

In the Supreme Court of the United States

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

v.

DARLENE GRIFFITH

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether correctional-facility policies that classify inmates based on biological sex, and that apply equally to inmates who self-identify with the opposite sex, are subject to heightened scrutiny under the Equal Protection Clause.

2. Whether respondent has plausibly alleged that a visual body-cavity examination violated his substantive-due-process and Fourth Amendment rights because the officer conducting the examination was of the same biological sex rather than the sex with which respondent self-identified.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court’s order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further consideration in light of *West Virginia v. B.P.J.*, 146 S. Ct. 2356 (2026), and *United States v. Skrmetti*, 605 U.S. 495 (2025).

STATEMENT

A. Respondent Darlene Griffith is “biologically male.” Pet. App. 34a. While he self-identifies as female and has taken hormones causing him to develop “breasts,” he retains male genitalia. *Id.* at 8a; see *id.* at 7a, 12a.¹

¹ Because this case is at the motion-to-dismiss stage, the facts alleged in respondent’s complaint are taken as true. Pet. App. 6a n.1.

Respondent entered the jail of El Paso County, Colorado, as a pretrial detainee in 2020. Pet. App. 5a, 8a. “Like most correctional facilities in the United States,” the El Paso County jail is “segregated on the basis of sex.” *Dothard v. Rawlinson*, 433 U.S. 321, 326 (1977). Respondent was assigned to a male housing unit, where he alleges that he was denied access to female underwear and lipstick that were available to female inmates. Pet. App. 8a, 10a-11a.

Also like other correctional facilities, the El Paso County jail subjects new inmates to a visual body-cavity examination by staff of the inmate’s biological sex. Pet. App. 8a; cf. 28 C.F.R. 552.11(c); *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 326-329 (2012). Respondent requested that his examination be performed by a female officer. Pet. App. 8a-9a. A female officer examined the top half of his body, but a male officer examined the bottom half. *Ibid.* Respondent alleges that the male officer “sexually harassed” him by making offensive remarks during the examination. *Id.* at 126a; see *id.* at 9a.

B. 1. Respondent sued petitioners (the county and its officers) in the District of Colorado. Pet. App. 12a. His operative complaint alleges that (i) the male housing assignment and denial of female commissary items violated his equal-protection rights under the Fourteenth Amendment; and (ii) the body-cavity examination violated his substantive-due-process right to privacy under the Fourteenth Amendment and his right to be free from unreasonable searches under the Fourth Amendment. *Id.* at 12a-13a.

The district court granted petitioners’ motion to dismiss. Pet. App. 243a-265a. The court determined that respondent’s equal-protection claims were subject to

rational-basis review under circuit precedent holding that trans-identifying persons are not a suspect class, and that respondent “ha[d] not adequately alleged that there is no rational reason” for the male housing assignment and denial of female commissary items. *Id.* at 254a (summarizing and “adopt[ing] in full” magistrate judge’s reasoning, *id.* at 253a); see *id.* at 259a-262a. The court also determined, based on a “careful balancing of penological concerns with inmates’ right to privacy,” that respondent had failed to state a substantive-due-process or unreasonable-search claim. *Id.* at 228a; see *id.* at 228a-232a, 255a-256a.

2. A divided panel of the court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-107a.

a. i. As relevant here, the Tenth Circuit held that respondent had plausibly alleged that the male housing assignment and denial of female commissary items violated equal protection. Pet. App. 15a-46a.

At the threshold, the court of appeals determined that the challenged actions are subject to intermediate scrutiny because they classify inmates on the basis of biological sex. Pet. App. 16a-30a. The court relied on its then-recent, since-vacated decision in *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024), cert. granted, judgment vacated, 145 S. Ct. 2840 (2025), which had applied heightened scrutiny to reverse dismissal of a claim that a policy “prevent[ing] all Oklahomans” from “amending the sex designation on their birth certificates” is unconstitutional because it “facially discriminat[es]” against “transgender people” based on sex. *Id.* at 785-786; see Pet. App. 16a-17a, 19a n.9, 23a n.11, 25a-27a, 30a n.15, 34a, 37a, 43a n.22, 44a-45a (citing *Fowler*). The court also invoked (Pet. App. 28a n.14, 31a n.15), among other cases, the Ninth Circuit’s since-reversed decision in

Hecox v. Little, 104 F.4th 1061 (2024), rev'd *sub nom. West Virginia v. B.P.J.*, 146 S. Ct. 2356 (2026), which had applied heightened equal-protection scrutiny to a policy excluding biological males from female sports.

