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 RESPONDENTS 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; JOHN DOES 1-5 OF BURLINGTON COUNTY JAIL, INDIVIDUALLY AND OFFICIALLY

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QUESTION PRESENTED

The District Court for the District of New Jersey certified the following question to the Court of Appeals for the Third Circuit: "whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment?" The Court of Appeals restated the question as "whether it is constitutional for jails to strip search arrestees upon their admission to the general population?"

[Pet. App. 1a; 46a].

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STATEMENT OF THE CASE

1. On March 3, 2005, April Florence was driving down I-295 in Burlington County, New Jersey, when she and her husband noticed that a state trooper was right behind them [J.A. 246a]. Mrs. Florence pulled off the highway and the police car followed. A mile later, when the state trooper put on his lights, Mrs.

Florence pulled over, handed the officer her license, registration, and insurance card, and presumably expected to be given either a warning or citation of some sort [*id*. at 246a-247a].[1] Instead, the officer returned and asked who owned the car [*id*. at 247a]. When Mrs. Florence identified her husband, Albert Florence, as the owner, the state trooper asked Mr. Florence to accompany him to the police car and then placed him under arrest [*id*. at 247a-248a]. Mrs. Florence was not arrested.

2. The state trooper arrested Mr. Florence that night because there was an outstanding warrant for Mr. Florence's arrest that had been issued in Essex County, New Jersey [J.A. 391a]. In accordance with settled New Jersey practice regarding outstanding arrest warrants, the state trooper took Mr. Florence first to State Police barracks for booking and then to the Burlington County Detention Center to be detained until the Essex County authorities picked him up.[2] The Detention Center, located in Mount Holly, is one of two correctional facilities operated by

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[1] Most such encounters result in the issuance of a ticket (i.e., a summons) and the immediate release of the driver.

[2] Arrested persons are taken to the police station (as Mr. Florence was taken to the barracks), but they are transported to a jail if, and only if, one of the following is true: (1) the charge is one of certain categories of crimes; (2) the arrestee had failed to appear when served with a summons; (3) there is reason to believe that the arrestee is dangerous to self, other persons, or property; (4) there is an outstanding warrant for the arrestee; (5) the identity or address of the arrestee is unknown or (6) there is reason to believe that the arrestee would not appear on a summons. N.J. Court Rule 3:3-1(c). If none of these five categories applies, the person is issued a summons at the station house and released. *Id*. This case, of course, qualified under the fourth category.

Burlington County. The other is the Correction Work Release Center in Pemberton. The Work Release Center houses females and some first-time male offenders who work outside the facility during the day. It is much smaller than the Detention Center, which houses approximately 450 inmates at any one time, all of them male.

The only jail about which Mr. Florence adduced facts in the district court was the Detention Center. Nevertheless, his class list includes persons arrested and committed to either facility between March 2003 and March 2007. The district court estimated from the records of commitments by date that the class from Burlington County might consist of 3900 non-indictable detainees (a number that somewhat overstates the number of persons in the class because some class members were arrested more than once during the class period) [J.A. 20a-21a]. By way of comparison, in 2004 – the most recent year for which the statistics are reported statewide – Burlington County had 18,147 non-traffic arrests of adults. State of N.J., Div. of State Police, Uniform Crime Report: State of New Jersey 2004 at 56, *available at* http://www.state.nj.us/njsp/info/ucr2004/pdf/2004_ucr_whole.pdf.

3. Mr. Florence spends quite a bit of his brief complaining about his arrest, angered because the judgment giving rise to his arrest warrant and subsequent incarceration had actually been satisfied shortly after the warrant was issued in April of 2003 [J.A. 85a]. But the State Police did not know that. The warrant still appeared on the computer as a valid and outstanding arrest warrant for a charge identified as "Hinder Prosecution." It was accompanied by an instruction "to the Sheriff of Essex County or any

law enforcement officer in New Jersey: You are ordered to take into custody the above defendant . . . and bring him/her before the Superior Court" in Essex County, and it had been duly signed by a Judge of the Essex County Superior Court on April 25, 2003 [*id*. at 89a-90a].[3] Of course, both the arresting officer and the Burlington County Detention Center had the right to rely on the accuracy of the warrant reporting system, a point that is not at issue here in any event, because Mr. Florence (and the class he represents) are not challenging New Jersey's practice of arrest and detention of persons with outstanding arrest warrants or, for that matter, the State's practices with respect to the maintenance or updating of warrant reporting. *Cf., Herring v. United States*, 555 U.S. 135, 146-47 (2009). There is no evidence in the record

[3] That warrant in turn arose from an incident in 1998, when – by his own account – Mr. Florence was stopped while driving a vehicle he did not own [J.A. 26a; 239a]. Rather than remain at the scene, he fled [*id*. at 239a]. He was subsequently arrested by the Maplewood police and charged with obstruction of justice, aggravated assault, and possession of a deadly weapon [*id*. at 241a-242a; 261a, 393a]. The district court found that most – if not all – of the originally charged offenses were indictable crimes, and that the two charges to which Mr. Florence pleaded guilty (hindering prosecution in violation of N.J. Stat. Ann. § 2C:29-3 and obstructing the administration of law in violation of N.J. Stat. Ann. § 2C:29-1) likewise appeared to have been indictable [J.A. 26a]. Nevertheless, Mr. Florence failed to make the agreed-upon monthly payments on the resulting $1574 fine; indeed between November 1999 and March 2003, he made only five payments (each for $50 or less) [*id*. at 85a]. Confronted with Mr. Florence's refusal to comply with the terms of his plea, the Honorable Joseph A. Falcone of Essex County issued a warrant for Mr. Florence's arrest in April of 2003 [*id*. at 89a-90a; *see also id.* at 81a, 85a]. Mr. Florence paid the entire balance less than a week later [*id*. at 85a].

that any class member other than Mr. Florence experienced any irregularity in the issuance or execution of an arrest warrant.

4. As part of the Burlington County Detention Center intake procedure and before he was placed among other inmates, Mr. Florence was "kwelled" – a term of art describing the process whereby a new detainee was taken to a shower and, with no one present except a single same-sex corrections officer, was given delousing lotion (Kwell), and was supervised to ensure that the Kwell was applied properly. Ten minutes after the Kwell had been applied, the new inmate was instructed to shower with warm, soapy water. Prior to having a new inmate shower, a corrections officer would observe him to see if there were any gang tattoos or evident signs of injury or illness and, of course, to look for any contraband. Under the intake procedures then in effect, if the corrections officer concluded that a given inmate should be subjected to a more rigorous search, he would mark the intake form to record that that inmate had been "strip searched" and would note the circumstances that led him to conduct the more intensive examination. The form that was filled out in Mr. Florence's case shows that he was "kwelled," but that he was not strip searched (as that term was used and understood by County personnel) [J.A. 390a].[4] Instead, the County referred to the

[4] The description in Mr. Florence's brief (at 5) – taken from his own deposition testimony – suggests that the process was more intrusive than that testified to by any of the Burlington County officers. Haywood Reeder, for example, testified that he gives an inmate Kwell and observes him while he is undressing to take the shower, makes sure that the inmate applies the Kwell, and checks for scars and marks. He also testified that he instructs every officer to conduct the process in the same way

inspection that was done as a matter of course prior to giving each new inmate Kwell as a "visual observation," not a "strip search."

