No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances.

PARTIES TO THE PROCEEDING BELOW

All the parties to the proceedings below are parties in this Court.

The petitioner is Albert W. Florence.

The respondents are the Board of Chosen Freeholders of the County of Burlington; Burlington County Jail; Warden Juel Cole, individually and in his official capacity as Warden of Burlington County Jail; Essex County Correctional Facility; Essex County Sheriff's Department; State Trooper John Doe, individually and in his official capacity as a State Trooper; John Does 1-3 of Burlington County Jail & Essex County Correction Facility who performed the strip searches; and John Does 4-5.

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BRIEF FOR THE PETITIONER

Petitioner Albert Florence respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey granting petitioner's motion for class certification (J.A. 6a) and denying reconsideration (*id.* 45a) are unpublished. The district court's opinion granting petitioner summary judgment (Pet. App. 48a) is published at 595 F. Supp. 2d 492. The district court's opinion certifying that decision for immediate appeal (Pet. App. 35a) is published at 657 F. Supp. 2d 504. The order of the United States Court of Appeals for the Third Circuit accepting jurisdiction over the appeal (Pet. App. 33a) is unpublished. The court of appeals' opinion reversing (Pet. App. 1a) is published at 621 F.3d 296.

JURISDICTION

The court of appeals issued its opinion on September 21, 2010. Pet. App. 1a. On December 10, 2010, Justice Alito extended the time to file the petition for certiorari until January 19, 2011. *See* App. No. 10A-586. Petitioner then timely filed his petition, which this Court granted on April 4, 2011. 131 S. Ct. 1816 (2011). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of

the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

STATEMENT OF THE CASE

Petitioner was arrested for a minor, non-criminal offense. Respondent jail officials acknowledged that they had no reason to suspect that petitioner was carrying contraband when they jailed him. But respondents nonetheless strip-searched him twice. The searches were both unconstitutional under a nearly uniform line of federal appellate authority and contrary to the expert policies adopted by every division of the U.S. Department of Justice. The Third Circuit nonetheless held that suspicionless strip searches never violate the Fourth Amendment.

1. Petitioner Albert Florence is the finance director of a car dealership. He lives in Burlington County, New Jersey, with his wife April and their three children.

On March 3, 2005, the Florence family was driving to the home of April's mother in the family's BMW to celebrate their purchase of a new home. A New Jersey state trooper stopped the vehicle in Burlington County. The trooper approached the vehicle and requested the identity of the owner. When petitioner identified himself, the trooper removed him from the car, arrested him, handcuffed him, and placed him in the patrol car.

When asked, the trooper told petitioner that he was being arrested on an Essex County, New Jersey, bench warrant. Petitioner had been arrested once before (though never jailed), and pleaded guilty to a

minor offense that required him to pay a fine in installments over time. When petitioner fell behind on the payments, a local judge found petitioner in civil contempt and granted the county a bench warrant for petitioner's arrest. J.A. 89a.

Petitioner promptly paid the balance owing on the fine. *Id.* 80a. The judgment underlying the warrant was at that point satisfied. Petitioner kept with him a copy of the official document certifying that fact, *id.* 86a, because in his view he had been previously been detained as an African American who drove nice cars and he wanted to avoid being wrongly arrested.

When petitioner was nonetheless erroneously arrested on the warrant, petitioner's wife retrieved the document and presented it to the New Jersey state trooper. But apparently because the county had failed to remove the warrant from the relevant computer system, the officer continued with the arrest.

2. State troopers transported petitioner to the local detention facility, the Burlington County Jail. Petitioner was to be held there until retrieved by officers from Essex County, which had issued the warrant, and which would resolve his status. Petitioner and April were told that would occur the next day. But petitioner was not retrieved for almost a week.

Under both New Jersey law and the Burlington County Jail's policy, an individual arrested for a minor offense – a "non-indictable" offense in the terminology of state law – "shall not be subjected to a strip search" absent a search warrant, consent, or

reasonable suspicion that he may possess contraband. N.J. Stat. § 2A:161A-1 (Pet. App. 101a); N.J. Admin. Code § 10A:31-8.4 to -8.7 (Pet. App. 105a-08a); New Jersey Attorney General's Strip Search and Body Cavity Search Requirements and Procedures (J.A. 72a); Burlington County Search of Inmates Procedure § 1186 (no strip search "unless there is a reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found") (Pet. App. 126a); *see also* J.A. 33a (federal court authority in New Jersey has required reasonable suspicion since 1987), 218a (Burlington does not conduct a "strip search" of individual arrested on municipal charges, including contempt, absent reasonable suspicion).

In this case, officers at the jail knew that petitioner had been arrested for the non-indictable offense of "civil contempt." J.A. 53a (intake form), 110a. The jail also would have been aware of the circumstances in which petitioner was arrested and whether he had a history of carrying contraband, *id.* 236a, and furthermore checked petitioner's criminal history, *id.* 102a, all to determine whether there was reasonable suspicion to conduct a strip search, *id.* 10a, 111a, 143a. The officer responsible for petitioner's intake recorded that he was not strip-searched because there was no "reasonable suspicion" that he was carrying contraband. *Id.* 390a.

Burlington County nonetheless requires every detainee – whatever the circumstances – to remove all his clothes and undergo what the jail terms a "visual observation" by an officer. The county draws the distinction that a "visual observation" is intended to uncover not contraband but instead any

identifying marks or wounds, whereas a "strip search" (which is conducted only upon reasonable suspicion) is a "systematic" procedure that is intended to intercept contraband before the individual is admitted into the facility. J.A. 10a-13a, 118a, 167a, 390a (observation "for recent injuries").

The Burlington County jail's "visual observation" of petitioner, *id.* 137a, 390a, proceeded as follows. An officer took petitioner to a shower stall with a partially opened curtain. The officer removed petitioner's handcuffs and directed petitioner to strip naked. From roughly an arm's length away, the officer directed petitioner to open his mouth and lift his tongue, lift his arms, rotate, and lift his genitals. Petitioner was then directed to shower in the officer's sight.

Afterwards, petitioner dressed in a jail jumpsuit and was placed in a cell. Both this Court's precedents and New Jersey law generally required the county to present petitioner promptly to a magistrate judge for a probable cause hearing. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991); N.J. Ct. R. 3:4-1(b), -2(a). The magistrate would have ordered petitioner's immediate release because he was not actually wanted for arrest. But the county never provided petitioner a hearing. During the six days they held petitioner, Burlington officials did not permit him to shower or provide him with a toothbrush, toothpaste, or soap.

