No. 10-___

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

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Susan Chana Lask
Counsel of Record
244 Fifth Avenue, Suite
2369
New York, NY 10001
(212) 358-5762
susanlesq@verizon.net

Thomas C. Goldstein
Amy Howe
Kevin K. Russell
GOLDSTEIN, HOWE &
RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

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.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT CONSTITUTIONAL PROVISION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 12

I. The Circuits Are Irreconcilably Divided Over Whether The Fourth Amendment Permits A Jail To Conduct A Suspicionless Strip Search Of Every Individual Arrested For Any Minor Offense, Whatever The Circumstances. 13

II. The Ruling Below Conflicts With This Court's Fourth Amendment Jurisprudence. 16

III. This Case Presents The Ideal Vehicle In Which To Resolve This Important Question. 31

CONCLUSION 35

APPENDICES

Appendix A, Court of Appeals Decision 1a

Appendix B, Court of Appeals Order Granting Jurisdiction 33a

Appendix C, District Court Opinion Certifying Appeal 35a

Appendix D, District Court Opinion Granting Summary Judgment 45a

Appendix E, Relevant Statutory Provisions..... 101a

Appendix F, Administrative Code Provisions..... 105a

Appendix G, Burlington County Jail Intake Policies 112a

Appendix H, Burlington County Search of Inmates Procedures, Section 1186..... 124a

Appendix I, Essex County Order No. 89-17... 137a

Appendix J, Essex County Jail Intake Policies Effective 2007..... 145a

TABLE OF AUTHORITIES

Cases

Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983) 17

Beard v. Banks, 548 U.S. 521 (2006) 25, 26

Bell v. Wolfish, 441 U.S. 520 (1979)..... passim

Bull v. City & County of San Francisco, 595 F.3d 964 (9th Cir. 2010) (en banc) .. 14, 15, 24

Chandler v. Miller, 520 U.S. 305 (1997) 19

Chapman v. Nichols, 989 F.2d 393 (10th Cir. 1993)..... 18

Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984)..... 21

Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984) 15

Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982)..... 18

Jimenez v. Wood County, Texas, 621 F.3d 372 (5th Cir. 2010)..... 15

Johnson v. California, 543 U.S. 499 (2005) 29

Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985)..... 15

Justice v. City of Peachtree City, 961 F.2d 188 (11th Cir. 1992)..... 18

Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981)..... 14, 28

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983)..... 15, 18

Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989)..... 15

McKune v. Lile, 536 U.S. 24 (2002) 19, 30

N.G. v. Conn., 382 F.3d 225 (2d Cir. 2004)..... 32

Overton v. Bazzetta, 539 U.S. 126 (2003)..... 26, 27

Powell v. Barrett, 541 F.3d 1298 (11th Cir. 2008) (en banc) 16

Roberts v. Rhode Island, 239 F.3d 107 (1st Cir. 2001)..... 14, 16, 21

Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) 17, 18

Schmerber v. California, 384 U.S. 757 (1966) 18

Shain v. Ellison, 273 F.3d 56 (2d Cir. 2001)..... 14, 24, 26

Shaw v. Murphy, 532 U.S. 223 (2001) 26

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) 19

Terry v. Ohio, 392 U.S. 1 (1968)..... 19

Tintetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980)..... 28

Washington v. Harper, 494 U.S. 210 (1990)..... 26

Way v. County of Ventura, 445 F.3d 1157 (9th Cir. 2006) 18

Weber v. Dell, 804 F.2d 796 (2d Cir. 1986)..... 14, 18

Wood v. Clemons, 89 F.3d 922 (1st Cir. 1996)..... 17

Constitutional Provisions

U.S. Const. amend. IV ..... passim

Statutes

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983..... 7

N.J. Stat. § 2A:161A-1 ..... 4, 29

Other Authorities

N.J. Admin. Code § 10A:31-1.3 (2010) 4

N.J. Admin. Code § 10A:31-8.1-8.7 29

N.J. Admin. Code § 10A:31-8.4 29

N.J. Admin. Code § 10A:31-8.5(b)(6)..... 4

N.J. Ct. R. 3:4-1(b) 5, 6

N.J. Ct. R. 3:4-2(a) 6

Civil Contempt of Court Commitments, Program Statement 5140.38 (2004), *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc..... 30

William C. Collins, National Institute of Corrections, U.S. Department of Justice, *Jails and the Constitution: An Overview* (2d ed. 2007), *available at* nicic.org/Downloads/PDF/Library/022570.pdf 28

Charlie Wojciechowski, "Whole Body Scans Nothing New to Jail Inmates," *NBC Chicago*, *available at* www.nbcchicago.com/news/local-beat/cook-county-jail-body-scans-85552562.html..... 22

IN THE

Supreme Court of the United States

NO. 10-___

ALBERT W. FLORENCE,

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Albert Florence respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. A) is published at 621 F.3d 296. The opinion of the United States District Court for the District of New Jersey finally resolving petitioner's Fourth Amendment claim (App. D) is published at 595 F. Supp. 2d 492. The district court's opinion certifying that decision for immediate

appeal (App. C) is published at 657 F. Supp. 2d 504. The court of appeals' order accepting jurisdiction over the appeal (App. B) is unpublished.

JURISDICTION

The court of appeals issued its opinion on September 21, 2010. App. 1a. Justice Alito subsequently extended the time to file this petition to and including January 19, 2011. App. 10A586. 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."

STATEMENT OF THE CASE

Petitioner was arrested for a minor, non-criminal offense. Respondents twice strip-searched him at two different jails, even though neither the nature of the offense nor the circumstances in which he was arrested suggested that petitioner might be carrying contraband. Petitioner subsequently filed this suit, alleging that respondents' conduct violated the Fourth Amendment. The district court granted petitioner summary judgment, finding no evidence that a practice of searching all arrestees without regard to the circumstances materially aids in detecting or deterring unlawful activity. The court of appeals reversed by a divided vote, holding as a matter of law that such a policy is consistent with the

Fourth Amendment and need not be supported by any evidentiary basis. The majority recognized that its ruling was consistent with decisions of two circuits but squarely conflicted with the precedent of eight others.