5. While a person arrested pursuant to a warrant ordinarily would appear before a judge shortly thereafter for the setting of bail in accordance with N.J. Court Rule 3:4-1(b), in Mr. Florence's case the warrant had been issued by an Essex County Judge. Accordingly, the Burlington County Detention Center was obliged to house Mr. Florence until the Essex County authorities picked him up and transported him to the Essex County Correctional Facility in Newark, roughly 70 miles to the north. When Essex County officers brought him before a judge there, a week after his initial arrest, Mr. Florence was able to

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[J.A. 183a-186a]. Charles Palmer likewise testified that he stands with the new inmate while the inmate undresses "[j]ust in case they have anything else on them or anything we actually go through the clothes and make sure nothing else is on them. Make sure nothing gets into the jail . . ." [J.A. 218a-220a; *see also id*. at 116a-118a; 161a-166a; 230a-231a; 234a]. Of course, even according to Mr. Florence's version – and as his intake form confirms – he was never touched or asked to squat [*Compare* Florence Br. at 5 *with* J.A. 9a-13a]. In any event, the district court did not resolve whatever factual dispute may be said to exist, and the Court of Appeals agreed with the district court's conclusion that the factual dispute did not need to be resolved in order to address the legality of the intake process. 621 F.3d 296 (3d Cir. 2010) [Pet. App. 1a-32a, at 6a]. Both the district court and the Court of Appeals recognized that in seeking to represent the class of persons "strip searched" Mr. Florence limited his allegations to those of what the district court considered a "strip search." [J.A. 23a n.5; *see also* Pet. App. 5a n.1]. Finally, even if the disputed assertions made in Mr. Florence's brief were to be accepted as fact, he has still alleged a procedure less intrusive than that at issue in *Bell*, and the Court below affirmed the counties' procedures even given the facts Mr. Florence alleged.

demonstrate that the original judgment had been satisfied and that the outstanding warrant should not have remained open. He was then released.[5]

6. Mr. Florence then brought this suit against both Burlington County and Essex County, averring that:

> The Fourth Amendment of the United States Constitution prohibits state officials, such as the Defendants in this action and the employees they supervise, from performing blanket strip searches of arrestees who have been charged with misdemeanors or other minor crimes or violations and/or detainees as holdovers on warrants from other jurisdictions unless there exists a reasonable suspicion to believe that the arrestee/detainee is concealing a weapon or contraband

[Amended Compl., Dist. Ct. Dkt. 24 at ¶ 57]. His class allegations, however, referred only to "commitment" – i.e., to those persons who were to remain in the custody of the Burlington County Detention Center until released [*id*. at ¶ 39].

At class certification, the Honorable Joseph Rodriguez of the District Court for the District of New Jersey recognized that the class definition in the Amended Complaint "technically excluded" Mr. Florence from his own class, because Mr. Florence's class definition had not included holdovers [J.A. 25a n.6] – i.e., those persons being held pending transfer to another jurisdiction. He therefore modified the definition of the class to read:

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[5] Some detainees stay at the Detention Center over six months, while others are transferred or released in a matter of days. The average time a detainee remained at the Detention Center in 2010 was just shy of one month.

> All arrestees charged with non-indictable offenses[6] who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants' 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

[*id*. at 43a].[7] The district court concluded that because the detainees at issue here were observed while

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[6] Under New Jersey law, a non-indictable offense is an offense that provides for imprisonment of six months or less, whether or not a fine is also provided for. *See* N.J. Stat. Ann. § 2C:1-4.

[7] Mr. Florence's brief includes some incorrect and misleading statements about the members of the class. Burlington County provided two reports to the plaintiffs, one of which contained a list of individuals processed for non-indictable offenses, and one of which contained a list of all individuals detained by Burlington County [*See* Dist. Ct. Dkt. 67]. It is true that some of the offenses discussed by Mr. Florence in his brief – such as improper riding of a bike, lack of audible signals, and a noisy muffler – appear on the latter (all persons jailed) list, but those offenses are listed *only in conjunction with other offenses or outstanding warrants*. One of the persons on the latter list, for example, Commit No. xxx191C, had two arrests listing violations for "no audible signals." Those arrests were both based on multiple offenses, however: on one arrest he also had an outstanding warrant for non-support, and on the other he also had multiple outstanding contempt of court warrants. Moreover, at the time of those arrests, Commit No. xxx191C had been previously arrested for both controlled substance and weapons violations, and during the class period alone he was arrested six times. It is thus not surprising that, while Commit No. xxx191C appears on the list of persons in the jail, he does not appear

naked, that absence of clothing rendered the observation of those detainees a strip search, without regard to the terminology the County used [Pet. App. 65a].[8]

By defining the class in that manner, the district court appeared to recognize a broad class that included both inmates who had been "visually observed" as a part of the kwelling process and those who had been subjected to more intensive searches.[9] But by excluding from the class all instances in which corrections officers had articulated a reasonable suspicion for a strip search, the district court effectively defined a class consisting *only* of persons who were visually observed, because, as discussed above, whenever an officer determined that a strip search or visual body cavity search was warranted, he marked the form accordingly, and stated the reasons. Only

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on the list of class members. For that matter, notwithstanding the representations in Mr. Florence's brief, no one on Burlington County's class list was committed to the Detention Center because of improper riding of a bike or lack of audible signals. All such persons appeared only on the more comprehensive list.

[8] Contrary to Mr. Florence's characterization, Burlington County did not "abandon" the distinction it drew; it merely defended its practice as constitutional – whether that practice was labeled a "strip search" or referred to by its proper designation of "visual observation" [*Compare* Florence Br. at 8 *with* Joint 3d Cir. Br. (Burlington Argument) at 7, 8, 17]. Burlington County has consistently maintained – and maintains here – that the intake procedures used at the time Mr. Florence was incarcerated were constitutional without regard to the words the district court used to describe them.

[9] In using the terms they used, the officers were merely echoing then-N.J. Admin. Code 10A:31-1.3 (2005) ("'Strip Search' means a thorough and systematic examination of an unclothed person's body and orifices, including visual inspection of external genital and anal areas, as well as the person's clothing and all personal possessions."); [*see also* Pet. App. 5a n.2].

the forms filled out for Mr. Florence and the class (Mr. Florence's appears at [J.A. 390a]) would have no reason identified – because they were all marked "not strip searched" and were instead marked "individual was showered, kwelled, and visual observation was made for recent injuries" [*id*.].

7. The district court later ruled, in response to cross-motions for partial summary judgment, that the intake process at issue here violated the Fourth Amendment of the United States Constitution as a matter of law. 595 F. Supp. 2d 492 (D.N.J. 2009) [Pet. App. 48a-100a, at 87a]. The defendants asked that the district court certify an appeal to the Court of Appeals for the Third Circuit [Dist. Ct. Dkt. 165, 166, 167]. Over the plaintiff's opposition, the district court certified the appeal at 657 F. Supp 2d 504 (D.N.J. 2009) [Pet. App. 35a-47a], and the Court of Appeals heard it. The panel – with the Honorable Judges Thomas Hardiman and Dolores Sloviter in the majority and Louis Pollak (sitting by designation) in dissent – reversed the district court and decided (in accord with the en banc decisions of the Courts of Appeals for the Ninth and Eleventh Circuits) that "the security risk was defined by the fact of detention in a correctional facility" and that individualized suspicion was not necessary for the procedures in question. 621 F.3d 296 (3d Cir. 2010) [Pet. App. 1a-32a, at 22a-23a].[10]

8. Mr. Florence asked this Court to grant certiorari to consider a somewhat broader question than the

[10] The Court of Appeals cited in support its earlier opinion in *Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000) ("[I]t is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security.") [Pet. App. 22a].

question addressed by the Court of Appeals [*Compare* Pet. App. 1a ("This interlocutory appeal requires us to decide whether it is constitutional for jails to strip search arrestees upon their admission to the general population") *with* Florence Br. at i ("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")]. In point of fact, the Court of Appeals never held that everyone who is placed under arrest – no matter where or under what circumstances – can be strip searched. Nor has Burlington County ever contended that it could strip search every individual arrested for every minor offense. Under New Jersey Court Rules, most persons arrested for minor offenses are given a summons and released. Those persons, and persons who post bail, typically are not confronted with any searches at all. The practice that Mr. Florence and the class have challenged in this case is Burlington County's procedure of delousing and observing every new detainee upon his intake into the Burlington County Detention Center. That was the practice the Court of Appeals considered and upheld, and it is the practice that Burlington County defends as constitutional here.

SUMMARY OF THE ARGUMENT

This Court decided *Bell v. Wolfish*, 441 U.S. 520 (1979) over three decades ago. Since then, the case has been cited over 11,000 times. Almost all of those citing the case agree that in *Bell* the Court articulated a balancing test, weighing a plaintiff's privacy interest against the institutional interest to ascertain whether a plaintiff has set forth a constitutional violation. This Court has decided other cases since, and those cases in no way undermine the holding of

Bell. Instead, the cases flesh out what "institutional interests" mean in the context of a jail – and what a prisoner's "privacy" means in that same context. In following these precedents, what the Court of Appeals for the Third Circuit did in this case was unremarkable. In point of fact, the holdings of this Court have been so consistent in their recognition of the hazards and challenges that jail administrators face, and the concomitant deference that is due to the administrators who are seeking to address those challenges, that Mr. Florence seeks to align himself with persons stopped and searched while driving down a highway. But he was not searched on a highway. He was searched in jail. And that fact is of critical importance in defining the proper constitutional analysis to apply here.

ARGUMENT

I. JAILS ARE NOT FOURTH AMENDMENT PROTECTED SPACES AND THE PERSONS WITHIN THEM HAVE LIMITED OR NO FOURTH AMENDMENT RIGHTS.

