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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

It is settled that the validity of a search under the Fourth Amendment depends on two elements: a court balances (i) the individual's reasonable expectation of privacy against (ii) the governmental interest furthered by the intrusion. In this case, the opening briefs of petitioner and his *amici* established that forcibly stripping an individual of all his clothes and inspecting the most private parts of his body is an extraordinary, almost unparalleled, intrusion into personal privacy and dignity. On the other side of the balance, while the security of correctional facilities is an important interest, decades of experience establish that it is advanced only trivially by strip searching minor offenders like petitioner who are not suspected of carrying contraband. In stark contrast to a planned jail visit (as in *Bell v. Wolfish*, 441 U.S. 520 (1979)), an unexpected arrest does not raise the substantial prospect of – or the need to deter – purposeful smuggling.

Respondents' justification for this search is instead the prospect that the police will by happenstance conduct an arrest for a minor offense of an individual who has no prior history of narcotics or weapons offenses but who is secretly carrying drugs taped to his genitals or shoved into his anal cavity. That scenario may happen, but its rarity is uncontestable. The overwhelming majority of ordinary Americans who might be arrested for some trivial offense like speeding – at least 99.99% – are not traveling about in such a bizarre fashion.

Respondents nonetheless contend that by strip searching the private parts of every single arrestee

they will advance a governmental interest in preventing the entry of drugs into prisons. Literally, that is true, in the attenuated sense that the jail will eventually chance upon the .01% outlier. But the Fourth Amendment does not ignore the tremendous cost imposed upon the 99.99% of other arrestees such as petitioner. Jails have the unquestioned authority not only to use pat down searches and metal detectors on all arrestees, but to strip search any person for whom reasonable suspicion arises, including from the circumstances of the present arrest or his prior criminal history. The wildly hypothetical prospect that an arrestee for whom no such suspicion exists might be the one out of every five, ten, or twenty *thousand* arrestees who is carrying drugs in this manner does not remotely justify the government subjecting every single person to the unique, dehumanizing degradation of a strip search. The discovery of contraband in these circumstances is such an astonishingly uncommon event – and the other well-known sources of contraband are so numerous – that the practice as a whole exacts too great a cost to the treasured Fourth Amendment right of privacy.

Given that the invasion of personal privacy is so grossly disproportionate to the governmental interest advanced, respondents can prevail only if this Court holds that the right of personal privacy and dignity enshrined in the Constitution does not apply with any force from the moment that an individual who is arrested for an offense like failing to pay a fine crosses the threshold of a correctional facility. Under any form of genuine constitutional scrutiny, this search violates the Fourth Amendment. Having only

recently reaffirmed that even convicted "[p]risoners retain the essence of human dignity inherent in all persons," *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011), this Court should hold that suspicionless strip searches of those charged with minor offenses violate the Constitution.

I. Strip Searches Of Minor Offenders Constitute A Grave Intrusion On Individual Privacy And Dignity.

Respondents essentially ignore half this case: the privacy interests upon which their strip search policies intrude so dramatically. The opening briefs of petitioner and his *amici* demonstrated that strip searches invade a specially protected sphere of personal privacy with consequences that are psychologically devastating. In recently confronting a similar but far less intrusive search, this Court concluded that the "meaning" of the practice, combined with "the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions." *Safford United Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) (holding that search of student's undergarments violated Fourth Amendment). Federal judges with long experience in assessing the reasonableness of varied search practices have for decades called out strip searches of persons arrested for minor offenses as especially "dehumanizing," "demeaning," and "terrifying." Pet. Br. 22 & n.9 (collecting authorities).

Importantly, the search itself cannot be separated from the broader context in which it occurs. This case involves ordinary Americans, not

hardened criminals. The individuals subject to this practice – who are arrested for non-criminal offenses like failing to wear a seatbelt, not yielding at an intersection, or not paying a fine – are often teachers, salesmen, housewives, and the like who have no comparable experience with the criminal justice system. The palpable fear and humiliation of the arrest are compounded when immediately followed by the devastation of being treated as essentially less than human as they are forcibly stripped naked and their bodies, including their most deeply private parts, are inspected. This can happen to any one of us.

Petitioner's *amici* documented – without contradiction by respondents – the still more crushing effects of this practice on vulnerable populations, including the victims of sexual assaults. *See generally* Br. of Domestic Violence Legal Empowerment and Appeals Project *et al.*; Br. of Sister Bernie Galvin *et al.* This appears to be the first form of search confronted by this Court that is so grave that it has caused innocent individuals not merely to experience significant, long-term psychological harm, but to kill themselves. Pet. Br. 24.