1. Petitioner Albert Florence lives in Burlington County, New Jersey, with his wife April and their three children – Shamar, William, and Elijah. He is employed as a finance director of a New York car dealership.

On Thursday, March 3, 2005, April (then pregnant) was driving Mr. Florence and Shamar (then four years old) in the family's BMW sport-utility vehicle to her mother's home for dinner. A New Jersey State Trooper stopped the vehicle in Burlington County for a traffic infraction. Florence identified himself as the vehicle's owner. The officer conducted a records search, which reported that Florence was the subject of an outstanding bench warrant in Essex County, New Jersey.

The basis for the warrant was that Florence had supposedly failed to pay a fine. Florence presented to the officer a copy of the official document confirming the fact that he had already paid the fine. (Florence kept the letter accessible because in his view he had been pulled over in the past by the police as an African American who drove nice cars.)

The officer did not attempt to verify the accuracy of the letter or otherwise confirm that Florence was actually wanted for arrest. Without any reason to believe that Florence was engaged in ongoing criminality, the officer arrested him – handcuffed him, placed him in the squad car, and transported

him to the State Police Barracks. The officer did not issue a traffic citation.

Concerned for his wife, child, and responsibilities at work, Florence pleaded with the officers at the police barracks to confirm the validity of the warrant. They refused, asserting that only the police in Essex County, which issued the warrant, bore that responsibility. Florence was then transported in handcuffs to the local detention facility – the Burlington County Jail – to be held until he was retrieved by Essex County, which supposedly would occur the next day.

2. Florence's ostensible offense – failure to pay a fine – constitutes civil contempt in New Jersey; it is not a crime. App. 3a, 51a. New Jersey strictly limits strip searches of individuals who are jailed after being "detained or arrested for commission of an offense other than a crime," N.J. Stat. § 2A:161A-1 (App. 101a), a category that includes all "non-indictable offense[s]," N.J. Admin. Code § 10A:31-1.3 (2010) (App. 105a); *see also* App. 53a n.3. These individuals "shall *not* be subjected to a strip search" – defined as "the removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts" – in the absence of a search warrant, consent, or at least reasonable suspicion that the individual possesses contraband, N.J. Stat. § 2A:161A-1 (App. 101a) (emphasis added); *id.* § 2A:161A-3 (App. 102a), or a history of violence or a prior criminal conviction, N.J. Admin. Code § 10A:31-8.5(b)(6) (App. 108a).

The stated policies of the Burlington County Jail conform to New Jersey law. "A person who has been detained or arrested for commission of an offense

other than a crime . . . shall *not* be subject to a strip-search unless there is a reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found." Burlington County Detention Center/Corrections & Work Release Center Policies and Procedures: Search of Inmates § 1186 (emphasis added) (App. 126a).

Neither the nature of the offense for which Florence was detained nor the circumstances in which he was arrested gave respondents any reason to suspect that he might have possessed weapons, drugs, or any other contraband at the time he was admitted to the Burlington County Jail. Officers nonetheless required him to strip naked for inspection by an officer, pursuant to "Burlington Jail's custom and practice, which every corrections officer follows." App. 55a. Florence was taken to an eight-foot-long stall with a partially opened curtain. The officer removed Florence's handcuffs and ordered him to "take off all [his] clothes." Florence Dep. 69, Dec. 22, 2006. Sitting at an arm's length away, the officer directed Florence to open his mouth, lift his tongue, and lift his arms. The officer required Florence to turn around so that he could examine Florence's backside. The officer finally ordered Florence to turn back around and lift his genitals for inspection.

Florence was held in the Burlington Jail for six days. During that lengthy period, neither Burlington nor Essex made any effort to inquire whether he was actually wanted for arrest. Nor did they present Florence to a magistrate judge to determine whether there was a basis to hold him. *See* N.J. Ct. R. 3:4-1(b) (bail must be set for persons arrested pursuant

to a warrant "without unnecessary delay, and no later than 12 hours after arrest"); *id.* R. 3:4-2(a) (if a detainee remains in custody, he "shall be brought before a judge for a first appearance . . . within 72 hours after arrest, excluding holidays"). Throughout this detention, jail personnel also refused to permit Florence to shower, or to provide him with a toothbrush, toothpaste, or soap.

The efforts of Florence's family to secure his release were foiled. April sought the assistance of the East Orange, New Jersey, office that had been responsible for issuing the fine, but the clerk directed her to go to the Newark courthouse. She sought help there, but the clerk of that court directed her to go to the Trenton courthouse. The most that she could secure in Trenton was additional paperwork confirming, yet again, that Florence had in fact paid the fine underlying the erroneous warrant. She then retained a lawyer, who continued the effort to secure his release.

3. After nearly one week, Florence was finally transferred to the Essex County Correctional Facility. At that time, the policy of that facility was that all arriving arrestees – without regard to the basis for their arrest – were to be strip-searched, with officers "observ[ing] carefully while the inmate undresses," examining the arrestee's mouth; ears, nose, hair, and scalp; fingers, hands, arms, and armpits; and all body openings and the inner thighs. Essex Department of Public Safety General Order No. 89-17 (App. 141a). (Soon after Florence's arrest, the Facility coincidentally changed its policy to conform to New Jersey law and limit strip searches of individuals arrested for minor offenses. *See* App.

58a; *see also* Essex County Jail Intake Policies (2007) (App. 145a).)