The Tenth Circuit rejected the reasons for applying rational-basis review articulated below, which “seem[ed]” to “consider[] only the portion of [respondent’s] Equal Protection Claim alleging transgender status is itself a protected class”—a question the court expressly reserved—without addressing “the separate component challenging sex classifications.” Pet. App. 29a; see *id.* at 20a, 23a-24a, 28a. And the court declined to decide whether rational-basis review is independently required by *Turner v. Safley*, 482 U.S. 78 (1987), which held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” Pet. App. 35a. The court determined that petitioners “never made th[at] argument” and that its correctness was “not so obvious.” *Id.* at 36a, 38a-39a; see *id.* at 35a-43a. While acknowledging that “courts are split on whether intermediate scrutiny applies” to prisoners’ sex-discrimination claims notwithstanding *Turner*, the court denied that the Tenth Circuit “has already decided” that question. *Id.* at 42a & n.20.

Under heightened scrutiny, the Tenth Circuit determined that respondent had plausibly alleged an equal-protection violation. Pet. App. 31a-33a. Although respondent “does not challenge *that* the Jail separates people based on sex,” the court accepted his “challenge[] [to] *how* it does so”—namely, by treating him like “all biological males” despite his “gender identity.” *Id.* at 24a-25a, 27a n.13, 32a. The court thus deemed it plausible that applying otherwise-permissible sex classifications

to respondent “perpetuated sex-based stereotypes and affirmatively harmed” him, and that those policies do not “serve important government objectives through means substantially related to those objectives” as applied to him. *Id.* at 32a-33a.

ii. The Tenth Circuit also held that respondent had plausibly alleged that the body-cavity examination violated his substantive-due-process and Fourth Amendment rights, in two respects. Pet. App. 51a-70a. First, the court determined that respondent plausibly alleged there was “no ‘legitimate penological purpose’” for a “male” officer to participate in the examination because respondent is “transgender.” *Id.* at 59a-60a; see *id.* at 57a-62a. Second, the court deemed plausible respondent’s allegation that the male officer unconstitutionally “conduct[ed] the strip search in an abusive manner”—specifically, by making “sexually explicit” comments to respondent, who “was particularly vulnerable to searches by male deputies,” again because he is “transgender.” *Id.* at 64a, 66a; see *id.* at 64a-68a.

b. Judge Ebel wrote a concurring opinion. Pet. App. 78a-79a. He stated that this case presents “difficult equal protection issues,” which “will be affected by” the “level of scrutiny” and are “made more difficult because of some arguably divergent language” in prior decisions. *Id.* at 78a.

c. Judge Tymkovich dissented. Pet. App. 80a-107a.

i. As to equal protection, Judge Tymkovich determined that respondent’s claims fail for two “independent[]” reasons. Pet. App. 84a.

First, respondent “has not shown” that he “is similarly situated to others who were treated differently,” a threshold showing that any equal-protection plaintiff “must first” make. Pet. App. 84a. “According to the logic

of [respondent's] complaint, the 'similarly situated' inmates are biologically female prisoners." *Id.* at 85a. But respondent had effectively "concede[d]" the "constitutionality of *sex*-based segregation in jail"—which was "unquestionabl[e]" because, among other reasons, "[e]nduring *physical* differences" between the sexes mean that "sex-segregation leads to safer institutions." *Id.* at 81a-82a, 88a-89a. That was "an assumption baked into [respondent's] complaint"; "of course, [respondent] 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." *Id.* at 83a. Accordingly, his claim necessarily failed because "[t]he way in which [respondent] claims to be similarly situated ([respondent's] gender identity) is not the relevant distinction the Jail permissibly draws ([respondent's] biological sex)." *Id.* at 85a. In other words, respondent "was treated identically to those with whom" he "is similarly situated, biological males," and this "identical treatment forecloses" an equal-protection claim, regardless of the level of scrutiny. *Id.* at 85a-86a.

