

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 United States Court of Appeals
for the Tenth Circuit**

**BRIEF OF *AMICI CURIAE* THE STATES OF KANSAS,
OKLAHOMA, ALABAMA, ARKANSAS, FLORIDA,
GEORGIA, IDAHO, INDIANA, IOWA, LOUISIANA,
MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA,
NORTH DAKOTA, OHIO, SOUTH CAROLINA,
SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WEST
VIRGINIA, AND WYOMING AND THE ARIZONA
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INTEREST OF *AMICI CURIAE*¹

Amici curiae the States of Kansas, Oklahoma, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wyoming and the Arizona Legislature operate, regulate, and oversee numerous prisons, jails, and other correctional institutions. Confining convicted criminals and people who have been lawfully charged with, or suspected of, a crime “is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.” *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). The task is neither for the faint of heart nor for judges to second guess absent truly compelling reasons. And among correctional facilities, jails face a particularly tough task, as they must process, house, and keep safe a constant stream of short-term inmates. *Amici* have a strong interest in ensuring correctional facilities can operate efficiently, effectively, and safely without micromanagement from the bench. See *Meachum v. Fano*, 427 U.S. 215, 229 (1976) (“The federal courts do not sit to supervise state prisons, the administration of which is acute interest to the States.”).

Instead of appropriately affording an elected sheriff the flexibility and discretion necessary to

¹ *Amici* provided timely notice to the parties of their intent to file this brief. See Rule 37.2.

safely manage the jail in El Paso County, Colorado, the Tenth Circuit applied a searching standard of review and granted transgender-identifying inmates specialized status under the Equal Protection Clause. The court, as Judge Tymkovich observed in dissent, effectively held “that housing inmates based on their biological sex is presumptively unconstitutional.” App. 80a. The Constitution requires no such radical departure from centuries of settled correctional practice. *See, e.g.*, Matthew W. Meskell, *The History of Prisons in the United States from 1777 to 1877*, 51 Stan. L. Rev. 839, 847 (1999) (“[O]n April 5, 1790, the Pennsylvania legislature passed the law that established the legal foundation for America’s first true prison system,” a law that “ordered that jailers segregate the sexes.”). This Court has never hinted that housing inmates by biological sex is constitutionally suspect, much less presumptively unconstitutional.

The Tenth Circuit’s decision threw out prudence and precedent, and it places correctional facilities in an untenable situation. By having to house inmates based on asserted gender identity, facilities will inevitably infringe upon the privacy and safety of other inmates and guards. In other words, the facilities are sued if they do, sued if they don’t. And smaller, rural facilities with minimal resources will be hardest hit in trying to juggle these competing demands. This Court should thus grant the petition for a writ of certiorari and reverse the Tenth Circuit.

SUMMARY OF THE ARGUMENT

In effectively holding sex-based housing policies presumptively unconstitutional in correctional facilities, the Tenth Circuit erred in at least three ways, each of which warrants this Court's intervention.

First, sex-based housing policies comport with the Constitution because, at bottom, they treat similarly situated inmates alike. *All inmates—male and female—are housed with members of their biological sex.* These policies protect inmate and guard safety, security, and privacy. No state action runs afoul of the Equal Protection Clause. In concluding otherwise, the Tenth Circuit flipped Equal Protection analysis on its head while flying in the face of history and common sense.

Second, running a correctional facility is a tough, dangerous task for which the courts are the least qualified among the three branches of government. Recognizing reality, this Court has repeatedly admonished that *Turner* deference is generally the appropriate lens through which courts should review the policies of correctional facilities. This Court has not excluded policies that implicate sex from *Turner's* reach. The Tenth Circuit erred in applying intermediate scrutiny instead of the requisite deference.

Finally, the Tenth Circuit's searching review was especially inappropriate in light of *Skrmetti's* directive that courts not second-guess decisions by the political branches regarding transgender issues. Had the Tenth Circuit waited a few days before denying rehearing, it could have reconsidered the case with

this Court’s guidance. The Tenth Circuit rushed ahead, and now this Court should step in.

ARGUMENT

A correctional facility separately housing men and women is a quintessential administrative decision, with undeniable historical backing, to which courts should readily defer. Such a policy comports with the Equal Protection Clause because there is no impermissible differential treatment, and it protects safety and privacy many times over.