Jail personnel ordered Florence and four other detainees to enter a shower area together and strip as a group. Naked and under the close observation of two officers and in the plain sight of each other and other persons traveling through the room, the five detainees were all ordered together to open their mouths, lift their genitals, and then turn around, squat, and cough.

The next day, Thursday, officers transported Florence with a group of other inmates to the Essex County Courthouse. Florence's attorney appeared before a judge, who was "appalled" that a warrant ever existed for Florence's arrest in the first place and ordered his immediate release. Florence Dep. 139.

4. Florence subsequently filed this lawsuit pursuant to 42 U.S.C. § 1983 against municipal officials and various persons involved in his arrest and the two suspicionless strip searches. Among other claims, Florence alleged that (notwithstanding state law and their own stated policies) respondents engaged in a pattern or practice of conducting strip searches that were unreasonable under the Fourth Amendment because neither the nature of the offense nor the circumstances of the arrest gave rise to any reason to suspect that the detainee might be carrying contraband when he arrived at either jail. The district court certified a class of individuals who, during a specified period, had been subjected to a suspicionless strip search at the Burlington and Essex County facilities when detained for minor offenses. *Florence v. Bd. of Chosen Freeholders of*

the County of Burlington, No. 05-3619, 2008 WL 800970, at *17 (D.N.J. Mar. 20, 2008). Over the course of three years of litigation, the parties undertook extensive discovery, exchanging documents and conducting depositions of Florence and numerous employees of the jails.

The district court granted petitioner summary judgment. The court held that the Fourth Amendment forbids a suspicionless strip search of an individual arrested for a minor offense, if neither the nature of the offense nor the circumstances of the arrest create some reason to suspect the individual may be carrying contraband. App. 87a. The court contrasted this case with *Bell v. Wolfish*, 441 U.S. 520 (1979), which considered challenges to various procedures at the Metropolitan Correctional Center (MCC) in New York City. As is relevant here, MCC officials had determined not to engage in "close and constant monitoring of contact visits" between inmates and persons outside the institution "to avoid the disruption of the confidentiality and intimacy that these visits are intended to afford." *Id.* at 560 n.40. Instead, after every such contact visit, the inmate was required to "expose [his] body cavities for visual inspection as a part of a strip search." *Id.* at 558. Jail officials defended the policy on the ground that such direct contact between inmates and outsiders, which occurred without immediate oversight by jail personnel, could be used to smuggle contraband into the facility. *Id.*

This Court rejected the plaintiff-inmates' broad claim that a strip search cannot "*ever* be conducted on less than probable cause." *Id.* at 560 (emphasis in original). The Court held that the case instead called

for "a balancing" of several factors: "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.* at 559. The Court did "not underestimate the degree to which these searches may invade the personal privacy of inmates." *Id.* at 560. On the other hand, such a facility presents "serious security dangers." *Id.* at 559. This Court accepted the jail officials' submission that the searches were generally reasonable under the Fourth Amendment because, in the circumstances of that case, they were "necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution," which could be coordinated through contact visits. *Id.* at 558. It concluded that "under the circumstances, we do not believe that these searches are unreasonable." *Id.*

In this case, the district court recognized that "a circuit split has developed" over whether *Bell*'s authorization to conduct strip searches after planned and loosely supervised contact visits extends more broadly to permit such searches of all individuals upon their admission to a jail for any minor offense, whatever the circumstances. App. 73a. Upon considering the conflicting lines of decisions, the district court agreed with the "overwhelming weight of authority," *id.* 87a – the "eight circuits [that] presently agree that reasonable suspicion must be present before a strip search is conducted" of persons arrested for minor offenses, who logically would not be coordinating the smuggling of contraband, *id.* 72a. On the other hand, the district court specified that a policy which more narrowly "mandates strip searches

for all individuals charged with felonies or drug-related/weapons-related misdemeanor offenses may be upheld because such [a] policy contains an implicit recognition of reasonable suspicion, albeit a general one." *Id.* 70a.

The district court reasoned that a strip search is inherently a significant intrusion on personal privacy. *Id.* 72a. Moreover, in Essex County, the search took "place in the presence of other inmates, which further contributes to the humiliating and degrading nature of the experience." *Id.* 84a. With respect to the interests of the government, a policy categorically requiring a strip search of all individuals arrested for minor offenses illogically fails to consider both the nature of the offense (such as whether narcotics or weapons were involved) and the identity of the offender (treating "a hypothetical priest or minister" the same as "a gang-member arrested on an allegation of drug charges"). *Id.* Finally, the district court found it compelling that respondents failed to submit any evidence that would support their claims "of a smuggling problem" by individuals arrested without warning for minor offenses. *Id.* 85a. "Such a surprise [in being arrested for a minor offense] does not give the arrestee an opportunity to plan a smuggling enterprise, unlike an admitted inmate who has knowledge of a forthcoming contact visit." *Id.* 79a.

5. Having conclusively resolved petitioner's claims under the Fourth Amendment, the district court certified its order awarding Florence summary judgment for appeal; the Third Circuit accepted the certification and reversed by a divided vote. *Id.* 7a, 17a. The court of appeals held that the Fourth

Amendment permits a general policy of suspicionless strip searches upon admission to jail, whatever the circumstances, and concluded that respondents must be granted judgment as a matter of law even in the absence of any evidence that such a policy would detect or deter illegal activity.

From the outset, the court of appeals (like the district court) recognized the "clear dichotomy" between decisions of eight circuits invalidating such blanket strip-search policies and the contrary rulings of two other circuits upholding them. *Id.* 2a. The Third Circuit elected to join the minority view of this "circuit split." *Id.* 17a, 21a.