3. On the sixth day, Essex County officers finally retrieved petitioner and transferred him to the Essex County Correctional Facility. Admittees at this facility are screened by a metal detector and also a Body Orifice Screening System (BOSS) chair that

identifies metal hidden within the body. J.A. 324a. At the time of the events of this case, Essex County's policy – which Essex subsequently changed to parallel Burlington County's – required a detailed strip search of all admittees no matter what the circumstances. Essex County Dep't of Pub. Safety Gen. Order No. 89-17 (Pet. App. 137a, 140a); J.A. 318a.[1]

Essex's search of petitioner was more extensive and public than Burlington's. Officers directed petitioner and several other detainees to enter a shower area, strip, and shower. Under close supervision of the officers and in the plain sight of each other and other employees entering the room, the detainees then stood together and were ordered to open their mouths, lift their genitals, turn around, squat, and cough.

Finally, a full week after his arrest, petitioner was transported to the Essex County Courthouse.

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[1] Under Essex's current policy, in the absence of reasonable suspicion, individuals arrested for non-indictable offenses are nominally not subject to a "strip search," but apparently those individuals are nonetheless still required to strip naked and be observed by officers. Essex County Directive No. 04-06 (J.A. 56a); J.A. 273a, 315a, 331-32a. As in Burlington, the facility is aware of the charge for which the individual is admitted. J.A. 275a. The circumstances of the intake process, such as an alarm by the metal detector or the BOSS chair, may also provide reasonable suspicion for a detailed strip search. *Id.* 332a.

The judge was advised that petitioner was not wanted for arrest and ordered his immediate release.

4. Petitioner subsequently filed this lawsuit pursuant to 42 U.S.C. § 1983 against, *inter alia*, the Burlington and Essex County entities, officials, and employees who were responsible for the searches conducted when he was admitted to the jails. As is relevant here, he alleged that respondents subjected him to suspicionless strip searches in violation of the Fourth Amendment.[2]

On the parties' cross-motions for summary judgment, the district court held that respondents' conduct violated the Fourth Amendment. Preliminarily, the court ruled that "[w]hether it is called a 'strip search' or a 'visual observation'—the distinction going only to the intrusiveness of the search—it is still a search for purposes of Fourth Amendment analysis." Pet. App. 65a.

The district court found persuasive that at the time of the events in this case the federal courts (including the District of New Jersey) had for decades uniformly held that suspicionless strip searches of

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[2] On petitioner's motion, the district court certified as plaintiffs a class of individuals "charged with non-indictable offenses" who were admitted to the Burlington County Jail or Essex County Correctional Facility after March 3, 2003, and "were directed by [respondents'] officers to strip naked before those officers, no matter if the officers term that procedure a 'visual observation' or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs, or weapons." J.A. 43a.

minor offenders violate the Fourth Amendment. *Id.* 69a-72a (citing, *inter alia*, *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Davis v. City of Camden*, 657 F. Supp. 396 (D.N.J. 1987)); *see also infra* at 13 n.4. No federal court of appeals had disagreed with that view until the Eleventh Circuit's decision overturning that court's prior precedent in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc). *See* Pet. App. 77a-78a. The court found compelling that, against this "overwhelming weight of authority," "neither county submit[ted] supporting affidavits that detail evidence of a smuggling problem specific to their respective facilities." *Id.* 87a. The court took care to note that its ruling did not "prohibit[] jail officials from ever searching non-indictable offenders, assuming they have reasonable suspicion to do so." *Id.* 86a.[3]

5. After the district court certified its summary judgment ruling for immediate appeal, *id.* 46a, the Third Circuit accepted the certification, *id.* 33a, and reversed by a divided vote, *id.* 28a-29a. Before the court of appeals, the Burlington respondents abandoned their argument that their "visual observation" of respondent did not amount to a strip search. *Id.* 6a n.3. The Third Circuit held that the searches were permissible under the Fourth Amendment because they were conducted in

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[3] The court also held that Burlington Warden Cole was not entitled to qualified immunity in light of this uniform line of authority, including multiple decisions of the District of New Jersey, prohibiting suspicionless strip searches at the time of the events in this case. Pet. App. 94a-95a.

circumstances analogous to the searches of inmates who engaged in planned contact visits that this Court sustained in *Bell v. Wolfish*, 441 U.S. 520, 558 (1979). The Third Circuit majority rejected petitioner's argument "that the risk that non-indictable offenders will smuggle contraband is low because arrest for this category of offenses is often unanticipated," reasoning: "Even assuming that most such arrests are unanticipated, this is not always the case. It is plausible that incarcerated persons will induce or recruit others to subject themselves to arrest or non-indictable offenses to smuggle weapons or other contraband into the facility." Pet. App. 23a. The majority also deemed irrelevant that respondents "have not presented any evidence of a past smuggling problem or any instance of a non-indictable arrestee attempting to secrete contraband." *Id.* 25a. It reasoned that "the Jails' justifications for strip searches would be stronger if supported by [such] evidence," but it concluded that in light of this Court's decision in *Bell*, *supra*, "the Jails are not required to produce such a record." *Id.*

6. This Court granted certiorari. 131 S. Ct. 1816 (2011).

SUMMARY OF THE ARGUMENT

The government has significant power to conduct reasonable searches of arrestees to ensure the security of jails. Arresting officers conduct pat-down searches. Jail officials then subject arrestees to metal detectors and other devices. The arrestees' possessions, including clothing, are subject to an inventory search. Detainees are then subject to being viewed in their undergarments by officers.

Several factors may give rise to reasonable suspicion justifying a more intrusive strip search or body-cavity search. The present offense, or a prior offense by the individual, may be a serious crime or may involve drugs or weapons, suggesting the possibility that the individual might be carrying contraband. The circumstances of the arrest may suggest that the individual was purposefully trying to gain admission to the facility. The preliminary searches at the jail may give rise to suspicion that the detainee is smuggling contraband. But when, as in this case, none of the circumstances give rise to any reason to believe that the individual may be carrying contraband, a strip search is unreasonable and therefore unconstitutional.

The same Fourth Amendment standard applies to jail searches as in every other context: the reasonableness of a jail search is determined by balancing the intrusion on individual privacy against the governmental interest. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979). An order to strip naked before a government official is a dramatic intrusion upon personal privacy and dignity that falls within "a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). That is particularly true in the case of an individual unexpectedly arrested for a minor offense, who naturally will find the entire course of events terrifying. Strip searches are also particularly traumatic for a number of groups, including victims of domestic violence and sexual assault.

Accepting respondents' submission that jails may strip search any detainee without regard to the

circumstances invites a sweeping intrusion upon individual privacy. Americans are arrested with surprising frequency for an array of trivial offenses. The class certified by the district court in this case includes individuals who were strip-searched after being detained for infractions such as driving with a noisy muffler, failing to use a turn signal, and riding a bicycle without an audible bell.