This Court has repeatedly and flatly rejected the idea that prisoners possess the "ordinary citizen" privacy interest that Mr. Florence advocates. In *Lanza v. New York*, 370 U.S. 139 (1962), a case that preceded *Bell* by almost two decades, the Court had the opportunity to address whether a wiretapped conversation in a jail visiting room "was a violation of those principles of the Fourth Amendment which have found recognition in the Due Process Clause of the Fourteenth." *Id*. at 141. The Court dismissed the notion (which it called "at best . . . novel") that a jail was a constitutionally protected area. While recognizing that the Court has been generous in con-

struing Fourth Amendment protection, extending it to business offices, stores, hotel rooms and automobiles, the Court went on to say that "it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Id*. at 143. The Court quoted this very language twenty years later in *Hudson v. Palmer*, 468 U.S. 517 (1984), when it concluded that a "right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Id*. at 527-28. In other words, it has long been settled in this Court that neither a prisoner nor the cell that person occupies has an "ordinary" right of privacy.

Mr. Florence does not discuss these holdings. Instead, he tries to draw a distinction between "arrestees" and persons who have been convicted [*See* Florence Br. at 19].[11] But the class at issue here was not merely arrested; each person in the class was also jailed. And this Court has expressly stated that when a person is in jail, the line between pretrial detainees and convicts is drawn only by virtue of Eighth Amendment constraints, necessary because

[11] He also contends that there is a distinction between persons who are charged with "indictable" offenses and those who are charged with "non-indictable" offenses, a difference that he finds meaningful based on his insistence that the sole purpose of the "search" is to detect contraband, and his assumption that those who are accused of committing "non-indictable" offenses are less likely to attempt to bring contraband to jail than those who are accused of committing indictable offenses. As explained *infra*, the institutional interests at issue here extend beyond the interception of contraband. Moreover, Mr. Florence presented no evidence that persons accused of non-indictable offenses posed less of a risk than those accused of indictable offenses.

the state cannot "punish" a person until he or she has been found guilty. *Bell*, 441 U.S. at 537 n.16. Mr. Florence has not alleged, on behalf of his class, that the intake process at the Burlington County Detention Center was "punishment." Accordingly, under *Bell*, what Mr. Florence and his class are challenging is a condition of confinement for a class much like *Bell*'s.[12] *Id*.

In *Bell*, the district court had differentiated between the rights of pretrial detainees and the rights of convicted prisoners. The Court of Appeals for the Second Circuit had affirmed that distinction in part, relying heavily upon the ground that pretrial detainees are "presumed to be innocent." *Id*. at 528, 532. This Court, however, held that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id*. at 533. Moreover, *Bell*, like this case, did not present the question whether the plaintiff was properly detained (a question that the Court had previously answered in *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)):

> The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. These legiti-

[12] In considering whether the practice of visual body cavity searches following visitation was constitutional, the Court in *Bell* reserved the question whether the Fourth Amendment even applied. 441 U.S. at 558 ("However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches are unreasonable" (internal citations omitted).)

> mate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial. We need not here attempt to detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention. It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.

Bell, 441 U.S. at 540. As a consequence, the Court held that the visual body cavity searches were justified and constitutional.

Certainly, as Mr. Florence stresses, the Court recognized that the practice at issue in *Bell* – visual body cavity searches – was humiliating and intrusive. In recognition of that fact, Burlington County's practice at the time of Mr. Florence's arrest was that even strip searches as defined by then-N.J. Admin. Code 10A:31-1.3 (2005), discussed *supra* at n.9, were per-

formed only if there was a particular reason to do so. The practice that is at issue here – visually observing a new detainee during kwelling – was the only practice that was followed during all intakes. In upholding that practice, the Court of Appeals recognized that it was brief in duration, conducted in private, and less intrusive than the practices at issue in *Bell* [Pet. App. 19a-20a]. These factors were the ones identified as significant in *Bell* itself: "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." 441 U.S. at 559.

With all due respect, Mr. Florence's overgeneralization of "strip searches" fails to distinguish the actual practice at issue here from more intrusive, more public, or apparently gratuitous procedures. But those distinctions are important. Just as jails are distinct from backyards and summonses are different from warrants, a private visual observation preceding a delousing shower is distinct from all sorts of more humiliating procedures. *Cf.*, *Campbell v. Miller*, 499 F.3d 711 (7th Cir. 2007) (reviewing a search in an "open" backyard of a defendant who was issued a citation at the time and released); *Hill v. McKinley*, 311 F.3d 899 (8th Cir. 2002) (upholding procedures to address an unruly arrestee but finding that leaving the woman restrained and naked for an extended period violated her right to privacy). The mere fact that a number of these procedures included disrobing does not render them interchangeable for purposes of the *Bell* analysis.

Moreover, *Bell* is not the Court's last word on this point. That decision was followed a few years later by *Hudson*, *supra*, and by *Block v. Rutherford*, 468 U.S. 576 (1984). Although *Block* has quite a bit to

say about the issues Mr. Florence has raised, he cites that case at only two places in his brief (pages 12 and 37), suggesting both times that the lack of a constitutional right to contact visits diminished the petitioners' privacy interests. Mr. Florence is incorrect in that regard.[13] What diminished the prisoners' privacy interests was the fact that they were in jail.

In *Hudson*, the Court reaffirmed that jails and prisons are not Fourth Amendment protected spaces and that the rights of inmates are obviously circumscribed by the nature of incarceration. Thus, the Court's recognition that prisons are not "beyond the reach of the Constitution" was qualified:

> [W]hile persons imprisoned for crime enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the circumscription or loss of many significant rights. These constraints on inmates, and in some cases the complete withdrawal of certain rights, are "justified by the considerations underlying our penal system." The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of "institutional needs and objec-

[13] It is not at all clear that the Court was rejecting the constitutional significance of the right at issue in *Block*. When the Court in *Turner v. Safley*, 482 U.S. 78, 96 (1987) weighed the restrictions at issue there against the "constitutionally protected marital relationship in the prison context," it was weighing a (different) restraint on the same class of rights. And although the majority in *Block* found that precluding contact visits was a reasonable restraint, the dissent would have required a stronger showing than was made in *Bell* to justify the restraint because the right to "enter into, maintain, and cultivate familial relations [that] is entitled to constitutional protection" impinged on a fundamental right while the practices challenged in *Bell* did not. *Block*, 468 U.S. at 599.

> tives" of prison facilities, chief among which is internal security.

468 U.S. at 524, *citing*, inter alia, *Bell*.

Turning specifically to whether a person in prison can have a "justifiable," "reasonable," or "legitimate" expectation of privacy in his cell, the *Hudson* Court concluded:

> Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.
>
> * * *
>
> A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that "[loss] of freedom of choice and privacy are inherent incidents of confinement."

Id. at 525-26, 527-28, *quoting in part Bell*, 441 U.S. at 537. Of particular importance here, *Hudson* draws no constitutional distinction between "close and continual surveillance of inmates" and the "close and

continual surveillance of . . . their cells." 468 U.S. at 527.

Hudson's holding that prisoners have no reasonable expectation of privacy was expressly reiterated by this Court in *Samson v. California*, 547 U.S. 843, 848 (2006). In *Samson*, the Court defined the privacy interests of *parolees* – even though parolees are no longer within the confines of the institution itself – by reference to institutional needs. Moreover, the Court rejected as "misplaced" Mr. Samson's insistence (similar to Mr. Florence's) that the constitutional adequacy or infirmity of one state's policies is apparent from an examination of the practices of other jurisdictions. "That some States and the Federal Government require a level of individualized suspicion is of little relevance to our determination whether California's supervisory system is drawn to meet its needs and is reasonable, taking into account a parolee's substantially diminished expectation of privacy." *Id*. at 855. If a person who has left a penal institution carries with him a diminished expectation of privacy, how much less sense would it make to hold that a person who is entering a penal institution is entitled to an undiminished expectation of privacy?[14]

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[14] As the Court of Appeals for the Eleventh Circuit found in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc), there is no "serious dispute" that inmates of the same sex may be required to shower together and that guards of that sex may watch them while they are showering to prevent any misconduct. *Id*. at 1313 n.6, *citing Oliver v. Scott*, 276 F.3d 736, 746 (5th Cir. 2002); *Johnson v. Phelan*, 69 F.3d 144, 145-46 (7th Cir. 1995) and *Timm v. Gunter*, 917 F.2d 1093, 1101-02 (8th Cir. 1990). Mr. Florence cites several cases in support of his "circuit split" that do not focus on *inmates* but were instead decided in the context of a person who – although he or she might be

The *Lanza-Bell-Hudson* cases, taken together, stand for the proposition that conditions in jail simply do not raise Fourth Amendment questions, and that while there are other constitutional protections that prisoners retain, the Fourth Amendment is not among them. But even if one were to argue that those cases do not reach that far, they stand at least for the proposition that any limited Fourth Amendment rights that may remain are secondary to institutional security. In any case, it is safe to say that what one *cannot* conclude under these cases is that the expectation of privacy in jail is the same as the expectation of privacy that a citizen has while living at home, driving an automobile, or attending school. Yet that foreclosed conclusion is exactly the argument that pervades Mr. Florence's (and his amici's) briefs.