The majority opinion concluded that its holding was compelled by this Court's decision in *Bell*. The majority rejected the district court's conclusion that, unlike the contact visits in *Bell*, an arrest for a minor offense does not – without more – present the recurring prospect of a coordinated effort to smuggle materials into the facility. "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 on non-indictable offenses to smuggle weapons or other contraband into the facility." *Id.* 23a (emphases added).

The majority recognized that respondents had presented no "evidence regarding discovery of contraband on indictable and non-indictable offenders during intake, [or] the incidence with which gang members are arrested for non-indictable offenses." *Id.* 25a. Moreover, respondents had "not presented *any* evidence of a past smuggling problem or *any* instance of a non-indictable arrestee

attempting to secrete contraband." *Id.* 24a-25a (emphases added). But it read this Court's decision in *Bell* "to conclude that the Jails are not required to produce such a record." *Id.* 25a.

District Judge Pollak (sitting by designation) dissented. He would have found it unreasonable to conduct intrusive strip searches of "any citizen who may be arrested for minor offenses, such as violating a leash law or a traffic code, and who pose[s] no credible risk for smuggling contraband into the jail," particularly in the absence of "a single document[ed] example of anyone doing so with the intent of smuggling contraband into the jail." *Id.* 30a (quoting *Bull v. City & County of San Francisco*, 595 F.3d 964, 990 (9th Cir. 2010) (en banc) (Thomas, J., dissenting)). Judge Pollak concluded that it was implausible that individuals would with any regularity "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." *Id.* 31a n.1.

6. This petition followed.

REASONS FOR GRANTING THE WRIT

This case perfectly fits the criteria for this Court's review. The lower courts resolved the case by taking contrasting sides on a widely acknowledged eight-to-three circuit split. Only this Court can resolve that conflict, which is rooted in irreconcilable interpretations of this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). Review is also warranted because the ruling below cannot be

reconciled with this Court's Fourth Amendment precedents, which hold that such an intrusive search is reasonable only if there is some basis to suspect that the individual is engaging in some form of illegality, such as smuggling contraband.

Contrary to the view of the majority below, *Bell* does not compel a contrary result. Whereas *Bell* involved loosely supervised contact visits that were arranged with individuals outside the jail, it is far less likely that contraband will be smuggled when an individual is arrested without warning for a minor offense. The jail's interest in security moreover can be met through less intrusive searches of admittees.

Finally, this case is an ideal vehicle in which to resolve the question presented, because the parties compiled an extensive record and because the lower courts resolved the case entirely as a matter of law, and only on the basis of this single issue. Certiorari accordingly should be granted.

I. The Circuits Are Irreconcilably Divided Over Whether The Fourth Amendment Permits A Jail To Conduct A Suspicionless Strip Search Of Every Individual Arrested For Any Minor Offense, Whatever The Circumstances.

The Third Circuit held in this case that a jail may strip-search every individual arrested for any offense in any circumstance. Both the court of appeals and the district court recognized that the circuits are squarely divided over that question. App. 17a, 42a. Judge Kozinski has similarly written that the question whether the Fourth Amendment permits blanket strip searches of non-indictable offenders is an "interesting and difficult question"

that requires "guidance from the Supreme Court – which is entirely absent." *Bull v. City & County of San Francisco*, 595 F.3d 964, 982, 988 (9th Cir. 2010) (en banc) (concurring opinion). Relatedly, Judge Cabranes has explained that the question of how much deference the Fourth Amendment affords to jail officials in this specific context "calls out for resolution by the Supreme Court." *Shain v. Ellison*, 273 F.3d 56, 70 (2d Cir. 2001) (dissenting opinion). Further percolation of the question presented would serve no purpose, as the lower courts (like the Third Circuit in this case) now merely choose "which line of cases [they view as] more faithful to the Supreme Court's decision in *Bell*." App. 2a-3a.

Eight circuits have thus held that blanket strip searches of individuals arrested for non-indictable offenses violate the Fourth Amendment.[1]

---

[1] *See Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001) (reasonable suspicion is required "when the inmate has been charged with only a misdemeanor involving minor offenses or traffic violations, crimes not generally associated with weapons or contraband"); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) ("We hold that the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest."); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (when an individual is held for a minor offense not associated with possession of weapons or contraband and there is no individualized suspicion, "[a]n indiscriminate strip search policy routinely applied to [these] detainees . . . cannot be constitutionally justified simply on the

The Third Circuit in this case rejected that entire line of authority. App. 13a. It instead adopted the opposite position of the Ninth and Eleventh Circuits.[2]

---

basis of administrative ease in attending to security considerations"); *Jimenez v. Wood County, Texas*, 621 F.3d 372, 375-76 (5th Cir. 2010) (quoting *Stewart v. Lubbock County, Texas*, 767 F.2d 153, 156-57 (5th Cir. 1985) ("Because Lubbock County's strip search policy was applied to minor offenders awaiting bond when no reasonable suspicion existed that they as a category of offenders or individually might possess weapons or contraband, under the balancing test of *Wolfish* we find such searches unreasonable and the policy to be in violation of the Fourth Amendment.")), *reh'g en banc granted*, No. 09-40892, 2010 WL 4672930 (5th Cir. Nov. 18, 2010); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) ("[A]uthorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons ultimately will intermingle with the general population at a jail when there were no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail."); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1266, 1273 (7th Cir. 1983) (when detainees were arrested for "traffic, regulatory, or misdemeanor" offenses, "ensuring the security needs of the City by strip searching plaintiffs-appellees was unreasonable without a reasonable suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed"); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985) (holding that "security cannot justify the blanket deprivation of rights of the kind incurred here" when a detainee charged with a misdemeanor was subjected to strip and cavity searches); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984) (finding strip search unconstitutional when neither traffic violation nor individualized factors indicated arrestee might possess weapons or contraband).