This wholesale intrusion on personal privacy and dignity is not outweighed by an interest in deterring and detecting the smuggling of contraband into jails. That is an important interest, but not one that these policies advance materially. Respondents themselves maintain that their suspicionless "visual observations" of detainees are not designed to detect contraband. Respondents do conduct detailed strip searches intended to prevent smuggling, but only in cases of reasonable suspicion.

Most jails in this country have applied a reasonable suspicion standard for decades. That is also the rule adopted by all the relevant divisions of the U.S. Department of Justice. There is no evidence that it has led to an increase in smuggling. To the contrary, a reasonable suspicion standard improves jail security by focusing officers' attention on the detainees who present the greatest risk of smuggling.

The Third Circuit thought it was "plausible" that individuals would attempt to get themselves arrested in the hope that they would successfully evade detection and sneak contraband into jail. Pet. App. 23a. In fact, there is no evidence of any person attempting to do so, ever. Even if this does occur on rare occasions, that fact would not justify the massive intrusion on individual privacy of strip searches of

every person arrested for any minor offense, no matter what the circumstances.

The Third Circuit erred in concluding that *Bell v. Wolfish* excused respondents from producing any evidence that their strip-search policies deter or detect smuggling. The Court in *Bell* recognized the obvious point that inmates could use the opportunity presented by pre-planned, loosely supervised contact visits with outside visitors to smuggle contraband. In addition, inmates in that circumstance have a lessened expectation of privacy because a contact visit is a privilege, not a right. *Block v. Rutherford*, 468 U.S. 576 (1984). This is a very different case. Arrests for minor offenses are not opportunities to coordinate the introduction of contraband with inmates. The arrests almost always occur unexpectedly; in the event that an arrest appears purposeful, reasonable suspicion will exist, justifying a strip search.

ARGUMENT

The question presented by this case is not new or novel. There is a broad agreement among courts, governments, and professional organizations that it is unreasonable and unnecessary to conduct suspicionless strip searches of individuals arrested for minor offenses in the absence of reasonable suspicion that they are carrying contraband. Such a considered view does not itself establish a violation of the Fourth Amendment. *Virginia v. Moore*, 553 U.S. 164 (2008). But it both informs the determination whether petitioner asserts an expectation of privacy that society regards as reasonable and plays an important role in this Court's assessment of whether

prison policies, in particular, are consistent with the Constitution. *See, e.g.*, *Brown v. Plata*, No. 09-1233 (2011) (slip op. at 43) (considering professional standards "when determining . . . what is acceptable in corrections philosophy"); *Johnson v. California*, 543 U.S. 499, 508 (2005) (relying on the manner in which "[v]irtually all other States and the Federal Government manage their prison systems").

In the wake of this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), the federal courts of appeals uniformly held in numerous cases over the course of almost three decades that suspicionless strip searches of individuals arrested for minor offenses violate the Fourth Amendment.[4] No evidence emerged that such a rule facilitated smuggling into jails. As a Report commissioned by the U.S. Department of Justice concluded, jail officials "passionately believed that [these rulings] would result in major security problems because of dramatic increases in contraband entering the jail. However, these problems did not develop." William

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[4] *See Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Stewart v. Lubbock County, Texas*, 767 F.2d 153 (5th Cir. 1985); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984). That consensus was not interrupted until the Eleventh Circuit reversed its prior precedent in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc).

C. Collins, Nat'l Inst. of Corrs., U.S. Dep't of Justice, *Jails and the Constitution: An Overview* 28-29 (2d ed. 2007).[5] Instead, jail officials tended "to exaggerate a possible security threat." *Id.* at 28.

Every relevant division of the U.S. Department of Justice concurs. The Bureau of Prisons forbids suspicionless strip searches of minor offenders "unless there is reasonable suspicion that he or she may be concealing a weapon or other contraband." BOP Program Statement 5140.38, Civil Contempt of Court Commitments § 11 (2004). The Department of Homeland Security, which is responsible for immigration detainees, permits strip searches "only where there is reasonable suspicion that contraband may be concealed on the person, or when there is reasonable suspicion that a good opportunity for concealment has occurred." Immigration and Customs Enforcement Detention Standard: Searches of Detainees pt. 2, § 13 (2008). The U.S. Marshals Service, which houses eighty percent of its detainees in state and local jails, permits strip searches only "when there is reasonable suspicion that the prisoner may be (a) carrying contraband and/or weapons, or (b) considered to be a security, escape, and/or suicide risk." U.S. Marshals Service Directive, Prisoner Custody – Body Searches § 9.1(E)(3) (June 1, 2010). Finally, draft standards of the Bureau of Indian Affairs permit strip searches of arrestees detained in Native American jails only "when there is a reasonable belief or suspicion that he/she may be in

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[5] The Table of Authorities provides urls for documents available on the Internet.

possession of an item of contraband." Bureau of Indian Affairs, Office of Justice Servs., Adult Facility Guidelines 22 (2010 Draft).

The policies of the Department of Homeland Security and Bureau of Indian Affairs both explicitly incorporate the guidance issued by the American Correctional Association, which is the nation's premier organization of corrections professionals and the accrediting body for adult correctional facilities. The Association's "comprehensive" expert standards provide that "[a] strip search of an arrestee at intake is only conducted when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband." Am. Corrs. Ass'n, *Core Jail Standards* § 1-CORE-2C-02 (2010). *See also* Am. Corrs. Ass'n, *Performance-Based Standards for Adult Local Detention Facilities* § 4-ALDF-2C-03 (4th ed. 2004).

More than half of all Americans live in the eighteen states that prohibit suspicionless strip searches.[6] At least thirteen of these states adopted

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[6] *See* Cal. Penal Code § 4030(f) ("reasonable suspicion"); Colo. Rev. Stat. § 16-3-405(1) ("reasonable belief"); Conn. Gen. Stat. § 54-33L(a) ("reasonable belief"); Fla. Stat. § 901.211(2)(a) ("probable cause"); 725 Ill. Comp. Stat. 5/103-1(c) ("reasonable belief"); Iowa Code § 804.30 ("probable cause"); Kan. Stat. Ann. § 22-2521(a) ("probable cause"); 501 Ky. Admin. Regs. 3:120 § 3(1)(b) ("reasonable suspicion"); 26-239 Me. Code R. Ch. 1 § II(1)(B) (reasonable suspicion); Mich. Comp. Laws § 764.25a(1)(2)(a) ("reasonable cause"); Mo. Ann. Stat. § 544.193(2) ("probable cause"); Neb. Admin. R. & Regs.

these prohibitions before they were required to do so by one of the above-mentioned federal appellate decisions.[7] Among these is New Jersey, which has