Second, Judge Tymkovich determined that respondent's equal-protection challenge "independently fails because [respondent] cannot satisfy *Turner*'s rational basis review." Pet. App. 86a. He disagreed with the majority's determination not to reach that issue on party-presentation grounds, explaining that respondent's "equal protection claim is properly before this court" and "[t]he standard of review is not a new claim." *Id.* at 86a n.37. He concluded that *Turner* and its progeny "prescribe[] rational basis review to these sorts of correctional policies." *Id.* at 80a. He also invoked *L.W. v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023), *aff'd*, 605 U.S. 495 (2025), which had noted the constitutionality of

“hous[ing] men and women separately at a prison.” Pet. App. 89a; see *id.* at 95a, 97a. And he determined that respondent’s “conclusory” allegations that the challenged actions were irrational “do[] not survive deferential rational basis review.” *Id.* at 99a, 103a.

ii. As to the body-cavity examination, Judge Tymkovich determined that respondent’s claims “fail[ed] for several independent reasons.” Pet. App. 104a. He concluded that having male officers visually examine male inmates was rationally “[r]elated to [petitioners’] legitimate interests in prison security and employee welfare or privacy,” and also that the component of his claims regarding an officer’s alleged “abusive language” while examining respondent was barred by qualified immunity due to the lack of clearly established precedent on point. *Id.* at 105a; see *id.* at 106a.

3. The Tenth Circuit denied petitioners’ request for rehearing en banc. Pet. App. 114a-115a.

Judge Rossman, joined by Judge Federico, wrote an opinion concurring in the denial of rehearing en banc. Pet. App. 116a-117a; see *id.* at 115a. She reiterated that her panel opinion for the court had “follow[ed] the principle of party presentation” in declining to “resolve[]” whether *Turner* requires the application of rational-basis review to prisoners’ sex-discrimination claims. *Id.* at 116a. She also rejected Judge Tymkovich’s equal-protection analysis as “contrary to our precedent in *Fowler*.” *Id.* at 117a.

Judge Hartz wrote a dissenting opinion. Pet. App. 118a. He agreed in full with Judge Tymkovich’s principal dissent from denial of rehearing. *Ibid.* Judge Hartz also “fail[ed] 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 im-

portant issue within the next few weeks” in *Skrmetti*. *Ibid.* (The Court issued its decision in *Skrmetti* on June 18, 2025, eight days after the Tenth Circuit denied rehearing in this case, *id.* at 114a.)

Judge Tymkovich, joined by Judges Eid and Carson, also wrote an opinion dissenting from the denial of rehearing. Pet. App. 119a-124a; see *id.* at 115a. He reiterated that *Turner*’s “rational basis” standard governs respondent’s equal-protection claims, and he faulted the panel majority for “avoid[ing]” that “central question” by misapplying the party-presentation principle. *Id.* at 119a, 121a. He added that “the pending *Skrmetti* case may” provide further guidance. *Id.* at 120a n.1. He concluded that the decision below “puts [the Tenth Circuit] out of step with the Supreme Court and other circuits,” that “only the Supreme Court can truly solve this conflict,” and that “[t]his case is a good candidate for [the Court’s] review.” *Id.* at 124a.

DISCUSSION

The court of appeals rendered its decision without the benefit of this Court’s guidance in *West Virginia v. B.P.J.*, 146 S. Ct. 2356 (2026), and *United States v. Skrmetti*, 605 U.S. 495 (2025). Those intervening decisions clarified the analysis of constitutional claims involving trans-identifying persons in ways that foreclose the claims by respondent at issue in this petition for a writ of certiorari. Consistent with its usual practice, this Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *B.P.J.* and *Skrmetti*. In the view of the United States, although the Tenth Circuit incorrectly resolved the questions presented, those questions do not warrant

this Court’s plenary review at this time, especially given the clear guidance provided by *B.P.J.* and *Skrmetti*.²

A. The Court Should Grant, Vacate, And Remand In Light Of *B.P.J.* And *Skrmetti*

This Court routinely grants certiorari, vacates the judgment below, and remands the case (GVRs) when “intervening developments” yield “a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Most relevant here, the Court GVRs as an “alternative to summary reversal” when a lower court’s decision contravenes a subsequent decision of this Court. *Id.* at 168; see, e.g., *Wellons v. Hall*, 558 U.S. 220, 220 (2010) (per curiam) (GVR where “the Court of Appeals committed the same procedural error that [an intervening decision] corrected”); *Petersen v. Doe*, No. 24-449 (June 30, 2026) (GVR where lower court enjoined sports law similar to laws upheld in *B.P.J.*). Moreover, so long as an intervening decision “may determine the ultimate outcome of the litigation,” *Lawrence*, 516 U.S. at 167, the Court has GVR’d even when the intervening decision did not address the specific question presented. E.g., *Stitt v. Fowler*, 145 S. Ct. 2840 (2025) (GVR of petition addressing birth-certificate law in light of *Skrmetti*, which addressed medical-care law); *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 25-253 (May 18, 2026)

² In 2023, the United States filed an amicus brief in the court of appeals arguing that intermediate scrutiny applies to respondent’s equal-protection claims. See Gov’t C.A. Br. 3, 9-15. Following the change in Administration, and this Court’s intervening decisions in *Skrmetti* and *B.P.J.*, the United States has reconsidered that view on the merits of the first question presented.