Common sense sex-based inmate housing policies are now effectively unconstitutional in the Tenth Circuit. Correctional facilities in largely rural states will thus be placed in an untenable position of elevating the preferences of transgender-identifying inmates over the need to maintain safety and order and to protect the rights of other inmates and guards. Making matters worse, the Tenth Circuit reached this conclusion through searching review that was particularly inappropriate in light of this Court’s recent guidance in *United States v. Skrmetti*, 145 S. Ct. 1816, 1836 (2025). Accordingly, this Court should grant the petition for a writ of certiorari and make clear that El Paso County does not contravene the Constitution by separating inmates by their sex.

I. Sex-based housing policies are constitutional and necessary.

Biology matters. *See, e.g., Skrmetti*, 145 S. Ct. at 1829–30 (recognizing that “biological differences between men and women . . . may contribute to

variations seen in the safety and efficacy of drugs, biologics, and medical devices” (quoting FDA, *Sex as a Biological Variable* (Jan. 30, 2025)). And one of the situations in which it matters most is when inmates are involuntarily housed in correctional facilities. After all, “[c]ourts have long recognized that sex is a trait relevant to inmate privacy.” *West v. Radtke*, 48 F.4th 836, 850 (7th Cir. 2022). Although prisons are generally designated for either men or women, jails are a different beast, as they usually process and house both men and women for short periods of time. *See Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 326 (2012); Rosemary Herbert, *Women’s Prisons: An Equal Protection Evaluation*, 94 Yale L.J. 1182, 1182 (1985) (“At the federal state, and county levels, women are incarcerated in facilities that separate them from men. Typically, state prisons effect this separation through institutions designed exclusively for women. County jails, on the other hand, most often segregate women in a unit within the confines of a larger facility.”).

The Equal Protection Clause is not a shield against any and all government action. *See Skrmetti*, 145 S. Ct. at 1828. Rather, the Clause “essentially . . . direct[s] that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In other words, the Clause lives up to its name by ensuring equal treatment among “persons who are in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10, (1992). A government policy that meets this standard

is “presumed to be valid” and will be upheld if it bears a rational relationship to a legitimate government interest. *City of Cleburne*, 473 U.S. at 440.

Correctional facility housing policies that separate inmates by sex do not violate the Equal Protection Clause because they treat all similarly situated individuals alike, and for good reason. Biological men are housed with biological men, and biological women are housed with biological women. As Judge Tymkovich succinctly observed in his dissent below, the housing policy “classif[ies] inmates based on sex, *not* gender identity.” App. 85a. Thus, the proper comparison group here is other biological males, and they received the same treatment under the policy as the plaintiff: being housed with biological males. *See* App. 84a–86a; *see also, e.g., Star v. Gramley*, 815 F. Supp. 276, 278 (C.D. Ill. 1993) (rejecting similar argument because “the plaintiff is treated no differently from any other similarly situated (i.e., male) inmate”). And this is why, among other reasons, it has long been recognized that “the segregation of inmates by sex is unquestionably constitutional.” *Women Prisoners of D.C. Dep’t of Corr. v. D.C.*, 93 F.3d 910, 926 (D.C. Cir. 1996).

Generally, correctional facility housing policies are based on sex, not asserted or perceived gender identity, because biology fundamentally requires this separation. *See* Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the “Loving Analogy” for Same-Sex Marriage*, 51 How. L.J. 117, 157 (2007) (recognizing that “[e]very state

now segregates its prisoners by sex”). These facilities pose myriad dangers that necessitate sex-based housing. At the most basic level, forcing inmates to reside with members of the opposite sex invades their privacy and places them in distressing situations. *See West*, 48 F.4th at 850. And more severe harms, like sexual harassment, abuse, and violence, cement the need for this separation. Correctional facilities “are necessarily dangerous places; they house society’s most antisocial and violent people in close proximity with one another,” meaning “brutality and sexual aggression” among inmates is a constant risk. *See Farmer v. Brennan*, 511 U.S. 825, 858 (1994) (Thomas, J., concurring) (quotation marks omitted). As such, any efforts made to “reduc[e] sexual harassment” (like separating men and women) are certainly “legitimate.” *See Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999).

Housing men with women, and vice versa, threatens harm both to inmates and guards, which could lead to significant liability for correctional facilities. *See Freitag v. Ayers*, 468 F.3d 528, 539 (9th Cir. 2006) (“Nothing in the law suggests that prison officials may ignore sexually hostile conduct and refrain from taking corrective actions that would safeguard the rights of the victims, whether they be guards or inmates.”); *see also Reynolds v. Quiros*, 25 F.4th 72, 85 (2d Cir. 2022) (recognizing that correctional facilities may incur liability if court-mandated housing decisions result in “a sexually hostile work environment for . . . employees created by inmates’ behavior”). The potential danger is

particularly acute for women guards and inmates, as “scientific studies indicate that transgender-identifying females, even those who have undergone testosterone suppression to lower their testosterone levels to within that of an average biological female, retain most of the puberty-related advantages of muscle mass and strength seen in biological males.” See *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 820 (11th Cir. 2022) (*en banc*) (Lagoa, J., specially concurring).