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Tit. 81, Ch. 6, § 006.03A2, .03D4 ("reasonable suspicion" or "probable cause"); N.J. Stat. Ann. § 2A:161A-1(b) ("probable cause"); Ohio Rev. Code Ann. § 2933.32(B)(2) ("probable cause"); Tenn. Code Ann. § 40-7-119(b) ("reasonable belief"); Vt. Dep't of Corrs., Directive 315.01(II)(2) ("reasonable suspicion"); Va. Code Ann. § 19.2-59.1(A) ("reasonable cause"); Wash. Rev. Code § 10.79.130(1)(a), (1)(b) ("reasonable suspicion" or "probable cause"). Jails in major cities outside these states – such as Philadelphia, Pittsburgh, and Portland – now apply the same rule. *See* Mark Fazlollah, *Phila. to pay millions in suit over strip searches*, PHILA. INQUIRER, July 2, 2009, at A1; Len Barcousky, *Allegheny County agrees to settle jail strip-search suit*, PITTSBURGH POST-GAZ., Sept. 15, 2010, at B2; John Snell, *Suit claims jail strip searches were "illegal," "degrading,"* PORTLAND OREGONIAN, Dec. 11, 2006, at B2.

[7] Connecticut's 1980 law predated *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); New Jersey's 1985 law predated the Third Circuit's decision below; Virginia's law passed in April 1981 predated *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. Oct. 1981); Florida's 1981 law predated *Skurstenis v. Jones*, 236 F.3d 678 (2000); laws in Tennessee (passed 1982), Michigan (passed 1983), and Ohio (passed 1984) predated *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); Illinois's 1979 law predated *Tinetti v. Wittke*, 620 F.2d 160 (7th Cir. 1980); Iowa's and Missouri's laws, both passed in 1980, predated *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); California's March 1984 law predated *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. Nov. 1984); and the laws in Kansas (passed 1981) and Colorado (passed 1982)

forbidden strip searches of persons charged with minor offenses for more than a quarter-century. N.J. Stat. § 2A:161A-1 (enacted 1985) (Pet. App. 101a); N.J. Admin. Code § 10A:31-8.4 to -8.7 (Pet. App. 105a-08a). As Republican Governor Tom Kean said in his signing statement: "It is an outrageous abuse of authority to subject a person detained for a motor vehicle violation, for instance, to a strip search . . . . [I]t is a violation of a person's privacy and dignity and cannot be tolerated or condoned." Press Release (Mar. 7, 1985) (on file with the New Jersey State Law Library).[8]

In this case, respondents do not dispute that they had no reason to suspect that petitioner was attempting to smuggle anything into their jails.

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predated *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984). While Washington State's law was passed after *Giles v. Ackerman*, Washington legislators had previously instructed the corrections board in 1983 to "recommend categories of persons in custody who should not be subject to search." *See* Wash. Senate Bill Report at 2, E.S.H.B. 1148 (Feb. 27, 1986).

[8] Similarly, the American Bar Association's applicable Criminal Justice Standard, reflecting the consensus judgment of attorneys who represent both arrestees and governments, is that "[a] strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence and the proposed strip search is upon the prisoner's admission to a correctional facility or before the prisoner's placement in a housing unit." ABA Criminal Justice Standard 23-7.9(d)(ii).

Petitioner was arrested merely for failing to pay a fine. He sought to avoid being jailed, protesting (correctly) that he was not wanted for arrest. He has only one prior criminal offense, and it did not involve guns, drugs, or any other facts that suggested his involvement with contraband.

Nonetheless, respondents twice subjected petitioner to extremely degrading searches. They required him to stand naked before officers (and in the case of Essex County, several other inmates), turn around, and lift his genitals. For the reasons that follow, that entirely suspicionless conduct was unreasonable.

I. Strip Searches Of Arrestees Are Subject To The Fourth Amendment's Requirement Of "Reasonableness."

This Court has twice held that ordinary Fourth Amendment principles govern a claim that jail or prison officials engaged in an unreasonable search of a detainee. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979). In such a case, "as in other Fourth Amendment contexts," the inquiry is whether "a 'justifiable' expectation of privacy is at stake" – *i.e.*, whether the individual claims "the kind of expectation that 'society is prepared to recognize as reasonable.'" *Hudson*, 468 U.S. at 525 (quoting *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring)). That determination "necessarily entails a balancing of interests": "the interest of society in the security of its penal institutions and the interest of the prisoner in privacy." *Id.* at 527.

The Court has applied the traditional Fourth Amendment inquiry into reasonableness in every possible setting, including not only jails and prisons (as in *Bell* and *Hudson*, *supra*), but also – for example – schools, *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), borders, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), and sensitive facilities such as airports, *Florida v. Rodriguez*, 469 U.S. 1 (1984) (per curiam), where "the need for [particular searches] to ensure public safety can be particularly acute," *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000). Consistent with that uniform approach, the Court has not held that the Fourth Amendment's application to jails and prisons is subject to the more deferential analysis of *Turner v. Safley*, 482 U.S. 78 (1987), which applies "*only* to rights that are 'inconsistent with proper incarceration.'" *Johnson v. California*, 543 U.S. 499, 510 (2005) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)) (emphasis in original). The Court's Fourth Amendment doctrine accounts for the context of incarceration by treating it as a central component of the reasonableness of the individual's expectation of privacy in that unique setting. *Hudson*, 468 U.S. at 527; *Bell*, 441 U.S. at 559-60.

The justification for applying ordinary Fourth Amendment principles, rather than deferring broadly to the judgments of jail officials, is at its apex with respect to intake searches, which generally occur before a magistrate judge assesses whether there is probable cause for arrest. Manifestly, because arrestees have not been convicted, they are not subject to the government's broad authority to impose punishment. *Compare McKune v. Lile*, 536 U.S. 24,

36 (2002) ("A broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction."). But more than that, petitioner was detained by a police officer and searched twice by jail officials before respondents provided "a neutral and detached magistrate" with the opportunity to "protect[] against unfounded invasions of liberty and privacy" through a probable cause determination. *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). At least until a judge decides whether there is in fact a lawful basis to place an individual within the control of jail officials, who will subject him to a strip search, there is no basis to abdicate the judiciary's traditional and firmly established role in assessing whether governmental conduct constitutes an "unreasonable" search or seizure. U.S. CONST. amend IV.

For the reasons that follow, strip searches of inmates arrested for minor offenses are subject to "the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 318 (1997). "The demand for specificity in the information upon which policy action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry v. Ohio*, 392 U.S. 1, 21 n.8 (1968). This Court has rejected that requirement only "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989). A strip search of a person

arrested for a minor offense amounts to such a significant intrusion on personal privacy and dignity, and the justification for that intrusion is so meager, that it must be justified by *some* form of suspicion.