Even in those Courts of Appeals that Mr. Florence views as supportive of his position, it is widely recognized that once a person has been confined (or, in the alternative, convicted but released), privacy interests are severely limited. *E.g.*, *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992) ("With the person's loss of liberty upon arrest comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment"); *Oliver v. Scott*, 276 F.3d 736, 744 (5th Cir. 2002) (rejecting plaintiff's equal protection claim where female guards

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placed under arrest – was to be released right away. *See, e.g., Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993) ("In this case, it is undisputed that plaintiffs were arrested for minor traffic violations and were awaiting bail . . . ."); *Stewart v. Lubbock Cnty.*, 767 F.2d 153, 158 n.1 (5th Cir. 1985) (dissent: "For example, I have no doubt that it is not unreasonable to strip search minor offenders when, due to overcrowding, they must be placed temporarily with the more serious offenders").

observed male inmates in showers and bathrooms; while plaintiff could claim a privacy right under either the Fourth or Fourteenth Amendments, "[p]risoners retain, at best, a very minimal Fourth Amendment interest in privacy after incarceration"). Because none of those cases provides him any help, Mr. Florence turns to cases weighing the intrusiveness of warrantless searches against the privacy rights of a person who is going about the business of one's daily life, cases such as *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009) (schoolchild); *Chandler v. Miller*, 520 U.S. 305 (1997) (drug testing of candidates); and *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (drug testing of certain railway employees).

Moreover, even if one were looking to the cases on which Mr. Florence relies for guidance, they support the proposition that when a rule of general application is adopted in furtherance of an institutional interest, individualized suspicion is not required. In such cases, the Court has substituted an evaluation of the institutional interests giving rise to the policy for the objective analysis attendant upon individually targeted searches. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080-81 (2011), *citing Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (upholding drug testing against the reduced privacy expectation of student athletes); *Skinner*, 489 U.S. at 620 (same for Government's interest in regulating the conduct of railroad employees to ensure safety). In the jail context, institutional interests assume even more importance, because a student athlete or a railroad employee (or, for that matter, anyone who chooses to fly), has chosen that activity, and because of the benefit of participation has an independent incentive to comply with the rules, while an inmate has been

brought to jail precisely because he is suspected of (or has been convicted of) violating the law.

Other cases, such as *Safford*, are even less apposite, because they concern the level of suspicion required when an institution has singled out an individual for a search. It is only in those situations that reasonable suspicion is required. Even so, the searches in those cases were not motivated by law enforcement goals, and the Fourth Amendment analysis "requires some modification of the level of suspicion of illicit activity needed to justify a search," making probable cause unnecessary.[15] 129 S. Ct. at 2639, *quoting New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

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[15] Of course, Mr. Florence also relies on cases that discuss the extent to which and when law enforcement can initiate individually targeted warrantless searches for law enforcement purposes. *See Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk), *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (automobile search), *Thornton v. United States*, 541 U.S. 615 (2004) (same), *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (narcotics stop); *Florida v. Rodriguez*, 469 U.S. 1 (1984) (airport questioning of traveler). The Former Attorneys General of New Jersey (in a brief drafted by the American Civil Liberties Union) suggest that the Court ought to find that officers are specially trained to make individualized suspicion determinations and "'make inferences from and deductions about the cumulative information available' and 'draw on their own experience and specialized training' to analyze factors that 'might well elude an untrained person.'" Amicus Br. at 14, *quoting United States v. Arvizu*, 534 U.S. 266, 273 (2002). That quote, of course, is from this Court's consideration of the deference due to a border patrol officer who decides whether to stop a suspicious vehicle for further investigation. The former Attorneys General thus ask this Court to apply the quintessential law enforcement warrantless search standard, even though the officers whose conduct is at issue here are not in the field deciding the proper scope of an investigation but are, instead, admitting inmates to jail.

II. THIS COURT HAS REPEATEDLY RECOGNIZED THE INSTITUTIONAL INTERESTS AT ISSUE HERE.

A. Jail Administrators Are Owed Considerable Deference in Determining How to Protect Inmates and Employees.

This Court has persistently emphasized that jail administrators understand and can better respond to the needs of the persons under their care than litigants (or courts) can. In *Bell*, this Court discussed not only the diminished privacy interests set forth above, but also the heightened institutional interests of the jail.

> [M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. "[Central] to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.

441 U.S. at 546-47 (internal citations omitted). The Court went on to say:

> Finally, as the Court of Appeals correctly acknowledged, the problems that arise in the day-

> to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Id. at 547-48 (internal citations omitted). It was only after establishing this framework that the Court considered the specific complaints of the inmates. In rejecting the holding by the Court of Appeals that inmates had to be allowed to receive food packages, the Court observed, "Certainly, the Due Process Clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." *Id*. at 554. It also found that visual body cavity searches were both non-punitive and war-

ranted by the security needs of the institution. *Id*. at 560-61.

When the Court decided *Block* it reiterated the same principles: "[C]ondition[s] or restriction[s] of pretrial detention" are weighed against the institutional interests being protected to ensure that the conditions or restrictions are non-punitive and the institutional interests legitimate. 468 U.S. at 584. In striking that balance, courts ask whether the challenged restriction is "reasonably related to a legitimate governmental objective" or is "arbitrary or purposeless." *Id*. Even Mr. Florence has not suggested that the limited and uniform policy at issue here was "arbitrary or purposeless." Moreover, the *Block* Court went on to stress – as the Court had said in *Bell* (and even earlier in *Pell v. Procunier*, 417 U.S. 817, 827 (1974)) – that courts should play a "very limited role" in "the administration of detention facilities" because the administrative considerations are "peculiarly within the province and professional expertise of corrections officials" and, absent "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters." *Block*, 468 U.S. at 584-85 (internal quotations and citations omitted). As a result, the Court concluded that a complete prohibition on contact visits for even the most minor offenders was an "entirely reasonable, nonpunitive response to the legitimate security concerns identified, consistent with the Fourteenth Amendment." *Id*. at 588.

1. *Turner* Establishes a Proper Framework in Which to View the Institutional Interests.

The analysis in *Bell* and *Block* set forth the principles used in weighing institutional interests against an inmate's asserted rights. Accordingly, when the Court decided *Turner v. Safley*, 482 U.S. 78 (1987), it was reaffirming an already-established principle:

> If *Pell*, *Jones*, and *Bell* have not already resolved the question posed in *Martinez*, we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations."

Id. at 89. Moreover, this Court subsequently decided *Washington v. Harper*, 494 U.S. 210 (1990), in which it said: "We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Id*. at 224, *citing Turner*, 482 U.S. at 85.

Given this Court's statements, it is surprising that Mr. Florence does not advance a supported argument on why he thinks the procedure at issue here fails the *Turner* test. Instead, in his final footnote, he says only: "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" [Florence Br. at 40 n.14]. This conclusory averment neither addresses the rea-

sons that the County articulated in support of its policy nor accounts for the costs that the County demonstrated it would have to bear – not just administratively but in terms of reduced protection of its personnel and inmates – in order to accommodate Mr. Florence. It follows that Mr. Florence's dissatisfaction is not evidence sufficient to disprove the validity of the procedures the County put into place. *See Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.")

As set forth *infra*, the threats Burlington County seeks to protect against are real and serious, and the adoption of a procedure to address these challenges is both legitimate and non-punitive. The alternatives Mr. Florence proposed in the district court – such as purchasing BOSS chairs – would be costly for the County to implement, and even if they might detect some contraband, they are designed only to detect metal,[16] and they do nothing at all to protect against lice infestations, Methicillin-resistant Staphylococcus aureus ("MRSA") or other infectious diseases, or gang violence.