The Tenth Circuit’s opinion places facilities between a rock and a hard place, with the inevitable result being that someone’s rights *will* be violated and the facility *will* be liable.

Again, sex-based housing necessarily protects safety and privacy. As one early court to consider this issue prudently recognized:

A male prisoner cannot be housed in a women’s prison. Even though a transfer may relieve [the male prisoner’s] anxieties, clearly a violation of the women’s rights would be at issue. Prison authorities must be given great deference to formulate rules and regulations that satisfy a rational purpose and segregation of the sexes is a rational purpose.

Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986). That court’s reasoning was rooted in common sense and in this Court’s admonition that “[p]rison

administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). This deference (discussed more below) counsels against the Tenth Circuit’s searching review in an effort to manufacture a violation of the Equal Protection Clause. *See Klinger v. Dep’t of Corr.*, 31 F.3d 727, 732–33 (8th Cir. 1994) (recognizing that *Turner* “counsel[ed] against” finding that female inmates at one facility and male inmates at another facility were “similarly situated for purposes of prison programs and services”).

The Tenth Circuit effectively and improperly conflated asserted gender identity with sex, and its reasoning extends well beyond El Paso County’s jail. *See App.* 24a–28a. All sex-based housing policies in correctional facilities (and perhaps elsewhere) in the Circuit are now suspect. There is little daylight between the complaint here and the inevitable future lawsuits brought by transgender-identifying inmates relying upon the opinion. This is particularly destructive in the Tenth Circuit, where many of the communities are rural and rely on under resourced jails. Yet now these facilities must likely accede to the desires of any inmate whose claimed gender identity lies with the opposite sex.

The court’s reasoning just as easily applies to state prisons, and it will inevitably force them to transfer biologically male inmates to female prisons.

But as this Court has affirmed, “The Constitution does not . . . guarantee that the convicted prisoner will be placed in any particular prison.” *Meachum*, 427 U.S. at 224; *see also Olim v. Wakinekona*, 461 U.S. 238, 245–48 (1983) (recognizing ability of prisons to freely transfer inmates). Although “[a] prisoner has no right under federal law to compel . . . a transfer to another facility,” *Cox v. Fluery*, No. 2:08-CV-176, 2009 WL 3011221, at *5 (W.D. Mich. Sep. 16, 2009) (collecting cases), the Tenth Circuit effectively created one, so long as the transfer is claimed necessary to align an inmate’s housing with an asserted gender identity, regardless of biological sex. The opinion also poses a special danger to the federal prison system, given the high-profile prisons and prisoners in Leavenworth, Kansas, and Florence, Colorado, that lie within the Circuit. These inmates, some of the Nation’s worst and most dangerous offenders, may now invoke a recent change in asserted gender identity in an attempt to compel transfer to a more favorable facility.

Sex-based housing policies in correctional facilities align with both common sense and the Constitution. They promote order, safety, and privacy in highly volatile environments. The Tenth Circuit’s belief to the contrary is incorrect and distorts Equal Protection analysis.

II. The Tenth Circuit should have applied *Turner* deference because housing inmates is a quintessential administrative decision.

Common sense, sound judgment, and our constitutional structure establish that courts should not readily second-guess those who administer correctional facilities. *See Turner*, 482 U.S. at 84–85. And courts should especially avoid doing so when the facilities are carrying out universal practices that have endured since our country’s founding. *See Meskell, supra*, at 847; *see also* Christine M. Safarik, *Constitutional Law—Separate But Equal: Jeldness v. Pearce—An Analysis of Title IX Within the Confines of Correctional Facilities*, 18 W. New Eng. L. Rev. 337, 337 (1996) (“Although society generally has attempted to eradicate the separation of persons on the basis of an immutable characteristic, the segregation of prisoners on the basis of sex has withstood this societal evolution. Sexually segregated prisons are, in fact, the ‘norm’ throughout the United States.” (footnotes omitted)).