II. Suspicionless Strip Searches Of Individuals Arrested For Minor Offenses Constitute A Dramatic Intrusion On Personal Privacy And Dignity.

1. The first component of the Fourth Amendment reasonableness inquiry is the degree to which a search infringes upon privacy. The Third Circuit's passing acknowledgment "that a strip search constitutes a 'significant intrusion on an individual's privacy,'" Pet. App. 19a (citation omitted), is a substantial understatement. In fact, jail strip searches intrude on the very core of the personal dignity protected by the Fourth Amendment. Many other searches – such as searches of a home – implicate a zone of privacy from which an individual may seek to exclude the government but into which he will otherwise freely admit friends and family. A strip search, by contrast, much more dramatically forces the individual to expose an entirely private domain: areas of his body that he may have kept private from all but an intimate partner and medical professionals.

The Fourth Amendment's "overriding function" is to "protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). The "meaning" of a strip search when specifically demanded by the government, as well as "the degradation its subject may reasonably feel, place a search that intrusive

into a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). Jail strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). It is an "invasion of personal rights of the first magnitude." *Chapman v. Nichols*, 989 F.2d 383, 395 (10th Cir. 1993).[9]

"Prisoners retain the essence of human dignity inherent in all persons." *Plata*, *supra* (slip op. at 12). Yet a jail official's command that a person arrested for a minor offense strip naked conveys the stark message that the individual has lost one of the most basic rights of privacy in our society and is regarded as no more than a common criminal. The power to safeguard the privacy of one's body "safeguards human dignity as defined by modern society." Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 537 (2006). Individuals ordered to expose themselves can "experience a severe and sometimes debilitating humiliation and loss of self-esteem." *Id.*

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[9] *Accord, e.g.*, *Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006) ("The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute."); *Wood v. Clemens*, 89 F.3d 922, 928 (1st Cir. 1996) ("extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual"); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) ("so intrusive and demeaning").

An individual's display of his naked body is indeed so unusual in our society that in certain contexts it is itself a criminal offense.

The jarring psychological harm that a jail strip search may generate is magnified considerably in the case of persons arrested for minor offenses who (like petitioner) have never before been jailed. The course of events "take[s] that person by surprise, thereby exacerbating the terrifying quality of the event." *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) (citation omitted).

Here, petitioner was innocently driving with his family to his mother-in-law's home. He was arrested and handcuffed by police, and taken to the Burlington County jail. As of that moment in his life, petitioner had "never been . . . seen naked in front of a man" other than his father. J.A. 252a. Because the officer had "look[ed] at [him] with no clothes on, naked, [petitioner] just wanted to get away from him as quickly as [he] could." *Id.* 254a. The Seventh Circuit similarly recounted the effects of a strip search of a female physician arrested in Chicago, who suffered "reduced socializing, poor work performance, paranoia, suicidal feelings, depression, and an inability to disrobe in any place other than a closet." *Joan W. v. Chicago*, 771 F.2d 1020, 1021-22 (7th Cir. 1985).

When officers perform strip searches on all detainees without regard to the circumstances, they become desensitized to these traumatic and dehumanizing effects. *See Bull v. City & County of San Fran.*, 595 F.3d 964, 1000 (9th Cir. 2010) (en banc) (Thomas, J., dissenting). If jails instead make some effort to assess the risk presented by particular

detainees, they will view arrestees as "individual humans, rather than as booking-numbered objects to be processed." *Id.* (citing PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007) (describing Stanford prison experiments on guard and inmate behavior)).

2. Strip searches are especially traumatic for certain populations. The event may cause victims of sexual attacks and domestic abuse to relive their assaults. A woman strip-searched in Australia after having been raped called her mother inconsolable, repeating "[t]hey've done it again, they've done it again." Jude McCulloch & Amanda George, *Naked Poker: Strip Searching in Women's Prisons*, *in* THE VIOLENCE OF INCARCERATION 107, 116 (Jude McCulloch & Phil Scraton eds., 2009). Six weeks later, she hung herself. *Id.* at 116-17.

Members of cultures and religions that place a premium on modesty find strip searches especially traumatic. *See* McCulloch & George, *supra*, at 114 (discussing Catholic women incarcerated in Northern Ireland). Women who are menstruating or lactating may be subject to extreme degradation. For example, Colorado police mistakenly arrested Mercedes Archuleta on a warrant for another person, but strip-searched her even after recognizing their error. *Archuleta v. Wagner*, 523 F.3d 1278, 1282 (10th Cir. 2008). Archuleta began to lactate, but was ordered not to cover herself with her arms; instead, a male guard was directed to cut a maxi-pad in half for her to use. *Id.*; *see also* RUSSELL P. DOBASH ET AL., THE IMPRISONMENT OF WOMEN 205 (1986).

3. Respondents' contrary position that the Fourth Amendment permits indiscriminate strip

searches has sweeping implications. The number of trivial offenses for which individuals are regularly arrested – and would be subject to indiscriminate strip searches under the Third Circuit's decision – is astonishing. The class certified in this case includes individuals arrested for the following offenses:

- *car equipment violations*, such as driving with a noisy muffler, an inoperable headlight, bald tires, high beams on, or without a driver's-side mirror, operable windshield wiper, or fastened seat belts;
- *moving violations*, such as failing to obey a traffic signal, stop at a stop sign, or use a turn signal; improperly backing, making a U-turn, turning right, and turning at a green light; and crossing a double line;
- *parking violations*, such as parking in a no-parking zone; and
- *bicycle violations*, such as improperly riding a bicycle and riding without an audible bell.

The police thus regularly invoke their settled power to arrest an individual lawfully for any minor offense. Officers conducted a strip search in a case that closely parallels the arrest of a girl for eating a french fry in a Metro station. *Hedgepeth ex rel. Hedgepeth v. WMATA*, 386 F.3d 1148 (D.C. Cir. 2004). A woman arrested for eating a sandwich on the Metro was strip-searched in full view of male guards; when she began to cry, she was locked in an isolation cell for fifteen hours in only her underwear. Karlyn Barker, *Woman Arrested for Eating on Metro Sues Over Strip Search*, WASH. POST, Oct. 1, 1980, at C1.

Other reported examples abound:

- California: Sister Bernie Galvin, a nun who appeared at an anti-war protest and was charged with trespassing. *Bull*, 595 F.3d at 989 (Thomas, J., dissenting).
- Washington, D.C.: Bettye Heathcock, who attempted to exit a parking garage immediately upon entering because she thought the cost was too high and was charged with "false pretenses." Al Kamen, *Police, City in Contempt Over 1982 Strip Search,* WASH. POST, Jan. 5, 1983, at B1.
- Kentucky: Karen Masters, who failed to appear in traffic court because the judge gave her the wrong appearance date. *Masters v. Crouch*, 872 F.2d 1248, 1250 (6th Cir. 1989).
- Maryland: Vivian Anderson Smith, who failed to appear at a child support hearing and "was ordered to remove her clothing and squat while a female guard inspected her vaginal and anal cavities in the presence of another female detainee." Joseph D. Whitaker, *Strip-Searches Are Halted in Montgomery*, WASH. POST, Sept. 17, 1982, at C1.