Under *Turner*, the Court applies four factors to measure the reasonableness of a regulation. 482 U.S. at 89. First, there must be a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id*. Second, courts may ask "whether there are alternative means of exercising the right that remain

[16] According to the BOSS promotional materials posted at http://www.bodyorificescanner.com/, magnetic field sensors trigger an alarm when metal is detected.

open to prison inmates." *Id*. at 90. Third, the court considers the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id*.[17] Fourth, and finally, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id*. at 91. As Burlington County explained in its brief to the Court of Appeals, the application of *Turner* to uphold segregating gang members implicated the same institutional concerns – and called for the same deference – that an attempt to identify gang affiliation upon intake did [*See* Joint 3d Cir. Br. (Burlington argument) at 15, discussing *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002)].

In applying *Turner* to uphold similar intake procedures employed by the City and County of San Francisco, the en banc Court of Appeals for the Ninth Circuit held in part:

> The reasonableness of a search is determined by reference to its context. The search policy before us applied to arrestees transferred out of holding cells and introduced into the general jail population for custodial housing. According to San Francisco's unrebutted testimony, the purpose of the strip search policy was to prevent the smug-

[17] Under the third *Turner* factor, this Court has said that deference is particularly important when "the right in question 'can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike.'" *Thornburgh v. Abbott*, 490 U.S. 401, 418 (1989) (excluded publications).

> gling of drugs, weapons, and other contraband into the general jail population. Because the purpose of the search policy at issue was to further institutional security goals within a detention facility, the principles articulated in *Bell v. Wolfish* and *Turner v. Safley* govern our analysis. Cases that address searches of arrestees at the place of arrest, searches at the stationhouse prior to booking or placement in a holding cell, or searches pursuant to an evidentiary criminal investigation do not control our review, because housing in the general jail population and the issues attendant to effective detention facility administration are not factors in those cases.

Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 971 (9th Cir. 2010) (en banc) (internal citations omitted). This reasoning is consistent with the lineage of *Turner*. In other words, *Turner* informs and clarifies the proper dimensions of the relative rights under the *Bell* analysis, and application of *Turner*'s analysis to this case clearly demonstrates that the procedures at issue here are constitutional.

2. *Turner* and *Bell* Are Not Inconsistent.

Mr. Florence's dismissiveness of *Turner* may be attributable in part to the fact that the Court of Appeals for the Third Circuit saw no need to consider *Turner*. The same reluctance was manifested by the en banc Court of Appeals for the Eleventh Circuit in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008). Indeed, although both the en banc Courts of Appeals for the Ninth and Eleventh Circuits have upheld practices similar to those at issue here, they disagreed as to what effect *Turner* had upon the *Bell*

analysis. In contrast to the Ninth Circuit's analysis in *Bull*, the Court of Appeals for the Eleventh Circuit held that *Turner* did not overrule *Bell*, but noted that a defendant that met *Bell*'s standard would satisfy what it perceived as the more defendant-friendly *Turner* standard as well. *Powell*, 541 F.3d at 1302-03.

It is surprising that courts would be wary of *Turner*, given the way this Court's precedents developed and the fact that *Turner* expressly applied the principles set forth in *Bell*. The choice of phrasing of the Court of Appeals for the Eleventh Circuit was odd as well; given that *Turner* relied on *Bell*, it is hard to see how one could wonder whether *Turner* "overruled" *Bell*.

Perhaps the Court of Appeals for the Eleventh Circuit – like Mr. Florence – perceived *Lanza*, *Bell*, and *Hudson* as implicating an "ordinary" Fourth Amendment analysis that is somehow inconsistent with the deferential level of scrutiny *Turner* requires. But the fact is that *Bell* and *Turner* are not inconsistent. *Turner* deference is an application of the Court's emphasis on the proper role of institutional needs and its concomitant recognition that rights that are restricted cannot state a violation of a constitutional right in the jail or prison context except to the extent the violation of that claimed constitutional right undermines the "right to petition the government for the redress of grievances;" the protections "against invidious racial discrimination;" or "the protections of due process." 482 U.S. at 84.

In *Turner*, the Court began with the articulation of those three constitutional rights. The Court went on, "*Because prisoners retain these rights*, '[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge

their duty to protect constitutional rights.'" *Id*. (emphasis supplied) (citation omitted). The Court's holding in *Turner* was consistent with the results reached earlier in *Bell*, *Block*, and *Hudson*. And, in fact, in each of the pertinent pre-*Turner* cases, the Court included due process analyses and either reserved or rejected the applicability of the Fourth Amendment as the controlling constitutional principle. In *Bell*, for example, the Court merely "assum[ed] for present purposes" that "some Fourth Amendment rights" are retained upon commitment to a correctional facility. 441 U.S. at 558; *and see* quote and discussion *supra* at 14 & n.12. Likewise, as quoted and discussed *supra* at 18-19, the Court – notwithstanding its caution to hold that "the Fourth Amendment is inapplicable in a given context" – did just that in *Hudson*, holding that there could be no legitimate expectation of privacy in a prison cell, and that "the Fourth Amendment proscription against unreasonable searches" does not apply within those confines, because whatever expectation of privacy a prisoner has must "always yield to what must be considered the paramount interest in institutional security." 468 U.S. at 525-28; *see also Lanza*, 370 U.S. at 141, 143 (inquiring about "those principles of the Fourth Amendment which have found recognition in the Due Process Clause of the Fourteenth" and finding the concept of a constitutionally protected area within a jail "at best a novel argument").

None of these cases can be read to hold that the Fourth Amendment's protection against searches is a "retained constitutional right" once a person has been transferred to the custody of a prison or jail. Yet that

is precisely what Mr. Florence argues, positing that under *Johnson v. California*, 543 U.S. 499, 510 (2005) – a case involving an equal protection challenge – *Turner* should be considered inapplicable to Fourth Amendment rights because those rights, like the rights at issue in *Johnson*, are "consistent with proper incarceration." [Florence Br. at 19]. But a careful reading of *Johnson* leads to the *opposite* conclusion, because in *Johnson* the Court also recognized that some rights and privileges are limited or withdrawn upon lawful incarceration. 543 U.S. at 510. Precisely the same principle of limited or withdrawn rights was articulated – and the same case, *Price v. Johnston*, 334 U.S. 266, 285 (1948) was relied upon for support – in describing as limited (or nonexistent) Fourth Amendment rights at issue in both *Bell*, 441 U.S. at 545-46, and *Hudson*, 468 U.S. at 524; *see also Samson*, 547 U.S. at 848. *Johnson* thus affirms that holding.

Now, to be sure, there are contexts in which this Court has rebuffed efforts by courts to modify the way Fourth Amendment rights are analyzed. In *Albright v. Oliver*, 510 U.S. 266 (1994), for example, a defendant had claimed a substantive due process right to be free from "prosecution except upon probable cause." *Id*. at 268. The Court declined the invitation to apply the Fourteenth Amendment and applied the Fourth Amendment instead. *Id*. at 271. There are two possible ways to harmonize *Albright* and *Harper*, although at the end of the day the difference between the approaches may be more rhetorical than doctrinal.

First, courts have – albeit more frequently in the context of excessive force – found that the Fourth Amendment is a proper measure for deprivations of

liberty but not conditions of detention. *See Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir.) (en banc), *cert. denied*, 522 U.S. 1030 (1997).[18] Under this reading, when the Court reserved the Fourth Amendment question in *Bell*, it was resolved by (and practices

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[18] As with the *Bell* line of cases, this Court left open the possibility that the Fourth Amendment protections against excessive force cease at some point in *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (not resolving whether the Fourth Amendment continues to provide protection against deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins). As the Court of Appeals for the Sixth Circuit recently observed in *Aldini v. Johnson*, 609 F.3d 858, 865 n.6 (6th Cir. 2010), the Courts of Appeals are split as to where to draw that line, with the Second, Eighth, Ninth and Tenth Circuits holding that, if the arrest is warrantless, the line is crossed when arraignment occurs or when the arrestee leaves the custody of the arresting officer(s). The Fifth Circuit construes the line as blurred, *id*., while the Fourth, Seventh, and Eleventh Circuits hold that once a person has been arrested, the Fourth Amendment is no longer relevant and the question is, instead, one of substantive due process. *Id*.