(GVR of petition addressing private right of action in light of decision addressing substantive standard).

As petitioners anticipated (Pet. 11, 15, 31), this case satisfies the criteria for a GVR in light of *B.P.J.* and *Skrmetti*. Although those intervening decisions did not squarely address the questions presented here, they nonetheless foreclose respondent’s claims because they rejected the key constitutional reasoning underpinning those claims and the Tenth Circuit’s decision. Thus, *B.P.J.* and *Skrmetti* dictate “the ultimate outcome of the litigation” and make a GVR “appropriate.” *Lawrence*, 516 U.S. at 167.

1. In *B.P.J.*, this Court held that States “may determine eligibility for women’s and girls’ sports based on biological sex” consistent with the Equal Protection Clause. 146 S. Ct. at 2375. The Court noted that “everyone agrees that the States may maintain separate women’s and men’s teams—in other words, that the States may make distinctions based on sex—because of the inherent physical differences between women and men” that give rise to “safety” and other concerns. *Id.* at 2375-2376. The Court rejected the plaintiffs’ contention that those interests, “while sufficient reasons to exclude most biological males, do not justify excluding a relatively small *subclass* of biological males—namely, those biological males who identify as female and have taken puberty blockers or hormones.” *Id.* at 2375. Rather, “when a sex-based classification is justified as a constitutional matter”—“for example,” in “women’s and girls’ sports”—then a State “may treat all biological males the same and treat all biological females the same”; it “is not *constitutionally* required to grant individualized exemptions to specific [persons] or subclasses.” *Id.* at 2377, 2380. Thus, “the Constitution does

not require that schools determine eligibility for women's and girls' sports based on gender identity rather than biological sex." *Id.* at 2377 n.4. And that legal principle does not depend on factual claims that cross-sex "hormones" reduce sex differences, which "would not alter" the Court's reasoning "[e]ven if true." *Id.* at 2379.

B.P.J. built on *Skrmetti*, which rejected another constitutional claim seeking relief for "only transgender individuals." 605 U.S. at 519. The *Skrmetti* Court approved a state law banning certain medical care for trans-identifying minors, relying in part on the inevitability of "reference to sex" in "the medical context," where "biological differences" affect medical safety and efficacy—for example, the Food and Drug Administration "frequently approves drugs for use by only one sex." *Id.* at 512; see *id.* at 501-502. The Court also rejected as "misplaced" the plaintiffs' "allegations of sex stereotyping" in the challenged state law. *Id.* at 516. More generally, the Court "decline[d] the plaintiffs' invitation to second-guess the lines that [the state law] draws," emphasizing "the need for legislative flexibility in this area." *Id.* at 524. The Court "repeat[ed]" that caution in *B.P.J.*, underscoring that courts lack "license" to redraw legislative lines or carve out exemptions for trans-identifying plaintiffs "as we see best." 146 S. Ct. at 2380.

2. Those precedents foreclose respondent's claims. Like sports and medicine, prisons are another "context" where "everyone agrees" that some "sex-based classifications are permitted"—indeed, "amply justif[ied]" by "the inherent physical differences between men and women." *B.P.J.*, 146 S. Ct. at 2376, 2378-2379; see *Donthard v. Rawlinson*, 433 U.S. 321, 326 (1977). The prison context is also analogous to athletics in that the "forced"

inclusion of men in women’s spaces “can create significant safety risks” and privacy concerns for women, whose interests courts “must also account for,” among other “enormous practical and administrability problem[s].” *B.P.J.*, 146 S. Ct. at 2367, 2378, 2381. As Judge Tymkovich explained, respondent’s requested relief “would impose on others”—including “female guards” and “female prisoners”—“the very consequences [respondent] fears[] and which the Jail’s policies aim to minimize,” such as “risk[s] of sexual harassment, sexual assault, and extreme emotional distress.” Pet. App. 101a-102a; cf. *Dothard*, 433 U.S. at 335 (“There is a basis in fact” for the risks that male inmates pose to female guards.). Those parallels with *B.P.J.* underscore that the Constitution does “not require an overhaul of women’s [prisons] throughout America,” any more than women’s sports. 146 S. Ct. at 2381.