4. The failure to conduct a strip search "in a reasonable manner," *Bell v. Wolfish*, 441 U.S. 520, 560 (1979), "further contributes to the humiliating and degrading nature of the experience," Pet. App. 84a, and renders even an otherwise lawful search unreasonable, *see Campbell v. Miller*, 499 F.3d 711, 713 (7th Cir. 2007); *Logan v. Shealy*, 660 F.2d 1007, 1014 (4th Cir. 1981). Here, the Essex respondents

required petitioner to appear naked in front of multiple officers and several other arrestees, lift his genitals, turn around, squat, and cough. That was particularly "painful": petitioner was "very uncomfortable" because if you look "to your left and one guy is kind of staring," and you look "to your right, and the other guy is staring." *Id.* 257a.

III. The Intrusion On Personal Privacy From Suspicionless Strip Searches Is Not Outweighed By A Governmental Interest In Reducing The Smuggling Of Contraband Into Jails.

Despite this dramatic intrusion on personal privacy, the Third Circuit held that a jail may strip search any person detained for any purpose no matter what the circumstances on the theory that such a policy deters and detects the introduction of contraband into the facility. Pet. App. 23a. That assertion is refuted by respondents' own policies, common sense, and the experience of jails around the nation.

1. The Third Circuit's decision cannot be reconciled with the search policies adopted by Burlington and Essex Counties. Respondents cannot hope to deter smuggling by sending a message to potential arrestees when both New Jersey law and their own stated policies expressly forbid suspicionless strip searches. *See supra* at 4-6 & n.1. As to the detection of contraband, both jails have adopted policies that avowedly are *not* intended to uncover illicit materials. A principal argument of the Burlington respondents in the district court was that in the absence of reasonable suspicion they subject a

detainee only to a brief "visual observation," not an exhaustive "strip search." The Essex respondents adopted the same policy after the events of this case. In the court of appeals, respondents properly conceded that requiring admittees to remove their clothing for any purpose amounts to a Fourth Amendment search. Pet. App. 6a n.3. But the relevant point is that respondents avowedly do *not* currently engage in searches in a manner that they maintain is calibrated to uncover contraband, absent reasonable suspicion.

2. The Third Circuit majority ignored doubts about the effectiveness of respondents' policies and found no Fourth Amendment violation on the mere basis that it "is *plausible* that incarcerated persons will induce or recruit others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility." Pet. App. 23a (emphasis added). The Eleventh Circuit similarly found it sufficient that "[n]ot *everyone* who is arrested is surprised" by the arrest and therefore unable to engage in coordinated smuggling. *Powell v. Barrett*, 541 F.3d 1298, 1313 (11th Cir. 2008) (en banc) (emphasis added). This Court can assume that the scenario described by those courts may occur on very rare occasions. But most of even those few instances would be detected, either through the jail's use of pat downs and metal detectors, or because the circumstances of the arrest give rise to suspicion justifying a strip search. The relevant question is whether the remaining tiny risk of smuggling justifies subjecting thousands of individuals to the gross intrusion and loss of dignity of a strip search.

As the dissent below explained, "what might in some imagined circumstances be 'plausible' is without support in the record." Pet. App. 31a n.1. Both New Jersey state law and rulings of the District of New Jersey have long forbidden suspicionless strip searches. *See supra* at 4, 8. Yet as the district court noted, respondents produced no evidence "that detail[s] evidence of a smuggling problem specific to their respective facilities," Pet. App. 87a, much less evidence that a prohibition on suspicionless strip searches would give rise to smuggling. The Third Circuit majority in turn acknowledged that respondents "have not presented any evidence of a past smuggling problem of any instance of a non-indictable arrestee attempting to secrete contraband." *Id.* 25a.

Similarly, as discussed, suspicionless strip searches have been forbidden in the overwhelming majority of the country for decades by state statutes and federal court decisions. But as the study commissioned by the Department of Justice concluded, *see supra* at 13-14, and litigation before the federal courts reveals, there is not "a single document[ed] example of anyone [concealing contraband during arrest for a minor offense] with the intent of smuggling contraband into the jail." *Bull*, 595 F.3d at 990 (Thomas, J., dissenting).

The most exhaustive review of this question by a federal court was conducted with respect to New York's Orange County Correctional Facility in *Dodge v. County of Orange*, 282 F. Supp. 2d 41 (S.D.N.Y. 2003). During a four-year period, the jail strip searched all incoming detainees. The court examined every arrest record to determine whether permitting

the jail to do so only when reasonable suspicion existed would have reduced the amount of contraband discovered. It concluded that of the 23,000 searches, there was at most *one* instance in which a person smuggling drugs – and none carrying weapons – might have evaded detection under a reasonable suspicion regime.

The facts of this case illustrate the implausibility of respondents' claim that smuggling in these circumstances is a material problem. Respondents must imagine that petitioner drove around with his family with drugs strapped below his genitals hoping the car would be pulled over without even engaging in a moving violation, having paid a fine precisely to terminate the warrant for his arrest, while carrying the paperwork with him to ensure that he was never wrongly arrested, all as a giant effort at misdirection. Once arrested, both this Court's decisions and New Jersey state law required that he be presented promptly to a magistrate, who would have ordered his immediate release. It is not even "plausible" that smuggling could occur in these circumstances. *Contra* Pet. App. 23a. This Court should no more approve the dramatic intrusion of a strip search in these circumstances than it authorizes searches of the vehicles of individuals detained in police cars on the premise of "the mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules,'" *Thornton v. United States*, 541 U.S. 615, 626 (2004)

(Scalia, J., concurring in the judgment). *See Arizona v. Gant*, 129 S. Ct. 1710 (2009).[10]

None of the foregoing is intended to deny that smuggling into jails is a significant problem. *See Bell*, 441 U.S. at 559. But the evidence shows that individuals arrested in suspicionless circumstances for minor offenses are not a remotely material source of that problem.

3. To the extent that there is a reasonable prospect that minor offenders will attempt to engage in smuggling, jails have numerous alternatives at their disposal to detect contraband. At the point of arrest, officers uniformly search "the arrestee's person and the area within his immediate control." *Gant*, 129 S. Ct. at 1716 (citations and internal quotations omitted).