The question of what precisely triggers the transition has been addressed relatively infrequently and inconclusively in strip search cases, but there are courts that recognize a point of transition. At least some courts view strip searches differently depending on whether the person being searched is going to he admitted to jail. *See, e.g., Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); *Dobrowolskyj v. Jefferson Cnty*., 823 F.2d 955, 958 (6th Cir. 1987); *Archuleta v. Wagner*, 523 F.3d 1278, 1284 (10th Cir. 2008) (upholding searches of arrestees intermingled with general population of a corrections facility, but not those awaiting bail, and stating that when an arrestee is kept alone in a holding cell, the "obvious security concerns inherent in a situation where the detainee will be placed in the general prison population are simply not apparent"); *but see Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984) (intermingling is only one (and not the determinative) factor in assessing the reasonableness of a strip search).

such as those at issue here would clearly be governed by) *Turner*.

Second, *Turner* could be read merely to define the proper "weight" to be placed on each side of *Bell*'s balancing test when a person is incarcerated. As the Court of Appeals for the Seventh Circuit explained in *Peckham v. Wisconsin Dep't of Corr.*, 141 F.3d 694 (7th Cir. 1998), under *Bell* and its progeny there are some retained Fourth Amendment rights, but, "given the considerable deference prison officials enjoy to run their institutions, it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment." *Id*. at 697.

Under either construction, the privacy right of an inmate – whether it is non-existent or de minimis – does not trump the institutional interests that animated the decision that observing new detainees as they prepare to "kwell" and shower would be a single minimally intrusive step that would help to prevent the spread of lice and communicable diseases, to identify gang affiliation, and to detect contraband.

B. Mr. Florence Has Not Overcome the Deference Due to the Burlington County Detention Center.

Burlington County proffered several health and safety institutional interests that led to its decision that everyone admitted to the jail should be subject to the minimally intrusive intake procedures. In addition to the self-evident protection against lice, Burlington County discussed the threats it faced from contagious diseases such as MRSA and from gang infiltration, as well as from contraband – the institutional interest that had been articulated in

Bell [Burlington Summary Judgment Br., Dist. Ct. Dkt. 130 at 8-10 & Ex. A, C; Joint 3d Cir. Br. (Burlington) at 15-17; Joint 3d Cir. App. at 133-166, 175-227]. And the standard form itself stated that "visual observation was made for recent injuries" [*e.g.*, J.A. 390a], permitting corrections officers to identify circumstances when there was a need for medical treatment, or, for that matter, circumstances that might signal a suicide risk or need for other mental health intervention and/or treatment.[19]

The district court weighed Burlington County's institutional interests, and they are thus before the Court here. Yet rather than proffer any evidence that Burlington County did not face the problems that it does, Mr. Florence merely insisted below – and insists here – that the only justification the courts should weigh is the interception of contraband. He then went on to argue that there was insufficient linkage of contraband and misdemeanants to warrant a strip search [*Compare* Florence Summary Judgment Br. Dist. Ct. Dkt. 137 at 4-5, *with* Florence 3d Cir. Br. at 19-24 *and with* Florence Br. at 17-18; 28-35]. While recognizing that Burlington County had proffered other reasons, the Court of Appeals found that even the interception of contraband alone was enough to justify the practice at issue [Pet. App. 28a n.9].

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[19] A recent study showed that of the suicides taking place in jails, 84 percent took place in county jails, and almost a quarter of jail suicides occurred during the first 24 hours after intake. While 77 percent of jails provided some form of intake screening, only 8 percent of the victims were on suicide watch at the time of death. Nat'l Ctr. on Insts. & Alts., National Study of Inmate Suicide (May 29, 2010), *available at* http://www.corrections.com/news/article/24586.

Mr. Florence (and some of his amici) denigrate the institutional interests that were articulated by Burlington County, suggesting that they are somehow fictitious – or at least overstated. He is not the first to employ such a tactic given an inability to demonstrate any impropriety in the balance between the minimal privacy interest and weighty institutional concerns. *See, e.g., Banks v. United States*, 490 F.3d 1178, 1189 (10th Cir. 2007) (upholding the federal DNA Analysis Backlog Elimination Act against a Fourth Amendment challenge and observing that plaintiffs attempted to "overcome the minimal weight on their side of the scale by criticizing the link between the Government's stated interests and the Plaintiffs' status as non-violent felons"). Mr. Florence's doubts did not meet his burden to place "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations," and the Court of Appeals was right to defer to the jail administrators' "expert judgment in such matters." *Block*, 468 U.S. at 584-85. The institutional challenges facing Burlington County Jail – and jails all over this country – are very real, and they have been documented in case law, publicly available literature, and elsewhere.[20]

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[20] Moreover, it is disingenuous for Mr. Florence to complain – on this interlocutory appeal – about any lack of direct evidence in the record. When Burlington County explained to the district court that it had boxes of records it had collected on inmates documenting, inter alia, gang membership and contraband, the district court brushed the point aside, saying that the constitutionality of Burlington County's practice was a question of law, and not of fact [J.A. 354a-357a]. Given this exchange, and given the fact that *Bell* had already affirmed the penological importance of protecting against contraband, Burlington County attached exhibits on summary judgment that focused on the

In a case that began not dissimilarly to Mr. Florence's, an officer in Urbana, Illinois stopped a car after its driver disobeyed a traffic sign. The officer ran both the driver and the passenger through the computer and found that the passenger had an outstanding warrant for his arrest. At the Champaign County Correctional Center, the officers strip searched the defendant and found a bag containing 15 rocks of cocaine. *People v. Johnson*, 778 N.E.2d 772 (Ill. App. Ct. 2002), *appeal denied*, 788 N.E.2d 732 (Ill. 2003). In affirming the constitutionality of the statute that permitted such searches, the court did not mince words:

> Jails and correctional officials have a legitimate and substantial need, along with a corresponding duty, to prevent arrestees from smuggling weapons or contraband into a detention facility. The practice of strip searching detainees before their intermingling with the general jail population is a necessity for the health and safety of the arrestee, other inmates, and the correctional officers.

Id. at 779. *See Bull*, 595 F.3d at 969 ("Jail officials found contraband on arrestees charged with a range of offenses, including non-violent offenses such as public drunkenness, public nuisance, and violation of a court order"); *Powell*, 541 F.3d at 1310-11 (discussing cases).

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less-developed health and gang identification issues [Burlington Summary Judgment Br., Dist. Ct. Dkt. 130 (Ex. A, C)]. Similarly, Essex County attached exhibits documenting gangs and contraband in its facility [Essex Summary Judgment Br., Dist. Ct. Dkt. 131 (Ex. K)].

Burlington County Detention Center's administration is responsible for the health and safety of all inmates and all staff – which of course includes the new detainee. That new detainee will be housed with persons accused of all manner of crimes, and there is no assurance as to any incoming detainee's health or hygiene. Contrary to the contentions of the former Attorneys General, New Jersey's Administrative Code has in other contexts spelled out in detail almost identical procedures to meet an analogous articulated purpose. *See* N.J. Admin. Code 13:92-5.3(a)(9), (10), (11) (explaining signs, including lice and bruises, that are to be identified by officials when a juvenile is admitted to a facility).[21]

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[21] With all due respect, the former Attorneys General have been remarkably selective in their portrayal of state law, both in this regard and in their failure to discuss then – N.J. Admin. Code 10A:31-1.3 (2005) and 10A:31-8.5(b)(1)-(7) (2005). The first of these (10:31-1.3) is discussed *supra* at n.9. The other allowed a strip search of anyone – regardless of the level of offense – upon commitment to an Adult County Correctional Facility, as well as, inter alia, of anyone with a prior conviction of a crime. It coexisted with a different Code provision limiting strip searches on persons arrested for a non-indictable offense. The provision permitting strip searches on admission has since been amended to reach only persons arrested for a crime. But, of course, the conduct in question would be measured by the law then in effect. And at that time, officials presumably were aware not only of these Code provisions but that the statutory limitations on strip searches were meant to "provide greater protection than is afforded by the Fourth Amendment." *State v. Hayes*, 743 A.2d 378, 384 (N.J. Super. Ct. App. Div. 2000) (determining that, under the statute, the police could not strip search a defendant being held while they ran a search to determine if there were additional outstanding warrants because the defendant was not then "lawfully confined.") Officials presumably were likewise aware that the limitations were motivated by a concern that persons arrested but not to be admitted to jail not be strip searched. *See id*.; *see also State v.*