[2] *Id.* 21a; *Bull v. City & County of San Francisco*, 595 F.3d 964, 975 (9th Cir. 2010) (en banc) (finding a policy of strip-searching all detainees who enter the jail's general population is

Only a decision of this Court can provide the uniform protection from unreasonable searches promised by the Fourth Amendment. The circuits are not only hopelessly divided, but that conflict is rooted in irreconcilable interpretations of this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). *Compare, e.g.*, App. 22a ("*Bell* did not require individualized suspicion for each inmate searched"), *with Roberts v. Rhode Island*, 239 F.3d 107, 110 (1st Cir. 2001) ("[I]n the context of prisoners held in local jails for minor offenses, the *Bell* balance requires officers to have a reasonable suspicion that a particular detainee harbors contraband prior to conducting a strip or visual body cavity search"). Certiorari should be granted to resolve that conflict.

II. The Ruling Below Conflicts With This Court's Fourth Amendment Jurisprudence.

A. This Court's Precedents Require Individualized Suspicion To Justify The Significant Intrusion Of A Strip Search Of An Individual Arrested For A Minor Offense.

Strip searches deprive an individual of the most tangible protection of his intimate personal privacy –

---

constitutional "because the circumstances before us are not meaningfully distinguishable from those presented in *Bell*"); *Powell v. Barrett*, 541 F.3d 1298, 1307 (11th Cir. 2008) (en banc) ("The *Bell* decision, correctly read, is inconsistent with the conclusion that the Fourth Amendment requires reasonable suspicion before an inmate entering or re-entering a detention facility may be subjected to a strip search that includes a body cavity inspection.").

his clothing. The search forces the individual to expose parts of his body that our society by law requires be kept from public view, and that as an adult he may never have previously revealed to anyone other than an intimate partner in a bedroom and medical professionals. The display is made before complete strangers, in forced circumstances that can suggest nothing other than that the individual is suspected of significant criminality. Whereas other privacy interests considered under the Fourth Amendment often involve the individual's desire to exclude the *government* from spheres that are in some sense public because they are open to friends and associates – such as a home or a car – a strip search demands the dramatically more significant forced exposure of intimate details that the individual may have throughout his life withheld from *almost everyone*.

As this Court recently explained, "[t]he meaning of [a strip search], and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). Then-Judge Breyer previously noted that "all courts that have considered the issue [have recognized] the severe if not gross interference with a person's privacy that occurs when guards conduct a visual inspection of body cavities." *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983).[3] The Third Circuit in this case itself

---

[3] *See also, e.g., Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996) (describing strip searches as an "extreme intrusion upon

acknowledged that a strip search constitutes an "extreme intrusion on privacy." App. 19a.

Such a gross invasion of personal privacy directly implicates the Fourth Amendment's guarantee against "unreasonable" searches. The 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). This Court's jurisprudence effectuates the Amendment's requirements by "generally requir[ing] a law enforcement officer to have probable cause for conducting a search." *Redding*, 129 S. Ct. at 2639. Depending on the circumstances, a search may be reasonable on a lesser standard of proof, such as reasonable suspicion, but *some* individualized basis

---

personal privacy, as well as an offense to the dignity of the individual" (citation and internal quotation marks omitted)); *Weber*, 804 F.2d at 802 ("so intrusive and demeaning"); *Mary Beth G.* 723 F.2d at 1272 (7th Cir. 1983) ("demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission" (citation and internal quotation marks omitted)); *Hunter v. Auger,* 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience."); *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." (citation and internal quotation marks omitted)); *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993) ("There can be no doubt that a strip search is an invasion of personal rights of the first magnitude."); *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992) ("It is axiomatic that a strip search represents a serious intrusion upon personal rights.").

to intrude upon personal privacy is nonetheless generally required. *E.g.*, *Chandler v. Miller*, 520 U.S. 305, 318 (1997) (recognizing "the Fourth Amendment's normal requirement of individualized suspicion"); *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968) ("This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."). Individualized suspicion is not required 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).[4]

Under these basic principles, it is unreasonable under the Fourth Amendment for jail officials to engage in the deep intrusion into personal dignity of a strip search of every single individual admitted into the facility, no matter what the circumstances. Such a search may be justified either if the nature of the offense creates a reason to suspect that the individual may possess contraband (such as an offense involving weapons or drugs), or if the circumstances of the arrest provide some reason to believe that the

---

[4] Although the protections of the Fourth Amendment in jail may be still further diluted for individuals who are incarcerated after having been duly convicted of crimes, Florence was merely an arrestee. *Cf. 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.").

individual may be attempting to smuggle materials into a jail (such as an individual submitting himself to a voluntary detention). In addition, petitioner does not challenge New Jersey's authorization of such a search for individuals who have a history of violence or a prior criminal conviction.

But this is not such a case. Although petitioner was not even arrested for a criminal offense, he was nonetheless subjected to a search that was deeply intrusive of his personal privacy. Neither the nature of petitioner's offense (failure to pay a fine) nor the circumstances of the arrest (a traffic stop, at which petitioner strongly protested being detained) remotely supports the supposition that petitioner was carrying contraband in his underwear, much less that he was doing so in an attempt to smuggle something into a jail. Respondents do not contend otherwise. Yet despite the absence of *any* reason to believe that he might possess contraband, petitioner was twice required to strip entirely naked, lift his genitals, and turn around to have his entire body closely examined by complete strangers. Because none of the justifications for conducting strip searches in the absence of individualized suspicion exists here, the intrusive search of Florence was unreasonable and violated his rights under the Fourth Amendment.[5]

---

[5] The search of petitioner in the Essex Jail raises additional Fourth Amendment concerns. Even when otherwise consistent with the Fourth Amendment, a strip search of a jail inmate "must be conducted in a reasonable manner." *Bell*, 441 U.S. at 560. In the Essex facility, however, the search was