Accordingly, respondent’s equal-protection claims must be dismissed. Similar to the *B.P.J.* plaintiff, respondent “does not challenge *that* the Jail separates people based on sex,” but merely “*how* it does so”—specifically, he challenges the fact that “the Jail treats transgender women differently from cisgender women” for housing and commissary purposes. Pet. App. 27a n.13. But *B.P.J.* foreclosed that challenge by holding that “the Constitution does not require” policymakers to rewrite longstanding, indisputably permissible sex classifications by making them either turn on “gender identity rather than biological sex” or provide “case-by-case exceptions” for trans-identifying persons. 146 S. Ct. at 2377 n.4, 2380. Indeed, as *B.P.J.* explained, such challenges improperly ask courts themselves to discriminate based “on gender identity” by holding that “two [men]” with “the same” physical characteristics must be

treated differently merely because one “identifies as female.” *Id.* at 2377 n.4. And *Skrimetti* rejected as “misplaced” the kind of “sex stereotyping” allegations on which the Tenth Circuit relied, while underscoring the “wide discretion” the Constitution affords policymakers in this area. 605 U.S. at 516, 524.

Thus, the male housing assignment and denial of female commissary items that respondent challenges “readily” withstand either “rational basis review or intermediate scrutiny.” *B.P.J.*, 146 S. Ct. at 2379. In fact, respondent does not actually challenge the facial validity of those policies under intermediate scrutiny, as he seeks the benefits of female-specific housing and commissary items. Pet. App. 82a-83a (Tymkovich, J., dissenting). Instead, he merely raises the sort of as-applied claim that *B.P.J.* forecloses. 146 S. Ct. at 2377-2378.

Respondent’s substantive-due-process and Fourth Amendment claims likewise must be dismissed because they depend on reasoning this Court has since rejected. Here again, respondent “concedes” that the jail can visually examine the body cavities of inmates, Pet. App. 57a, and he does not dispute that “*most* biological males” may be examined by male officers, *B.P.J.*, 146 S. Ct. at 2375; see Pet. App. 8a-9a. In fact, his core premise is that male officers *must* examine male inmates to avoid the harms from “cross-gender” searches. See Pet. App. 52a. He “contends only that assigning a male” officer to examine *him* was unconstitutional because he self-identifies as female, *id.* at 57a, and that the male officer’s offensive remarks during the examination were unconstitutional because respondent’s “gender dysphoria” made him “particularly vulnerable to searches by male[s],” *id.* at 66a; see Br. in Opp. 27 (alleging that those remarks to a “vulnerable individual” “make plain

why cross-gender searches are ‘universally frowned upon’”). But again, petitioners were “not *constitutionally* required to grant individualized exemptions” for trans-identifying persons from practices that “generally” pass constitutional muster. *B.P.J.*, 146 S. Ct. at 2377. If anything, that conclusion is even clearer in the prison context, given the deferential standard of review that everyone agrees applies to respondent’s substantive-due-process and unreasonable-search claims. See p. 20, *infra*.

If the Tenth Circuit had issued its opinion after *B.P.J.* and *Skrmetti*, summary reversal would plainly be warranted. See, e.g., *District of Columbia v. R.W.*, 608 U.S. 22, 24 (2026) (per curiam) (summarily reversing a decision for “depart[ing] from the[] principles” of this Court’s prior precedent). But since the Tenth Circuit did not have the benefit of those decisions, a GVR is more appropriate. See pp. 9-10, *supra*.

The Tenth Circuit’s reliance on since-abrogated authorities underscores that conclusion. See Pet. 5, 31. The court invoked *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024), which this Court reversed in *B.P.J.*, 146 S. Ct. at 2382; and repeatedly relied on *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024), which this Court GVR’d in light of *Skrmetti*, see 145 S. Ct. 2840. In turn, *Fowler* had “join[ed]” the “reasoning” of other decisions later set aside, 104 F.4th at 793, including *Hecox* and *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024) (en banc), cert. granted, judgment vacated, 145 S. Ct. 2838 (2025). That toppling of a whole line of “cases on which the Court of Appeals based its decision” makes especially clear that a GVR here would be “in keeping with [the Court’s] ‘longstanding practice.’” *Lords Landing Vill. Condo. Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam).