Upon arrival at the jail, officers may conduct an inventory search of every detainee's clothing and any other property. *Colorado v. Bertine*, 479 U.S. 367, 371-73 (1987). They may pat the individual down, subject him to a metal detector, and visually inspect

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[10] Most smuggling is instead facilitated by jail employees. *E.g.*, David R. Shaw, Cal. Insp. Gen., *Inmate Cell Phone Use Endangers Prison Security and Public Safety* 6-7 (May 2009); Fla. Office of Program Pol'y Analysis & Gov't Accountability, *Corrections' Contraband Effort Is Sound* 5 (Apr. 2008). Two Essex County officers were thus recently arrested for playing a leading role in a smuggling ring that "hand-delivered drugs and cell phones" to detainees. *See* James Queally & Amy Ellis Nutt, *13 Charged in Essex Jail Smuggling Ring*, THE (NEWARK, N.J.) STAR-LEDGER, July 30, 2010, at 1.

him in his undergarments. *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001); *Giles v. Ackerman*, 746 F.2d 614, 618 (9th Cir. 1983). The Essex Warden testified in this case that the facility's Body Orifice Scanning System can "pinpoint" metal objects hidden within inmates still more accurately. J.A. 334a. Indeed, Essex attempted to suggest in the district court that the BOSS chair made strip searches unnecessary. *Id.* 39a.[11]

Individualized circumstances may justify the substantially greater intrusion of a strip search or even a body cavity search. The ordinary searches described above may give rise to suspicion that the detainee is carrying contraband. Also, reasonable suspicion justifying such a search may arise from the nature of the offense (such as crimes involving drugs or violence), the circumstances of the arrest (as when it appears that the inmate hid materials or was

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[11] Even more advanced technology is rapidly becoming available. Jails in Illinois and Florida use the Canon RadPro SecurPass, which produces body scans so detailed that they display "something as minute as a filling in someone's tooth," Elaine Pittman, *County Jails Deploy Whole-Body Scanners to Detect Hidden Weapons or Contraband*, GOV'T TECH., Apr. 27, 2011. Because this search takes seven seconds, rather than the fifteen minutes of a strip search, Chicago's Cook County Jail concluded that the RadPro system not only improves "the jail's search capabilities" but "also saves money." *Id.*

attempting to gain admission to jail), or the detainee's prior criminal history.[12]

Finally, in addition to the foregoing, many jails simply "isolate arrestees [accused of] minor offenses from the general jail population." *Giles v. Ackerman*,

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[12] *See Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding reasonable suspicion can be based on "the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest"); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) ("Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record."), *overruled by Bull v. City & Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010) (en banc); *Kraushaar v. Flanigan*, 45 F.3d 1040, 1045 (7th Cir. 1995) (same); *Watt v. City of Richardson Police Dep't*, 849 F.2d 195, 197 (5th Cir. 1988) (same); *Dobrowolskyj v. Jefferson Cnty.*, 823 F.2d 955, 957 (6th Cir. 1987) (noting that most circuits have held that blanket strip searches violate the Fourth Amendment absent "reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest, that the detainee is concealing contraband") (collecting cases); *see also* U.S. Marshals Service Directive § 9.1(E)(3) (June 1, 2010) (reasonable suspicion justifying strip search may arise from: ""Serious nature of the offense(s) charged, i.e., whether crime of violence or drugs; Prisoner's appearance or demeanor; Circumstances surrounding the prisoner's arrest or detention; i.e., whether the prisoner has been convicted or is a pretrial detainee; Prisoner's criminal history; Type and security level of institution in which the prisoner is detained; or History of discovery of contraband and/or weapons, either on the prisoner individually or in the institution in which prisoners are detained.").

746 F.2d at 618. Burlington County appears to follow some form of this practice. J.A. 134a, 205a, 210a.

4. There is no substantial argument that jails cannot effectively administer a "reasonable suspicion" standard. That rule has long governed searches in most of the nation's jails, including with respect to all arrestees in the federal system, with no reported difficulty. Both Burlington County and Essex County themselves apply precisely that standard today, and neither submitted any evidence that it is unadministrable. Thus, the form recording petitioner's intake at the Burlington facility specified that he was to be subject to a "visual inspection" rather than a strip search because there was no reasonable suspicion that he was carrying contraband. *Id.* 390a. In making that judgment, officers were aware of the offense for which petitioner was arrested and his prior criminal history. *See supra* at 4.

New Jersey law also requires respondents to classify detainees upon admission based on factors including their offense, previous incarceration, behavior, addiction(s), confinement status (such as pretrial detainee or sentenced inmate), and other similar security concerns. N.J. Admin. Code § 10A:31-22.2(a). Classifying incoming detainees based on their charges and background has long been regarded as an "essential management" tool for jails. James Austin, Nat'l Inst. of Corrs., U.S. Dep't of Justice, *Objective Jail Classification Systems: A Guide for Jail Administrators* 8 (Feb. 1998).

Such practices focus officers' attention on the detainees who present the greatest risk and improve security. When San Francisco replaced its policy of

strip searching a wide array of inmates with a reasonable suspicion standard, it continued to discover drug contraband at the same rate (once per month), but the rate at which it discovered weapons tripled (to once every five months). *Bull v. City & County of San Francisco*, No. C 03-0184 CRB, 2006 U.S. Dist. LEXIS 9120, at *6 n.3 (N.D. Cal. Feb. 23, 2006). In a related context, the National Institute of Corrections – a division of the U.S. Department of Justice that provides training and guidance to local facilities – advises that focusing jail resources on the particular detainees who present the greatest threat provides "[i]mproved security and control of inmates by identifying and providing appropriate surveillance for each group and by assisting the corrections staff in knowing what 'kind' of inmates are where." Austin, *supra*, at 8; *cf. Terrorism and Transportation Security, Before the Subcomm. on Transp. Security of the H. Comm. on Homeland Security*, 112th Cong. (2011) (statement of John Pistole, Administrator, Transportation Security Administration) (TSA plans now to focus its efforts on persons "that we assess . . . may be a higher risk," replacing its prior "one size fit[s] all approach," which was not "efficient or beneficial for the traveling public or for security").

IV. The Third Circuit's Contrary Reliance On *Bell v. Wolfish* Was Mistaken.

The Third Circuit majority dismissed respondents' failure to produce any evidence that suspicionless strip searches are necessary to reduce smuggling on the theory that under this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), "the Jails are not required to produce such a record," Pet.

App. 25a. *Bell* did not, however, depart from ordinary Fourth Amendment principles under which the government must justify such a significant intrusion on individual privacy and dignity.

Bell held that a correctional facility may conduct a strip search (including visually inspecting body cavities) of inmates who choose to engage in planned contact visits with outside visitors that were only loosely supervised by officers. Officials of the federal Metropolitan Correctional Center (MCC) adopted that policy because the visit could be planned in order to smuggle contraband into the facility.