“The difficulties of operating a detention center must not be underestimated by the courts.” *Florence*, 566 U.S. at 326. As Justice Scalia appropriately recognized, “general concerns associated with judges’ running social institutions are magnified when they run prison systems.” *Brown v. Plata*, 563 U.S. 493, 559 (2011) (Scalia, J., dissenting). Decades ago, this Court appropriately put to rest the notion that judges should “make the difficult judgments concerning

institutional operations” of correctional facilities. *Turner*, 482 U.S. at 89 (quotation marks omitted); see also, e.g., *Shaw v. Murphy*, 532 U.S. 223, 230 (2001) (“[U]nder *Turner* and its predecessors, prison officials are to remain the primary arbiters of the problems that arise in prison management.”); *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (recognizing “that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment”). Accordingly, “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Turner*, 481 U.S. at 89. In other words, *Turner* deference applies unless this Court has specifically held otherwise.

The confinement of convicted criminals and those lawfully accused or suspected of a crime poses innumerable risks. Chief among them are physical altercations between inmates, who may have previously engaged in violent conduct, have severe mental and psychological issues, and be driven by a sense of desperation. Understandably, “[t]here are few cases in which the State’s interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, by definition, is made up of persons with a demonstrated proclivity for antisocial criminal, and often violent, conduct.” *Washington v. Harper*, 494 U.S. 210, 225 (1990) (quotation marks omitted).

Safety issues—and the accompanying need for deference—are magnified in jails, where “officials

there know so little about the people they admit at the outset.” *Florence*, 566 U.S. at 336. Jails generally hold people for short periods of time, perhaps only after an initial booking or while awaiting trial or transfer to another facility, meaning correctional officers may be unable to readily ascertain how inmates will interact with each other and with guards. *See id.* And given the space and staffing capacities of jails, which will generally be less robust than state and federal prisons, jail staff often will be unable to accommodate the highly individualized needs of inmates. Against this backdrop, facility “administrators have not only an interest in ensuring the safety of . . . staff[] and administrative personnel, but also the duty to take reasonable measures for the [inmates’] own safety.” *Washington*, 494 U.S. at 225 (citation omitted). When, as in this case, a jail’s policy is at issue, it is even more appropriate for courts to defer to it.

The Tenth Circuit, contravening this Court’s precedent, applied a heightened standard of review to a bedrock administrative issue—inmate housing. *See* App. 27a. As Judge Tymkovich observed (and as just noted), the plaintiff’s Equal Protection Clause claim was “foreclose[d]” because the plaintiff was “treated identically to those with whom [the plaintiff] is similarly situated, biological males.” App. 85a–86a. That should have ended the case. But, assuming it was appropriate for the court to have proceeded with any scrutiny of the housing policy, *Turner* deference was the most searching standard available and should have applied because this Court has not excluded sex from *Turner*’s reach. *See* App. 93a–94a.

In *Johnson v. California*, this Court made an exception to *Turner* for decisions that implicate race because “searching judicial review of racial classifications is necessary to guard against [this] invidious discrimination.” 543 U.S. 499, 511 (2005). And the Court’s holding makes sense; after all, “[t]he right not to be discriminated against based on one’s race . . . is not a right that need necessarily be compromised for the sake of proper prison administration.” *Id.* at 510. The particularly heinous nature of racial discrimination further compels thorough judicial scrutiny. *See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023). Yet this Court has noted that even racial discrimination may—in extraordinarily rare cases—be permissible *in correctional facilities*. *See id.* at 207; *Johnson*, 543 U.S. at 512–13.

In *Johnson*, the Court did not discuss a carveout for policies that implicate sex, even though its opinion came well after it had held that sex-based policies, in most contexts, should be subject to intermediate scrutiny. In fact, in *Florence*, which was decided after both *Virginia* and *Johnson*, this Court “confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate’s constitutional rights must be upheld ‘if it is reasonably related to legitimate penological interests.’” 566 U.S. at 326 (quoting *Turner*, 482 U.S. at 89). This Court has not indicated that anything but *Turner* deference applies to correctional policies that implicate sex. And it should not carve out sex because,

as previously discussed, *there is a legitimate need* to separate inmates based on sex. The Tenth Circuit (wrongly) got ahead of its skis in carving out sex as an exception to *Turner*.

Turner's deferential standard of review should have governed the Tenth Circuit's analysis because the policy only implicated sex, not race. And the policy passes this deferential standard with flying colors. As previously noted, *see* § I, *supra*, sex-based housing policies further the "compelling government interest[s]" of maintaining privacy, safety, and order in correctional facilities, *see Johnson*, 543 U.S. at 512; *Florence*, 566 U.S. at 326. At the end of the day, sex-based housing policies are fundamentally administrative decisions that fall squarely within *Turner*.