Even more intrusive screenings have been upheld as justified by such institutional needs. In *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000), for example, a case cited by Mr. Florence, two strip searches were upheld, one based on individualized suspicion and the other based on institutional health concerns. When it decided *Powell*, the Court of Appeals for the Eleventh Circuit superseded its holding as to the first search. *See* 541 F.3d at 1301. In upholding the other search – which was not at issue in *Powell* – the Court of Appeals observed that "[t]he Alabama legislature has mandated that sheriffs 'exercise every precaution to prevent the spread of disease among the inmates.'" *Skurstenis*, 236 F.3d at 683, *citing* Ala. Code § 14-6-95. Pursuant to this mandate, the Shelby County jail instituted a policy of searching all inmates who have been admitted to the general jail population for communicable diseases at the earliest possible time during their incarceration. Because of the prevalence of head and body lice among inmates and because of the difficulty in sanitizing an area after lice have been found, one of the prime objectives of the search was to determine if an inmate had such lice. *Skurstenis*, 236 F.3d at 683. Based on that justification, the court upheld a cross-sex examination for lice, performed by a nursing assistant, in which the assistant "ran his fingers through" her head and pubic hair, *id*. at 681, reasoning that the intrusion was minimal, and, because of the threat of the

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Sheppard, 483 A.2d 235, 238-39 (N.J. Super. Ct. Law Div. 1984) ("While law enforcement officers have a legitimate interest in uncovering weapons or contraband, that interest is not without boundaries. The mere fact that a person is validly arrested, as here, does not provide the arresting officer an invitation to a limitless search absent some justification beyond the mere inability to post bail.")

transmission of body lice among inmates, the search was justified. *Id*. at 683. Surely that process is more humiliating than a same sex officer observing an inmate – from a distance – and then ensuring that he applies delousing shampoo properly, leaves it on for ten minutes, and showers it off.

In any event, "fine-tuning" to make the policy less observant would not eliminate criticism. Indeed, when the Court of Appeals for the Seventh Circuit upheld a policy that struck a different balance and implemented a more limited delousing policy, the lack of supervision and intervention caused the court to be skeptical. *See Russell v. Richards*, 384 F.3d 444 (7th Cir. 2004) (applying the Fourteenth Amendment to consider whether delousing violated a right to be free from unwanted medical treatment).

> There are some shortcomings in the jail's efforts to avoid such infestations by administering the delousing shampoo to new inmates, which may help to explain why the jail, by its own admission, finds itself disinfecting one or more cell blocks every six months or so. First, inmates are not told that they should leave the delousing shampoo in their hair for ten minutes, as the instructions accompanying Liceall shampoo advise. Second, as we have noted, no effort is made to ensure that an inmate uses the shampoo at all. Third, inmates are not asked to follow-up the initial application of Liceall with a second application seven to 10 days after the first, as the instructions recommend. Fourth, lice can infect not just the scalp but other areas of the body, but no prophylactic efforts are taken to address anything but head lice.

Id. at 446.

Lice are not the only health hazard that the Detention Center explained to the district court and the Court of Appeals [*See* Burlington Summary Judgment Br., Dist. Ct. Dkt. 130 at 9; Joint 3d Cir. Br. (Burlington Argument) at 16]. Communicable diseases such as MRSA can be easily spread and are costly to treat. The New Jersey Department of Corrections has posted on its website two videos entitled: MRSA: What You Need To Know and MRSA: Preventing Outbreaks in NJ Prisons. *See* http://www.state.nj.us/corrections/pages/index.shtml. That website also provides links to further information documenting the seriousness of the threat MRSA poses to inmates and staff. Indeed, in an argument plainly designed to promote its own profession, amicus Medical Society of New Jersey acknowledges and affirms the seriousness of the health threat jails face but suggests that they are effectively met only if medical (or at least medically trained) personnel conduct more intensive examinations. Suffice it to say that a better audience for that sort of policy argument might be the Board of Chosen Freeholders, or perhaps the state legislature.

Nor were health risks the only dangers Burlington County raised below. The County is also trying to protect its personnel and inmates from gangs. Recently, Burlington County was identified as one of only seven counties in New Jersey with over 100 active gangs. *See* N.J. Dep't of Law & Pub. Safety, Div. of State Police, Intelligence Section, Gangs in New Jersey: Municipal Law Enforcement Response to the 2010 NJSP Gang Survey, *available at* http://www.senatenj.com/uploads/district9/gangs-in-nj.pdf. The earlier 2007 report noted that gangs were present in 68 percent of Burlington County's municipalities [Joint 3d Cir. App. at 225]. Protection

against violence – and, in particular, gang violence – poses a serious challenge for the jail administration. In fact – as Burlington County discussed in its brief before the Court of Appeals – that court has affirmed the segregation of gang members under *Turner v. Safley*, 482 U.S. 78 (1987), thereby acknowledging the threat they pose to institutional security. *See Fraise v. Terhune*, 283 F.3d 506, 520-21 (3d Cir. 2002).

The State of New Jersey Commission of Investigation described the dominance of gangs in New Jersey's state prisons in a report entitled: Gangland Behind Bars: How and Why Organized Criminal Street Gangs Thrive in New Jersey's Prisons . . . and What Can be Done About it (May 2009), *available at* http://www.state.nj.us/sci/pdf/Gangs%20SCI%20Report%20Full.pdf. That report made several observations that confirm Burlington County's concerns.

- "[Department of Corrections] officials testified that the current identification process may effectively pinpoint as many as 90 percent of gang members entering the system or as few as 15 percent." *Id*. at 36.
- "Perhaps more troubling, the Commission found through a survey of the 21 County Prosecutors' Offices that they are seeing individuals otherwise known to be gang members with diminished and/or less obvious tell-tale tattoos, clothing and other physical markers." *Id*.
- "[F]ew counties currently use those same [gang identification] criteria" as the state prisons do. *Id*. at 37 (which, of course, undermines statewide identification and containment efforts).

Finally, it should be said that Mr. Florence's minimization of the concerns that Burlington County has raised surely should have no place in a judicial system willing to entertain lawsuits by those inmates who have experienced the very harms that the County's policy sought to protect against. *See, e.g., Hall v. Cole*, No. 08-4904 (NLH), 2009 U.S. Dist. LEXIS 6412, at *27-30 (D.N.J. Jan. 28, 2009) (refusing to dismiss Eighth Amendment claims against the warden, certain named correctional officers, and the Burlington County Board of Freeholders where an inmate alleged that he was housed with a person with infectious open sores and that he contracted infectious lesions from him); *Paulino v. Burlington Cnty. Jail,* No. 07-5315 (RBK), 2010 U.S. Dist. LEXIS 132509, at *1-2 (D.N.J. Dec. 14, 2010), *aff'd*, No. 10-4795, 2011 U.S. App. LEXIS 15113 (3d Cir. July 21, 2011) (dismissing on summary judgment lawsuit brought by pretrial detainee assaulted by gang member while awaiting trial).

In sum, Burlington County advanced profound (and sound) institutional rationales in support of its policy. The County believes that a proper response to those concerns is for it to treat all inmates for lice and to conduct a minimal initial observation to screen for obvious signs of contagious disease, gang affiliation, and contraband. It is easy to lose sight of the pragmatic and protective nature of these goals when reading Mr. Florence's provocative brief. He invites visceral reactions – but reactions that are directed toward the entirety of Mr. Florence's experience, not the kwelling process itself.

For that matter, it appears that much of Mr. Florence's brief is directed toward an entirely different complaint: what Mr. Florence and his amici

seem really to want is for some category of offenders (presumably "non-indictables") not to go to jail at all, either because persons who commit such offenses should not be arrested or because they should not be taken to jail even if placed under arrest. One could certainly write such a rule. But it would have nothing to do with the question before this Court: whether observing detainees upon entry to the jail is reasonably related to the protection of those who work at and reside in the jail.

Apparently hoping to appall his readers, Mr. Florence discusses cases (and sometimes not even cases, but simply newspaper articles) from other jurisdictions where what many would view as outrageous arrests occurred – and a strip search (often abusive) – accompanied the arrest. This attempt reaches its apex at pages 25-26 of his brief where he prefaces his argument by saying: "The police thus regularly invoke their settled power to arrest an individual lawfully for any minor offense." He then describes a case in which a child was taken to a juvenile detention center for eating a french fry in a District of Columbia metro station [Florence Br. at 25]. But that child was neither kwelled nor strip searched.[22] And, of course, whatever the Court rules here will have no impact on whether the District of Columbia is allowed to require that juveniles who violate the law be brought to detention centers – or

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[22] Mr. Florence does not explain that the Court of Appeals for the District of Columbia upheld the District's zero tolerance policy despite the fact that adults violating the policy received a citation carrying a $10-$50 fine, while children were taken to a juvenile detention center until their families retrieved them. *Hedgepeth ex rel. Hedgepeth v. WMATA*, 386 F.3d 1148, 1159 (D.C. Cir. 2004).

whether a zero-tolerance policy on eating in train stations makes sense. Nevertheless, Mr. Florence uses that case as a springboard for describing three newspaper articles (from 1980, 1982, and 1983, respectively) that recount stories of women allegedly arrested and abusively strip searched – two in the District of Columbia and one in Maryland – in support of his proposition that outrageous strip searches "abound" [*id*. at 25-26].[23] It is hard to see how stories of the mistreatment of women in other jurisdictions during the 1980s have any bearing on how and why New Jersey – much less the Burlington County Detention Center – conducts its intake procedure and whether that procedure is constitutional.