This Court should therefore GVR in light of *B.P.J.* and *Skrmetti*. Given how severely the Tenth Circuit’s decision contravenes the straightforward principles articulated in *B.P.J.* and *Skrmetti*, this Court may wish to include a short statement noting that “the Court of Appeals committed the same” errors that those decisions later “corrected,” *Wellons*, 558 U.S. at 220, thereby providing additional guidance, as this Court has done in the past. See, e.g., *Whitton v. Dixon*, 608 U.S. 493 (2026) (per curiam); *Hamm v. Smith*, 604 U.S. 1 (2024) (per curiam); *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, 589 U.S. 57 (2020) (per curiam); *Shoop v. Hill*, 586 U.S. 45 (2019) (per curiam).

3. Like the dissents below (pp. 7-8, *supra*), respondent correctly recognizes that “[t]his Court’s decisions from” the past two Terms “regarding equal protection claims relating to transgender plaintiffs may impact how this case proceeds.” Br. in Opp. 10. He nonetheless opposes a GVR, but his reasons are unpersuasive.

He primarily emphasizes (Br. in Opp. 22) that “this case arises in a motion to dismiss posture.” This Court, however, regularly GVRS appellate decisions that reversed dismissal orders—the same posture as this case. E.g., *Fazaga v. FBI*, 124 F.4th 637, 649 (9th Cir. 2024), cert. granted, judgment vacated, 146 S. Ct. 2160 (2026); *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 239 (D.C. Cir. 2022), cert. granted, judgment vacated, 144 S. Ct. 2675 (2024); *Saint Anthony Hosp. v. Eagleson*, 40 F.4th 492, 499 (7th Cir. 2022), cert. granted, judgment vacated, 143 S. Ct. 2634 (2023). Although interlocutory, the Tenth Circuit’s published decision remains circuit precedent that should not stand in light of *B.P.J.* and *Skrmetti*. See Cert Reply Br. 8-11. And given how squarely *B.P.J.* and *Skrmetti* foreclose respondent’s claims, the

Tenth Circuit should be given the opportunity to make that clear now. Otherwise, the district court will be placed in an untenable position between the Tenth Circuit's precedent upholding the viability of those claims and this Court's subsequent precedents foreclosing those claims.³

Respondent further suggests (Br. in Opp. 26) that the Court would “likely need to reach th[e] alternative argument” that “transgender status is itself a protected class” to grant the petition. That is incorrect. Because the Tenth Circuit expressly did “not consider” that issue, Pet. App. 20a, it is not an alternative holding that could render a GVR inappropriate. Moreover, as in *B.P.J.* and *Skrmetti*, that issue is not even truly presented here. As in those cases, petitioners’ mere refusal to exempt trans-identifying persons from otherwise-valid sex-based rules “do[es] not classify based on gender identity or transgender status” at all. *B.P.J.*, 146 S. Ct. at 2378 (citing *Skrmetti*, 605 U.S. at 517). And relatedly, as in those cases, respondent’s claims “readily” fail under *either* “rational basis review or intermediate scrutiny.” *Id.* at 2379; see *Skrmetti*, 605 U.S. at 517-519.

³ Respondent also predicted, before *B.P.J.* was decided, that the decision would not bear on the component of his claims challenging alleged remarks by a male officer during his body-cavity examination. Br. in Opp. 23. That prediction has proven incorrect; as explained, *B.P.J.*’s reasoning squarely forecloses the arguments for special treatment of trans-identifying persons on which the Tenth Circuit relied to reverse dismissal of those sub-claims. See pp. 13-14, *supra*. Regardless, any quibble over that subsidiary issue does not undermine the basis for a GVR of the decision below, so that the Tenth Circuit can consider whether *B.P.J.* and *Skrmetti* require dismissal of all, or merely most, of respondent’s remaining claims.

B. Plenary Review Is Not Warranted At This Time

Petitioners contend that the court of appeals erred by (1) declining to apply deferential rational-basis review under *Turner v. Safley*, 482 U.S. 78 (1987), to equal-protection claims challenging sex-based prison policies, Pet. 17-27; and (2) granting insufficient deference to prison officials in approving substantive-due-process and unreasonable-search claims against a visual body-cavity examination, Pet. 27-30. Although petitioners are correct on both points, plenary review is not warranted in this case.

