to prove "a justification for the sex-based classification

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confusion," which will persist "without additional guidance from the Supreme Court." *Id.* at *7.

[3] Griffith further criticizes Petitioners' reliance on *Williamson* (BIO 15), because it "assumed" that heightened scrutiny applied, *see Williamson*, 839 F. App'x at 636 n.2. But the court was only able to make that assumption because the constitutional standard was legally irrelevant—the court reversed on record-based deficiencies. *See id.* at 636 ("[O]ur uncertainties about the record and the basis for the district court's decision lead us to conclude that remand is appropriate" for additional findings.).

that is 'exceedingly persuasive[.]'" (*Id.* at 31a (quoting *Doe through Doe v. Rocky Mountain Classical Acad.*, 99 F.4th 1256, 1260 (10th Cir. 2024)).) But under *Turner*, Griffith had to "show that any 'difference in treatment was not reasonably related to' [the County's] 'legitimate penological interest[]' in institutional security." (*Id.* at 99a (Tymkovich, J., dissenting) (quoting *Fogle v. Pierson*, 435 F.3d 1252, 1261 (10th Cir. 2006)).) Petitioners won dismissal under rational-basis review, and the dismissal was reversed under heightened scrutiny.

That prison officials *might* win at trial under heightened scrutiny does not excuse the meaningful difference between the competing standards, nor does it cleanse the present circuit split. (*See* BIO 13–14.)

Last, as Judge Tymkovich recognized, there is yet another independent basis to resolve Griffith's equal-protection claims: "Griffith was treated identically to those with whom she is similarly situated, biological males. That identical treatment forecloses her Equal Protection claim." (Pet. App. 85a–86a.) Courts are in accord in resolving similar claims. (*See* Pet. 25.) Griffith has no response to these cases other than dismissing the analysis as "not an issue desperately calling out for this Court's review." (BIO 16 n.10.)

At bottom, the majority recognized "courts are split on whether intermediate scrutiny applies" to sex-based equal-protection claims in prisons (Pet. App. 42a), and Griffith fails to prove it was wrong.

III. The Court Should Grant Review to Apply the Principles of *Skrmetti* or hold for *B.P.J.*

Griffith next contends that certiorari is unnecessary because the equal-protection issue will "work

itself out" in this case. (BIO 23.) Specifically, she urges the Court to pass on the questions presented because the recent grant-vacate-remand of *Fowler* and the to-be-announced decision in *West Virginia v. B.P.J.* might provide future guidance to the district court on remand. (BIO 22–26.) More than just implying the Tenth Circuit's majority decision was wrongly reasoned, this plea misses the point—the district court will be bound by the decision absent a clear change in controlling law, such as this petition being granted.

When a court rules on an issue of law the ruling "should continue to govern the same issues in subsequent stages in the same case." *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)), *abrogated on other ground by Hughes v. United States*, 584 U.S. 675 (2018). And a "decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand and the appellate court in any subsequent appeal." *Vivos Therapeutics, Inc. v. Ortho-Tain, Inc.*, 142 F.4th 1262, 1265 (10th Cir. 2025). Law of the case does not allow the issue to "work itself out," as Griffith postulates.

The Tenth Circuit permits courts to depart from the law of the case only in "exceptionally narrow circumstances." *Bishop v. Smith*, 760 F.3d 1070, 1082 (10th Cir. 2014). Those circumstances include "when controlling authority has subsequently made a contrary decision of the law applicable to such issues." *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998). Absent this Court's review, or a grant-vacate-remand like in *Fowler*, the district court will be *required* to apply wrong constitutional standards to

Griffith's equal-protection and strip-search claims. This is true for at least two reasons.

First, neither *Fowler* nor *B.J.P.* expressly concern the *Turner* issue presented in this case. The majority bypassed *Turner* and ultimately concluded that "intermediate scrutiny still applies." (Pet. App. 43a.) This decision is binding on the district court below—and, as a published decision of the circuit, on every district court in the circuit. Holdings regarding the level of scrutiny applicable to a claim are the law of the case. *See Petrella v. Brownback*, 787 F.3d 1242, 1255 (10th Cir. 2015) ("Our holding as to heightened scrutiny will serve as law of the case upon remand."). True, the Court's future decision in *B.P.J. could* zero-out the majority's reasoning that a distinction based on transgender identity is classification or discrimination based on sex. (*See* BIO 25.) But that's a reason to hold the petition, not deny review.

The proceedings below will also be governed by the majority's declaration that there is "*no* 'legitimate penological purpose'" under the Fourth Amendment in denying the male inmate a strip search by the female officer. (*See* Pet. App. 59a–60a.) Indeed, every district court in the Tenth Circuit will be bound by this radical holding absent this Court's intervention. No other court has reached such a conclusion because it is constitutionally baseless. Contrary to Griffith's contention, this out-of-step constitutional progressiveness is not a reason for pause and percolation; it is a reason for swift intervention and reversal.

Second, it is far from certain that the Tenth Circuit's forthcoming opinion in *Fowler* will provide new controlling principles of law for this case. The majority's decision below was grounded in *Bostock v.*

Clayton County, 590 U.S. 644 (2020), as interpreted by *Fowler*. Though the Court vacated and remanded *Fowler* after *Skrmetti*, the *Skrmetti* decision expressly declined to address the *Bostock* analysis that was central to the Tenth Circuit's decision in *Fowler* and here. *See United States v. Skrmetti*, 605 U.S. 495, 520 (2025) ("We have not yet considered whether *Bostock's* reasoning reaches beyond the Title VII context, and we need not do so here."). Here, rather than hold that *Fowler* controlled this case, the majority imported portions of *Fowler's* reasoning. (*See, e.g.,* Pet. App. 26a ("*Fowler*'s logic—grounded in *Bostock*—readily applies to Ms. Griffith's claim.").) Seizing on this, the plaintiffs in *Fowler* are presently arguing that the majority's decision in *Griffith* is now "binding circuit precedent after *Skrmetti*" and that this Court's "GVR order [in *Fowler*] does not 'indisputably and pellucidly' abrogate [the circuit] precedent in *Griffith*." Pls.' Suppl. Br. 15–16, *Fowler v. Stitt*, No. 23-5080 (10th Cir. Sept. 2, 2025). If anything, *Fowler*—post-GVR—may well end up wrongly decided by relying on the majority's decision in this case. Quite the opposite of Griffith's suggestion. So a grant or a grant-vacate-remand is similarly required here.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court should decide the questions presented. If it does not decide these questions now, the Court should at least grant, vacate, and remand the Tenth Circuit's decision.

Respectfully submitted,

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NOVEMBER 24, 2025