This Court rejected the lower courts' ruling that such searches always require individualized suspicion and cannot "*ever* be conducted on less than probable cause." 441 U.S. at 560 (emphasis in original). It reasoned that the Fourth Amendment "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. That inquiry requires "consider[ing] the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

The Court did "not underestimate the degree to which these searches may invade the personal privacy of inmates." *Id.* at 560. But on the other hand, the Court recognized that "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.* at 559. Contact visits presented an obvious opportunity to "attempt[] to secrete these items into the facility." *Id.* Although the record of smuggling during contact visits was not extensive, the Court explained "that may be more a

testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises." *Id.*

The two central factors that animated this Court's assessment of the Fourth Amendment inquiry in *Bell* – the degree of the "intrusion" on privacy and "the justification for initiating it, *id.* – produce a different result in this case. The inmates' in *Bell* had a lessened expectation of privacy because they had no constitutional right to engage in contact visits. *Block v. Rutherford*, 468 U.S. 576 (1984); *see also Overton v. Bazzetta*, 539 U.S. 126 (2003). The inmates thus elected to exercise the privilege (not the right) "to receive visitors and to enjoy physical contact with them" under the conditions stated by the facility. *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) (citations and internal quotations omitted), *cert. denied*, 537 U.S. 1083 (2002). Arrestees such as petitioner, by contrast, make no such choice.

Conversely, the government's interest in conducting the search was far greater in *Bell* than in this case because the policy challenged in *Bell* addressed a far greater risk of smuggling, and did so more effectively. As the United States explained in *Bell*, loosely supervised contact visits present a "unique opportunity" for smuggling because inmates could coordinate the direct transfer of contraband from an outside visitor. U.S. Br. 72, 1978 WL 207132. That prospect is well established and as such need not be repeatedly proven in court. *E.g.*, *Block v. Rutherford*, 468 U.S. 576, 586 (1984) (visitors can "easily" conceal contraband and pass it to inmates during contact visits "unnoticed by even the

most vigilant observer"); U.S. Bureau of Prisons, *Searching and Detaining or Arresting Non-Inmates*, 72 Fed. Reg. 31,178 (June 6, 2007) (Bureau of Prisons has found that "delivery of illicit substances while visiting is a common method for such substances to be introduced into institutions").

The Third Circuit reached the opposite conclusion by quoting the district court's conclusion in *Bell* that the contact visits in that case did not present a realistic opportunity for smuggling because "inmates and their visitors [were] in full view." Pet. App. 24a (quoting *Wolfish v. Levi*, 439 F. Supp. 114, 147 (S.D.N.Y. 1977)). But this Court accepted the representation of the United States that the district court was incorrect, *see* U.S. Br. 72-73 & n.54, 1978 WL 207132, and decided the case on that basis: "MCC officials [had] adopted the visual inspection procedure as an alternative to close and constant monitoring of contact visits to avoid the obvious disruption of the confidentiality and intimacy that these visits are intended to afford." 441 U.S. at 560 n.40. In these circumstances, the government explained, contact visits presented a "unique" risk, *Bell* Pet. Br. 72, and the record in *Bell* documented instances of smuggling, *see Bell* J.A. 74-77, 86-87.

"As a matter of common sense, contact visits are far more likely to lead to smuggling than initial arrests," *Bull*, 595 F.3d at 998 (Thomas, J., dissenting), because "arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something," *Shain*, 273 F.3d at 64. As the dissent below explained, it is intuitively implausible that with any regularity "individuals would deliberately commit minor offenses such as

civil contempt – the offense for which Florence was arrested – and then secrete contraband on their person, all in the hope that they will, at some future moment, be arrested and taken to jail to make their illicit deliveries." Pet. App. 31a n.1.

Finally, this Court found the absence of significant evidence of smuggling during contact visits in *Bell* unsurprising, given that the challenged policy deterred such efforts. 441 U.S. at 559. By contrast, if respondents were correct that suspicionless strip searches are necessary to deter the smuggling of contraband into jails, there would be evidence of that fact from other facilities around the country in which that practice has been banned for decades. Smuggling by arrestees is already deterred by the jails' ordinary use of pat-down searches and (for metallic items) metal detectors, as well the prospect that circumstances will give rise to reasonable suspicion justifying a strip search. The consequences of detection are moreover severe, as the would-be smuggler will face significant criminal charges. *See* N.J. Stat. Ann. § 2C:29-6.[13] In contrast

[13] *See also, e.g.*, 18 U.S.C. § 1791 (providing or possessing contraband in federal prison can be punished by up to twenty years in prison); Tenn. Code Ann. §§ 39-16-201, 40-35-111 (introducing weapons or drugs into penal institution punishable by up to fifteen years in prison); Iowa Code Ann. §§ 719.7, 902.9 (possessing dangerous weapon in jail punishable by up to ten years in prison and possessing all other contraband punishable by up to five years); Ky. Rev. Stat. §§ 520.050, 532.020 (introducing contraband is a felony punishable by up to five years in prison).

to *Bell*, the practices at issue in this case add little or no additional deterrent value, given that any member of the public who inquired would learn that New Jersey law and the jails' own policies both formally prohibit suspicionless strip searches.

Bell thus provides no justification for respondents' failure to submit evidence supporting their counter-intuitive claim that suspicionless strip searches materially aid in detecting and deterring the introduction of contraband into jails. Courts "must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners." *Plata*, *supra* (slip op. at 13). The judgment accordingly should be reversed.[14]

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[14] For the reasons given in the text, suspicionless strip searches are unconstitutional even under the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987). There is no substantial justification for strip-searching all detainees. Under the *Turner* standard, this Court inquires whether the government "shows more than simply a logical relation [to the regulation's aims], that is, whether [it] shows a *reasonable* relation." *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion) (emphasis in original). "[R]estrictive prison regulations are permissible if they are 'reasonably related to legitimate penological interests,' and are not an 'exaggerated response' to such objectives." *Id.* at 528 (quoting *Turner*, 482 U.S. at 87). *Turner* also requires that prison regulations be targeted to an appropriate subset of the prison population. Thus, the policy restricting prisoners' access to reading materials challenged in *Beard*, 548 U.S. at 524-25, 530, applied only "to a group of specially dangerous and recalcitrant inmates" amounting to "about 0.01 percent of the total

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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prison population." At oral argument, the United States as *amicus curiae* acknowledged that the policy "wouldn't pass" the *Turner* test if applied "across the board to the general population." Tr. of Oral Arg. 27 (No. 04-1479); *see also Overton*, 539 U.S. at 130 (challenged policy applied only to inmates "classified as the highest security risks").