It finally bears emphasizing that even absent sufficient suspicion to justify a strip search, jail officials have significant discretion to protect their legitimate interests in the integrity and security of their institutions through less intrusive searches that preserve the individual dignity of persons who have been arrested for minor offenses. No court doubts the authority of jail officials to require that all detainees be screened through a metal detector, then disrobe and appear in their undergarments.[6] Modern technologies, such as the Body Orifice Scanning System and full body scanners, provide additional mechanisms to detect contraband without requiring that the individual strip naked. *See* Charlie

---

unnecessarily public: petitioner was required to stand naked, turn around, and lift his genitals before four other inmates, multiple officers, and other persons walking through the room. Petitioner was not only stripped naked, but he was further required to crouch and cough to expel anything in his anus. As the district court recognized, the searches took "place in the presence of other inmates, which further contributes to the humiliating and degrading nature of the experience." App. 84a. Respondents offered no justification for significantly magnifying the intrusion of the search by conducting it in such public circumstances.

[6] *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d at 112 ("lacking reasonable suspicion that an individual is hiding contraband, Rhode Island could still search that person's clothes, a far less intrusive procedure"); *Giles v. Ackerman*, 746 F.2d 614, 618 (9th Cir. 1984) ("Of course, the County remains free to enhance its security by implementation of procedures that are less intrusive than strip searches, including the use of pat down searches and metal detectors and the segregation of inmates to isolate arrestees for minor offenses from the general jail population.").

Wojciechowski, "Whole Body Scans Nothing New to Jail Inmates," *NBC Chicago* (police chief explaining that the shift by Cook County Department of Corrections to full-body scanners for searches is "fantastic" and that "[w]e've gotten away from strip searches"), *available at* www.nbcchicago.com/news/local-beat/cook-county-jail-body-scans-85552562.html.

B. The Third Circuit's Reliance On This Court's Decision In *Bell v. Wolfish* Is Misplaced.

Respondents do not dispute that the strip searches in this case would be invalid if subject to the basic principle that the Fourth Amendment ordinarily requires some form of individualized suspicion to intrude so profoundly upon individual privacy and dignity. *See* Part II-A, *supra*. They instead contend that this case is controlled not by ordinary Fourth Amendment principles but by this Court's holding that, in certain circumstances, a suspicionless strip search of a jail inmate may nonetheless be reasonable. That argument lacks merit.

1. In *Bell v. Wolfish*, 441 U.S. 520 (1979), jail officials required that detainees who engaged in contact visits – *i.e.*, direct contact with someone from outside the facility with whom they had arranged to meet in person – without direct oversight by prison officials subsequently be subject to a strip search and visual inspection of their body cavities to determine whether they had received contraband during the visit. In upholding that policy, this Court did not broadly rule that the Fourth Amendment permits strip-searching all inmates whatever the circumstances. Nor did the Court hold that jail strip

searches were a unique context in which courts should abandon their reliance on evidence and common sense in determining whether searches are reasonable. Instead, it held that the Constitution "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. The Court held that "under the circumstances" presented, the searches in question were reasonable. *Id.* at 558.

This Court specifically accepted the jail officials' sensible determination that there was a realistic prospect that an inmate and a visitor would use a contact visit that occurred without direct supervision to smuggle illicit materials into the facility. According to the government, such visits "present a *unique* opportunity" for smuggling contraband into jails. Pet. Br. 72, No. 77-1829, *Bell v. Wolfish*, 1978 WL 207132 (emphasis added). The Court accepted the jail officials' determination that their search policy was "necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution." 441 U.S. at 558.

2. This Court's decision upholding the strip searches in *Bell* is inapplicable to the suspicionless strip searches in this case on two grounds. *First*, *Bell* expressly rests on a concern with "inmate attempts to secrete [contraband] into the facility," 441 U.S. at 559 – in that case, the prospect that such loosely supervised contact visits logically could be coordinated by the inmate and the visitor to smuggle material into the jail. That concern is absent here.

The Third Circuit's contrary assertion – that "it is equally reasonable to assume that a detainee will arrange for an accomplice on the outside to subject

himself to arrest for a non-indictable offense to smuggle contraband into the facility," App. 24a – is not realistic. "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). That is because "arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something. For the exceptions – for example, a person who is allowed to visit the bathroom unescorted before an arrest – reasonable suspicion may well exist." *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001).

As the dissenting judge below correctly recognized, it is 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." App. 31a n.1. Further, the logic of the majority below requires such a hypothetical conspiratorial arrestee to imagine that he could coordinate the specific jail to which he would be admitted and the particular inmates with whom he would then come into contact. Then, he would have to conclude not only that the contraband he was carrying would evade the jail's extensive ordinary searches – visual inspections of admittees in their undergarments, pat downs, and metal detectors – but also that nothing about the circumstances of his arrest would justify the jail's taking the more intrusive step of conducting a full strip search.

The majority below disagreed, reasoning that the Fourth Amendment was satisfied here because it was

assertedly "*plausible*" that individuals hypothetically might "subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility." App. 23a (emphasis added). Applying that exceptionally forgiving standard, the Third Circuit upheld the searches in this case despite the admitted inability of respondents to produce "any" actual proof that they materially assisted in deterring or detecting unlawful activity. *Id.* 25a.

That reasoning ignores the record in this case and conflicts with this Court's precedents. As the dissent below explained, "what might in some imagined circumstances be 'plausible' is without support in the record." App. 31a n.1 (Pollak, D.J., dissenting). Further, even in the prison context, a court must determine whether officials "show[] more than simply a logical relation, that is, whether [they] show[] a *reasonable* relation." *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion). The Constitution "requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Id.* at 535. "[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) (internal citation omitted).