III. The Tenth Circuit ran afoul of *Skrmetti*.

Judicial deference should be at its apex here. First, a correctional facility's administrative policy is at issue. Second, the facility is a jail, which has its own unique challenges. *See Florence*, 566 U.S. at 326, 336. And finally, because the issue involves accommodating a transgender-identifying inmate, the dispute enters an area where this Court recently held that the political branches should be afforded "wide discretion." *See Skrmetti*, 145 S. Ct. at 1836; *see also*,

e.g., *Brandt ex rel. Brandt v. Griffin*, 147 F.4th 867, 884 (8th Cir. 2025) (applying *Skrmetti*).

In *Skrmetti*, this Court recognized that the Equal Protection Clause is not violated every time state action adversely impacts a transgender-identifying person. See 145 S. Ct. at 1834. Although that case involved state legislation, its reasoning readily applies to local correctional policies. “[L]egal debates surrounding transgender issues are profound and unsettled,” *Darlingh v. Maddaleni*, 142 F.4th 558, 565 (7th Cir. 2025) (citing *Skrmetti*), and these issues inevitably include ensuring transgender-identifying inmates are housed in correctional facilities in a manner designed to maximize safety and privacy *for all inmates* in light of limited resources. An elected county sheriff is certainly “more politically accountable” than federal judges, and thus should receive deference in creating and implementing policies that implicate transgender inmates. See *Brandt*, 147 F.4th at 884.

Correctional facilities are not perfect. There will inevitably be times, especially in jails, when a policy could have been better, or when another action could have been taken. But through *Turner* and its progeny, this Court has rejected as inappropriate the judicial “second-guessing or micro-management” of these facilities and their administrators. See *Est. of DiMarco v. Wyo. Dep’t of Corr., Div. of Prisons*, 473 F.3d 1334, 1342 (10th Cir. 2007) (citing *Sandin*, 515 U.S. at 482–84). Indeed, “courts cannot assume that . . . prison officials are insensitive to the requirements

of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system[.]” *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981). *Skrmetti* aligns with *Turner* deference in this case. The Tenth Circuit thus ran afoul of two lines of precedent.

Although *Skrmetti* was decided after the Tenth Circuit issued its initial opinion, the Tenth Circuit could—and should—have held the petition for rehearing pending this Court’s decision. Over the protests of four judges, App. 118a (Hartz, J.); App. 120a (Tymkovich, J., joined by Eid and Carson, JJ.), the Tenth Circuit instead denied rehearing in early June. The court was well aware of *Skrmetti*’s forthcoming value, as it had already abated several appeals in other cases so that it could benefit from *Skrmetti*. See *Poe ex rel. Poe v. Drummond*, 149 F.4th 1107, 1119 (10th Cir. 2025) (similar law being challenged as the Tennessee law in *Skrmetti*); Order, *Bridge v. Okla. State Dep’t of Educ.*, No. 24-6072 (10th Cir. Feb. 18, 2025) (challenge to sex separation in public school restrooms).

The Tenth Circuit’s error was particularly egregious because its opinion below relied heavily on *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024)—which this Court vacated soon after (and in light of) *Skrmetti*. See *Stitt v. Fowler*, 145 S. Ct. 2840 (2025). Given the pending petition for a writ of certiorari in *Fowler*, the Tenth Circuit should have foreseen the distinct possibility of a grant-vacate-and-remand.

Instead, it pressed ahead with its radical and transformative decision.

The Tenth Circuit's opinion and denial of rehearing were made without the benefit of *Skrmetti*. If nothing else, this warrants *another* grant-vacate-and-remand.²

“Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain.” *Bell*, 441 U.S. at 537. And because lawfully detaining people is hard and dangerous, decisions in this realm deserve deference. Courts should not readily second-guess the administration of correctional facilities. The Tenth Circuit's unprecedented intrusion into the administration of a county jail cannot stand. By effectively requiring correctional facilities to house inmates according to subjective asserted (or perceived) gender identity rather than objective biological sex, the decision imperils safety, privacy, and order throughout the Tenth Circuit. The Constitution does not compel States to elevate gender identity claims over inmate safety and privacy. This Court's intervention is essential to restore the appropriate deference that *Turner*, *Bell*, and (now) *Skrmetti* require.

² It would also be worthwhile for this Court to grant-vacate-and-remand this matter after it decides *Little v. Hecox*, No. 24-38, and *West Virginia v. B.P.J.*, No. 24-43.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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