III. "INDIVIDUALIZED SUSPICION" IS NOT A COHERENT OR WORKABLE STANDARD IN A DETENTION CONTEXT.

The practice at issue here – like the practices at issue in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (drug testing of student athletes), *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 825 (2002) (drug testing of students participating in a variety of extracurricular activities), and *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 620 (1989) (same for certain railroad employees) – is a generalized procedure that is implemented to prevent harm to all inmates and staff. Nothing in *Bell* sets forth a requirement of individualized suspicion, which may explain why the Court has included *Bell*

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[23] Mr. Florence also discusses two actual strip search cases (both also of women) – one discussed by the dissent in *Bull*, and another the subject of the decision by the Court of Appeals for the Sixth Circuit in *Masters v. Crouch*, 872 F.2d 1248, 1250 (6th Cir. 1989).

among cases where individualized suspicion is not required due to an institution's special, non-law enforcement needs. *Vernonia*, 515 U.S. at 663-64 n.3.

In this instance, even more than with drug testing, the reliability and effectiveness of the policy depends upon the consistency and predictability of its application. The Court of Appeals recognized – as now-Chief Judge Kozinski had recognized in *Bull* – that the downside of "individualized suspicion" is that it injects subjectivity into a process that should be generally applied. *See Bull*, 595 F.3d at 983 (Kozinski, J., concurring) (when an institution performs blanket searches, it "trade[s] the protection afforded by individualized suspicion for protection derived from the fact that the government treats all similarly situated people in precisely the same way"). This trade-off is justifiable, because "[t]he potential for abuse in a 'reasonable suspicion' scheme is high, particularly where reasonable suspicion may be based on such subjective characteristics as the arrestee's appearance and conduct at the time of arrest" [Pet. App. 27a]. Moreover, as this Court has observed in the law enforcement context:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but

> they may be "literally impossible of application by the officer in the field."

New York v. Belton, 453 U.S. 454, 458 (1981) (citation omitted).[24]

The regime that Mr. Florence and many of his amici propose is even more unworkable than a restriction placed on police in the field. An offense level is not a reliable indicator of a person's likelihood to have lice or a communicable disease – or, for that matter, gang membership. And while one might expect persons committing certain sorts of offenses to be more likely to try to transport certain sorts of contraband (e.g., a person accused of a non-indictable controlled substance offense might be more likely to attempt to bring in controlled substances than persons accused of other offenses, whether indictable or not), the charge alone does not provide enough information for a jail to formulate "individualized suspicion."

There is likewise no evidence that a charge is a reliable measure of the risk the violator poses. As the district court noted, many offenses in New Jersey could be either indictable or non-indictable offenses, depending upon the penalty – including the charge on which Mr. Florence's warrant was issued [J.A. 26a]. Moreover, even if one were able to separate, say, non-indictable trespassing from indictable trespassing, one would still be unable to say which of those offenders would be the more likely to be gang members or to have contracted MRSA or lice. An officer admitting a detainee into the jail cannot be deemed to know how hostile or erratic the detainee's behavior

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[24] The Court's conclusion in *Belton* was criticized by the Court in *Arizona v. Gant*, 129 S.Ct. 1710 (2009).

was up to and during arrest and booking; to know whether a thorough search will show outstanding warrants under other names or in other states' or federal databases; or to know the full circumstances giving rise to the arrest. And that officer certainly does not know the person's health or hygiene history or his or her gang affiliation (absent a record of previous detentions at that jail). Indeed, all that an admitting officer can be deemed to know for certain is that the arresting officer and the officer at the police station determined that detention was proper in accordance with the standards set forth in New Jersey Rule of Court 3:3-1(c).

In *Block*, the district court proposed permitting the jail to deny visits to some persons while mandating that the jail permit visits for others. The Court recognized that any such line would be unworkable:

> There are many justifications for denying contact visits entirely, rather than attempting the difficult task of establishing a program of limited visitation such as that imposed here. It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits. Additionally, identification of those inmates who have propensities for violence, escape, or drug smuggling is a difficult if not impossible task, and the chances of mistaken identification are substantial. The burdens of identifying candidates for contact visitation – glossed over by the District Court – are made even more difficult by the brevity of detention and the constantly changing nature of the inmate population.

468 U.S. at 587. Although drawing on *Bell* rather than *Block*, the en banc Court of Appeals for the Eleventh Circuit reached the same conclusion in *Powell*:

> The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. It finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities. The Supreme Court made no distinction in *Bell* between detainees based on whether they had been charged with misdemeanors or felonies or even with no crime at all. Instead, the policy that the Court treated categorically, and upheld categorically, was one under which all "[i]nmates at all Bureau of Prison facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." *Bell*, 441 U.S. at 558, 99 S. Ct. at 1884. It was a blanket policy applicable to all.

Powell, 541 F.3d at 1310. And the Court of Appeals for the Ninth Circuit considered at great length how its own precedents would make a rule that allowed strip searches for only certain classes of persons unworkable:

> How is a Deputy Sheriff confronted with a suspect arrested on possible charges of vandalism (like plaintiff Bull), burglary (like plaintiff Timbrook) or interfering with a police officer (like plaintiff Galvin) going to know whether such individuals are subject to search? Finally, we get to the most troublesome category: cases

where the deputies determine there's individualized suspicion for a search. The district court found this includes anyone with a prior involving weapons, controlled substances or violence, thereby importing all the ambiguities discussed above. But even arrestees without relevant priors may be searched if their conduct raises suspicion that they're smuggling contraband. So what exactly does that encompass? While struggling to prove that no member of the protected class has ever been found with contraband in their private spaces . . . plaintiffs classify an arrestee who was "nodding off," and another who was "nervous," as inmates as to whom there was individualized suspicion. If "nodding off" and "nervous" are sufficient for individualized suspicion, can "gave me a dirty look," "was hyperactive" or "had poor posture" be far behind? How, exactly, are deputies to know what does and does not amount to individualized suspicion, and who ultimately decides? Administering this category, like the others discussed above, will require a fair amount of trial and error, and a substantial degree of judicial involvement . . . It's easy enough to say who is and is not going to enter the general population of a jail, just as it's easy to say who is going to engage in a contact visit, board a commercial aircraft, enter a public building, drive a railroad or play high school football. The activity in question defines the class. But once courts start carving out constitutionally favored sub-classes because the members belong to some imaginary group with a lower risk rating than the class as a whole, courts cannot avoid getting intimately involved in the conduct of the activity. This one case has

> generated a substantial record, countless lower court pleadings and no less than seven appellate opinions – so far. And *Yourke*, a case involving just a single strip search, has been ongoing over six years. If plaintiffs here succeed, every strip search will become a potential federal case. Federal judges will start running the jails, along with pretty much everything else.

Bull, 595 F.3d at 985-87 (Kozinski, J., concurring) (internal citations omitted). With all due respect, the institutional costs of making a wrong call as to which persons are the "right" ones to kwell are high, and, given the balancing under *Bell* and *Turner*, whatever de minimis privacy interest a detainee might retain plainly does not warrant subjecting other inmates or jail personnel to illness, violence – or liability – for performing an imperfect calculus about who is "suspicious" and who is not.

CONCLUSION

People go to jail because a judge makes a decision – to issue a warrant, to deny bail, or to sentence. In each instance, the judge has determined that the threat to public safety trumps a person's right to remain "on the street." By definition, gathering all such threats under one roof creates an unsafe place. Yet despite the inherently unsafe nature of a jail, wardens are charged with ensuring the safety of both the inmates and the people working at the jail. One long-accepted element of maintaining safety and security entails watching all inmates at all times, drawing no lines based on what the inmate is doing or why the inmate was admitted. Consistent with that philosophy, in this case and at this time, Burlington County thought it a good policy to observe

and kwell every inmate upon admission to the general population. There is nothing in the Constitution of the United States or any decision of this Court that says that that is an unreasonable policy when placing people into a jail. And the fact is that it is not. Accordingly, Burlington County respectfully requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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