It thus is not enough that respondents can generically point to a problem with smuggling in jails. Although this Court has shown jail officials considerable deference, it nonetheless has consistently insisted on a demonstration of the direct relationship between the goals of a policy that directly implicates protected constitutional rights and

the particular inmate population to which those policies apply. In *Washington v. Harper*, 494 U.S. 210 (1990), the Court emphasized the "exclusive application" of the policy at issue "to inmates who are mentally ill and who, as a result of their illness, are gravely disabled or represent a significant danger to themselves or others." *Id.* at 226. In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court took care to note that a policy limiting visits for certain inmates was limited to "[i]nmates who are classified as the highest security risks." *Id.* at 130. And most recently, in *Beard v. Banks*, 548 U.S. 521 (2006), it was significant that the policy was limited "to a group of specially dangerous and recalcitrant inmates," amounting to "about 0.01 percent of the total prison population." *Id.* at 525, 530 (plurality opinion).

Second, *Bell* is properly distinguished from this case on the ground that the detainees in *Bell* voluntarily submitted to the intrusion of a strip search by electing to engage in a loosely supervised contact visit in full knowledge of the jail's strip-search policy. The inmates in *Bell* could have avoided the strip searches but elected to give up some measure of privacy "to receive visitors and enjoy physical contact with them." *Shain*, 273 F.3d at 64 (citation and internal quotation marks omitted). Indeed, this Court has always placed significant weight on whether there are "'alternative means of exercising the right' available to inmates." *Shaw v. Murphy*, 532 U.S. 223, 230 (2001) (quoting *Turner*, 482 U.S. at 90). *E.g.*, *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003) (in sustaining a restriction on visitation rights, the Court emphasized that inmates

had "alternative means of associating with those prohibited from visiting"). By contrast, individuals such as Florence who are involuntarily arrested and then strip-searched are entirely powerless to avoid this dramatic intrusion on their privacy.

3. Because there is no significant logical basis for respondents' practice of strip-searching individuals arrested for minor offenses in circumstances that do not otherwise create any suspicion, respondents bear the burden to come forward with evidence demonstrating that such a policy is necessary to detect or deter criminality. If smuggling in the distinct circumstances of arrests of non-indictable arrestees were in fact a realistic problem, respondents with all their experience in running jails surely could come forward with *some* evidence of that fact. And respondents had every opportunity in the district court to build such a record. But both the district court and the majority below recognized that respondents were not able to provide any empirical evidence to support their speculation that arrests might be coordinated as an effort to smuggle materials into a jail. App. 24a-25a, 87a.

Even if respondents themselves were unexpectedly constrained in their ability to come forward with any evidence, certainly there would be some relevant experience in facilities around the nation demonstrating that individuals have arranged arrests on non-indictable offenses. For decades in the wake of *Bell*, the uniform view of the federal courts of appeals was that the Fourth Amendment forbids suspicionless strip searches of non-indictable arrestees, *see, e.g.*, *Tintetti v. Wittke*, 479 F. Supp.

486 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); that remains the rule in the great majority of the country.

But so far as the federal courts have been able to determine, 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." *Id.* 30a (Pollak, D.J., dissenting) (quoting *Bull*, 595 F.3d at 990 (Thomas, J., dissenting)). A report by the U.S. Department of Justice similarly concludes that the actual experience in jails does not justify policies requiring such sweeping searches. Instead, it identifies a distinct tendency "to exaggerate a possible security threat." William C. Collins, National Institute of Corrections, U.S. Department of Justice, *Jails and the Constitution: An Overview* 28 (2d ed. 2007), *available at* nicic.org/Downloads/PDF/Library/022570.pdf. In the wake of court rulings holding that jails may not adopt a categorical policy of strip-searching all non-indictable arrestees, jail officials "passionately believed that [the rulings] would result in major security problems because of dramatic increases in contraband entering the jail. However, these problems did not develop." *Id.* at 28-29.

Whatever thin justification respondents' bald assertions might provide for the searches of petitioner in this case evaporates entirely in the light of New Jersey law. The state legislature has adopted a comprehensive regime governing safety and security at correctional facilities, including with respect to the searches of arrestees. *See* N.J. Stat.

§ 2A:161A (App. 101a); N.J. Admin. Code § 10A:31-8.1-8.7 (App. 105a). Respondents offer no reason to doubt the legislature's competence to make such judgments. Yet state law explicitly provides that individuals arrested for a non-criminal offense "shall not be subjected to a strip search" in the absence of a warrant, consent, probable cause, or reasonable suspicion that the individual possesses a weapon or drugs. N.J. Stat. § 2A:161A-1 (App. 101a); *see also* N.J. Admin. Code § 10A:31-8.4 (App. 105a).

4. Even if this Court were to decline to accept the judgment of the State of New Jersey that it is unnecessary to strip-search individuals arrested for non-criminal offenses, the decision below could not be sustained on the basis of deferring to the judgment of respondents as jail officials. Respondents offer no reason to believe that circumstances in the Burlington or Essex facilities specially require suspicionless strip searches. Even more important, the jails' own formal policies forbid such a categorical approach. *See supra* at 5 (Burlington), 6-7 (Essex). Respondents cannot seriously maintain that such a suspicionless strip search is in fact necessary to maintain the security of the facility when both state law and the jails themselves nominally forbid it.

Furthermore, the United States Bureau of Prisons ("BOP") has determined that blanket strip searches are unnecessary to ensure security in its correctional facilities. Even in those jurisdictions in which such searches are permitted by the Fourth Amendment, the BOP still requires reasonable suspicion before conducting a strip search of those charged with minor offenses: "Detainees charged with misdemeanors, committed for civil contempt

(without also serving a concurrent criminal sentence) or held as material witnesses may *not* be [strip] searched visually unless there is reasonable suspicion that he or she may be concealing a weapon or other contraband." Civil Contempt of Court Commitments, Program Statement 5140.38, § 11 (2004) (emphasis added), *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc. *Cf. 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"); *McKune v. Lile*, 536 U.S. 24, 35 (2002) (Kennedy, J.) (relying on experience of the "Federal Bureau of Prisons and other States").