As explained, *B.P.J.* and *Skrmetti* foreclose respondents' claims wholly apart from the particular doctrinal questions raised in the petition. And for both related and independent reasons, this case is not a suitable vehicle to resolve those questions. The Tenth Circuit did not pass on the merits of the first question presented, which may decline in importance now that many claims presenting the question will, like respondent's, fail regardless under *B.P.J.* and *Skrmetti*. The Court should thus await further percolation on that question and a case in which it is decisive. As for the second question presented, there is concededly no circuit split, and it is difficult to imagine the issue arising in any context other than a trans-identifying inmate whose claim for special treatment is foreclosed by *B.P.J.* and *Skrmetti*.

1. The Tenth Circuit should not have applied intermediate scrutiny to respondent's equal-protection claims. Because "[r]unning a prison is an inordinately difficult undertaking" that is "peculiarly within the province of the legislative and executive branches of government" under the "separation of powers," this Court in *Turner* "h[e]ld that a lesser standard of scrutiny is appropriate in determining the constitutionality" of "prison rules."

482 U.S. at 81, 84-85. Setting aside Eighth Amendment claims (which have a prison-specific jurisprudence, Pet. 18 n.3), inmates' constitutional claims are not subject to "heightened scrutiny" (even if they would be outside of prison), and challenged policies must be upheld so long as they are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 87, 89. Importantly, this Court has "made quite clear that the standard of review [it] adopted in *Turner* applies to *all* circumstances in which the needs of prison administration implicate constitutional rights," including under "the Fourteenth Amendment." *Washington v. Harper*, 494 U.S. 210, 221-222, 224 (1990) (emphasis added); see *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 326 (2012). The Court in *Harper* thus specifically rejected an argument to limit and "distinguish[]" *Turner*. 494 U.S. at 223.

"The Court has only narrowed *Turner* once," Pet. App. 87a (Tymkovich, J., dissenting), and that exception does not apply here. In *Johnson v. California*, 543 U.S. 499 (2005), the Court held that heightened scrutiny applies to an equal-protection claim challenging a "policy of *racially* segregating prisoners." *Id.* at 502 (emphasis added); see *id.* at 515. The Court relied in part on pre-*Turner* precedent that had "applied a heightened standard of review in evaluating racial segregation in prisons." *Id.* at 506, see *id.* at 507-512. And the Court reasoned that the right to be free from racial discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration"—indeed, "public respect for our system of justice is undermined when the system discriminates based on race." *Id.* at 510-511. Neither of those points applies to sex: Respondent has identified no pre-*Turner* precedent applying heightened scrutiny to sex segregation in

prison, where everyone (including respondent) agrees that men and women *must* be separated, see pp. 11-12, *supra*, to protect safety and privacy, see Pet. App. 88a-98a (Tymkovich, J. dissenting). There is thus no basis to extend *Johnson*'s race-discrimination exception to sex-based prison policies, which do not share race discrimination's "unique" concerns. Cf. *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 224 (2017).

The Tenth Circuit acknowledged that "race 'is different' from sex," and that *Turner* "may" therefore "foreclose heightened scrutiny" for sex-discrimination claims. Pet. App. 39a-41a. Yet it found that conclusion "not so obvious" (*id.* at 39a) primarily because of this Court's statement in *United States v. Virginia*, 518 U.S. 515 (1996), that "'all gender-based classifications today' warrant 'heightened scrutiny.'" *Id.* at 555. But *Virginia* did not involve prison policies and, unlike *Harper*, was not considering whether to recognize an exception to *Turner*. Rather, *Virginia* was just emphasizing that heightened scrutiny applied not only to invidious classifications but to so-called "benign" ones, which sheds no light on the applicable standard in the prison context. See *id.* at 535-536. Thus, as *Virginia*'s author elsewhere emphasized, quoting Chief Justice Marshall, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012). And here, overreading *Virginia* to silently abrogate *Turner* and *Harper* would be especially anomalous because "*Johnson*—the only case narrowing *Turner*—was also decided nine years after" *Virginia*, "[y]et it does not mention" *Virginia*. Pet. App. 92a n.41 (Tymkovich, J. dissenting). Thus, *Johnson* itself

underscores that *Virginia* “didn’t” implicitly “create[] a *Turner* carve out for sex-based classifications.” *Ibid.*