Finally, the Fourth Amendment reasonableness of respondents' strip searches of petitioner cannot be divorced from their antecedent decision to arrest petitioner for a non-criminal offense in the first place – indeed, to arrest him for an offense he did not actually commit. Respondents' concern that an individual in petitioner's position might hypothetically introduce contraband into the facility is an imagined dilemma entirely of their own making. The government in this case constructed a system under which it failed to determine correctly whether an individual was actually guilty of any offense, then arrested him for the utterly trivial failure to pay a fine, and then added the dramatic further intrusion of requiring him to strip naked in front of complete strangers, bend over, and cough. It simply is unreasonable to subject ordinary Americans to such extraordinary indignities.

III. This Case Presents The Ideal Vehicle In Which To Resolve This Important Question.

Certiorari should be granted in this case for the further reason that the suspicionless search of petitioner on the basis of his arrest for a non-indictable offense typifies the recurring factual circumstances of the cases that have given rise to the split in the courts of appeals. The underlying facts, including the scope and application of the jails' policies and practices, were the subject of extensive discovery in the district court, which wrote a thorough opinion. The court of appeals, in turn, considered and decided only this single question. The fact that the case involves two different jails, which apply different policies and conducted somewhat different searches in distinct circumstances, makes the case particularly well-suited as an opportunity to thoroughly explore the Fourth Amendment's application to searches of non-indictable arrestees.

Respondents moreover do not attempt to conjure up even a wildly hypothetical scenario in which Florence could have been attempting to smuggle materials into their facilities in his underwear or in his anus. Respondents would have to imagine petitioner as Houdini in reverse – full of almost magical slights and misdirection, all intended to get himself locked up – as he concocted an arrest warrant for a trivial offense (yet paid the fine to cover his tracks) and drove around with drugs taped underneath his testicles, ordering his pregnant wife to speed (with their four-year-old son in the back seat for cover), hoping to be arrested (while nonetheless protesting his innocence and showing the officer the official state paperwork to that effect) and hoping to

be taken to the Burlington and Essex County jails (despite the fact that New Jersey law required his prompt presentation to a magistrate and release) where he would meet up with fellow co-conspirators. That course of events is as absurd to articulate as it is offensive to believe. Yet it is inescapably the logic underlying the "reasonableness" of the searches in this case.

The conclusion that there was no justification for a strip search is even more obvious with respect to the Essex County facility. Upon Florence's transfer from Burlington County, he had *already* been strip-searched. Respondents knew that Florence was not carrying contraband because they already had stripped him naked and then kept him in a tightly controlled environment, with very limited contact with other inmates. Essex County's further strip search of petitioner served only to subject him to additional humiliation. *Cf. N.G. v. Conn.*, 382 F.3d 225, 233-34 (2d Cir. 2004) ("Whatever the justification for strip searches upon initial admission to a first detention facility, we see no state interest sufficient to warrant repeated strip searches simply because of transfers to other facilities."); *id.* at 238 (Sotomayor, J., concurring) ("Absent an individualized basis to believe that the plaintiffs had acquired contraband while in custody of the authorities, these re-entry searches violated Fourth Amendment standards of reasonableness.").

Additionally, the facts of this case place the privacy interest threatened by strip searches in stark relief. Not only are strip searches performed on individuals who are lawfully committed to jail; they are also applied to upstanding citizens who have done

nothing to deserve admission to jail in the first place, much less a humiliating strip search once they are detained. Florence is a hardworking financial director who clocks twelve-hour days. Florence Dep. 18. He is a middle-class family man, who, at the time of the arrest, was building a three-quarter million dollar home. *Id.* at 134. He is "put . . . on a higher pedestal" by his extended family, because he manages to hold a steady white-collar job. *Id.* at 147.

Florence's sworn deposition testimony confirms the dehumanizing intrusion of the searches in this case. At the time of the Burlington search, Florence had "never been . . . seen naked in front of a man," which made him "freak[] out" even more about the searches. *Id.* at 70. Because the officer had "look[ed] at [him] with no clothes on, naked, [Florence] just wanted to get away from him as quickly as [he] could." *Id.* at 73.

At the Essex County facility, Florence recalled, the search was particularly "painful" because he was "visualizing being stripped naked at Burlington and now being stripped naked at Essex." *Id.* at 129. "[A]ll you see is yourself being . . . looked at and . . . people eyeballing you, and I felt people were staring at me because they saw me naked." *Id.* at 117. Florence explained that being among a group of naked men made him "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.* at 130. Florence was "freaked" because he feared an officer would remark "he has a big penis or [a] small penis," all of which "was very uncomfortable." *Id.* at 117-18.

Florence has thus far resisted his family's suggestion that he see a psychiatrist or doctor to address the aftermath of these events. When he sees a State Trooper pull over a person, he experiences "anxiety" that the "person is going to go [through] the same treatment that I went through, the same strip search [and] the same men looking at you or belittling you . . . . You wonder about that and that's something that will always stick with me." *Id.* at 148. Florence's embarrassment was compounded because he felt dehumanized while in jail. He observed that the officers at both facilities "really don't care" about the inmates; "[i]t's a game to them." *Id.* at 130. To this day, when seeing a police officer, Florence's son asks, "Daddy, are you going to jail?" *Id.* at 175.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Susan Chana Lask
Counsel of Record
244 Fifth Avenue, Suite
2369
New York, NY 10001
(212) 358-5762
susanlesq@verizon.net

Thomas C. Goldstein
Amy Howe
Kevin K. Russell
GOLDSTEIN, HOWE &
RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

January 19, 2011