2. The Tenth Circuit also should not have reversed the dismissal of respondent’s claims challenging the body-cavity examination. The court rightly acknowledged those claims are controlled by *Turner*’s deferential standard, which requires only a “‘reasonable relationship’ to a ‘legitimate governmental objective.’” Pet. App. 60a; see *Florence*, 566 U.S. at 330 (holding that *Turner* “governed” a Fourth and Fourteenth Amendment challenge to a similar policy). But the court badly erred in accepting respondent’s contention that “there was *no* ‘legitimate penological purpose’” for a “male” officer to examine him. Pet. App. 59a. Respondent “offer[ed] 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.” *Id.* at 105a (Tymkovich, J., dissenting); cf. *B.P.J.*, 146 S. Ct. at 2382 (Thomas, J., concurring) (“Legislatures have many obvious rational bases to keep men who believe that they are women out of teams and private spaces reserved for women.”); *Skrmetti*, 605 U.S. at 553 (Barrett, J., concurring) (similar). Nor has respondent identified any prior case holding that an officer’s “offensive language” could “transform an otherwise reasonable search into a constitutionally violative one.” Pet. App. 106a (Tymkovich, J., dissenting).

Simply put, it is obvious that prisons have legitimate—indeed, compelling—reasons not to force female officers to inspect male inmates’ genitalia for contraband. It is hard to believe the Tenth Circuit would have entertained such claims by any biological male other than one who self-identifies as female—*i.e.*, a male inmate who claims, for whatever reason, that he wishes to

be strip-searched only by females. Yet trans-identifying inmates are no more entitled to special treatment under substantive-due-process or reasonable-search principles than under equal-protection principles. Cf. *B.P.J.*, 146 S. Ct. at 2377 n.4. And without such special treatment, nothing remains of the decision below. See Pet. App. 66a (resting on the proposition that respondent’s “trans-gender” identity made him “particularly vulnerable”).

3. Nonetheless, plenary review is not warranted for several reasons.

To start, “[t]he first question presented was not decided in this case.” Br. in Opp. 10; contra Cert. Reply Br. 4. The Tenth Circuit declined to reach that question because petitioners “never made the argument” below, and the court determined that “that failure of party presentation is decisive *in this case*.” Pet. App. 36a. The court therefore did not “decide[] what side of th[e] split it is on,” *id.* at 42a n.20, as Judge Rossman (the opinion’s author) reiterated upon denial of rehearing, *id.* at 116a. Judge Tymkovich, too, recognized that the court “avoided” that question and merely “held that whether *Turner* controlled was unclear.” *Id.* at 121a.

Petitioners object that the Tenth Circuit misapplied the party-presentation principle. Cert Reply Br. 3 n.1. That objection has some force. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (“[O]nce a federal claim is properly presented, a party can make any argument in support of that claim.”); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (“[T]he 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.”). But petitioners do not contend the party-presentation issue is itself certworthy. And re-

gardless of whether the Tenth Circuit correctly decided that issue, it did not pass on the merits of the first question presented. That “makes this case a particularly poor vehicle for further review,” Pet. App. 117a (Rossman, J., concurring in the denial of rehearing en banc), because this is “a court of review, not of first view,” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

There is also no circuit conflict warranting further review now. In the 21 years since *Johnson*, only two courts of appeals have issued published decisions deciding whether *Turner* applies to sex-discrimination claims, and both held it does not. *Harrison v. Kernan*, 971 F.3d 1069, 1076-1078 (9th Cir. 2020); *Roubideaux v. North Dakota Dep’t of Corr. & Rehab.*, 570 F.3d 966, 974 (8th Cir. 2009). While the United States disagrees with those decisions for the reasons discussed, see pp. 17-20, *supra*, further percolation is warranted given the paucity of recent cases. And the second question presented is concededly not the subject of a split. See Br. in Opp. 13 n.7; Cert. Reply Br. 10.

Most importantly, the prospective importance of both questions is limited by *B.P.J.* and *Skrmetti*, which will independently foreclose claims, like respondent’s, seeking special treatment for trans-identifying inmates. See pp. 11-14, *supra*; Pet. 19-21, 25-26 (collecting cases). Although claims presenting at least the first question are sometimes raised by non-trans-identifying inmates, *e.g.*, *Harrison*, 971 F.3d at 1071, the Bureau of Prisons has informed this Office that trans-identifying inmates presently bring the bulk of claims like respondent’s as to federal correctional facilities. Especially if this Court GVRs with a statement explaining that such claims fail as a matter of law under *B.P.J.* and *Skrmetti*, see p. 14, *supra*, the questions presented should become largely

academic without this Court's further intervention. And for the same reason, addressing the questions presented on plenary review would be entirely unnecessary to resolve this case since *B.P.J.* and *Skrmetti* foreclose respondent's claims regardless.

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals' judgment vacated, and the case remanded for further consideration in light of *B.P.J.* and *Skrmetti*.

Respectfully submitted.

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