This case perfectly illustrates the weighty privacy and dignity interests at stake. Petitioner was wrongly arrested for civil contempt for failure to satisfy a fine. He was subjected to a pat down search and metal detector, both of which are regarded in every other context (including airports and entry to this Court) as sufficient to locate contraband, and neither of which triggered any suspicion. His entire criminal history consisted of a single instance of

driving away from a traffic stop, resulting in a guilty plea of "hinder[ing] prosecution." J.A. 68a, 89a.[1] There is thus no dispute that when respondents booked petitioner into their facilities, they had no reason to suspect – not the slightest inkling – that he might be carrying contraband, much less that he was doing so in his undergarments or body cavities. Yet respondents nonetheless twice subjected petitioner to the extraordinary degradation of ordering him under close observation to stand naked, lift his genitals, and expose his anus – and in the case of Essex County to do so before multiple other people. Under any regime that requires any form of suspicion, these searches were brazenly unconstitutional.

Respondents make only one passing effort to undercut the significance of this privacy interest. They note (Essex Br. 21) that inmates are observed by officers while naked in showers. But the two circumstances are not analogous, because the arrestee's interest is not merely in wearing clothing. Instead, during a strip search, an officer scrutinizes the individual's genitals and breasts from an arm's

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[1] Respondents do not contend that this prior offense or the circumstances in which it occurred (when he left a traffic stop and drove home without the officer's permission) gave rise to suspicion justifying the search. The Solicitor General's repeated invocation of the fact that petitioner had been "charged" with "possession of a deadly weapon" (Br. 28; *see also id.* 2 n.1) – omitting both the facts of the underlying offense and the charge to which he actually pleaded guilty – is therefore surprising and disappointingly misleading. The so-called "deadly weapon" was the car he drove away; that is no doubt why the "charge" was never pursued.

length away, a uniquely degrading intrusion into personal privacy and dignity. In a shower, by contrast, the arrestee is merely observed at a distance in essentially the same fashion that he is overseen in all other areas of the facility. *Cf. Safford*, 129 S.Ct. at 2642 (strip search violated the Fourth Amendment, notwithstanding that students may undress in the presence of others for gym class).

Further, each intrusion on privacy must be evaluated in the light of the particular governmental interest it advances. Respondents correctly note that showers must be monitored to protect inmates from sexual assault. *See* Essex Br. 21. That specific interest justifies that particular practice, but it is not implicated by the strip searches at issue in this case. Respondents do not contend otherwise.

II. Respondents' Argument That Suspicionless Strip Searches Of Minor Offenders Are Subject To Little Or No Fourth Amendment Scrutiny Lacks Merit.

a. Respondents principally contend (*e.g.*, Essex Br. 1, 29; Burlington Br. 12, 23–25) that this Court should uphold suspicionless strip searches of minor offenders under the Fourth Amendment because the judiciary must defer to the judgments of correctional officials. Preliminarily, if respondents' sweeping invocation of "deference" were accepted, no prisoner would ever prevail in a constitutional challenge to even the most outrageous prison policy. By definition, every such claim challenges the facility's judgment. But "deference" is not "abdication" and neither the Constitution generally nor the Fourth Amendment specifically enacts the tautology that

every prison policy is *ipso facto* reasonable. Correctional officials have vitally important jobs, but they are not judges and they ordinarily do not undertake to balance their efforts to advance the institution's interests in security against inmates' and arrestees' interest in personal privacy and bodily integrity. That is instead the sworn responsibility of the courts.

Thus, even accepting that respondents are correct that strip searching every single arrestee no matter what the circumstances incidentally improves their ability to intercept the introduction of contraband (*see supra* at 1-2), that fact does not answer the question presented by this case. Reducing the Fourth Amendment inquiry to whether a search assists in jail security would have startling implications. Jails could go still much further than requiring strip searches and adopt astonishing measures that are even more "effective," precisely because they are more intrusive. They could conduct a physical body cavity search of every arrestee and every employee, every day; they equally could require every inmate to remain constantly naked, including in public visitor rooms. Respondents' interpretation of the Fourth Amendment would deprive the courts of authority to find that these extreme practices violate the Fourth Amendment, given correctional officials' accurate judgment that both would even more effectively improve their effort to limit contraband.

That is not the law. This Court's Fourth Amendment precedents do reflect significant respect for the judgments of corrections officials in the assessment whether a given search will aid the institution's security. But they equally reject

respondents' sweeping attempt (Burlington Br. Part I; Essex Br. Part I) to eject the judiciary from assessing the reasonableness of their policies on the theory that the Fourth Amendment right to privacy never constrains the policies of jails and prisons. As the Solicitor General admits (at 7), this Court's decisions provide that even in prisons, "[w]hether a search is reasonable depends on a *balance* of the individual's privacy interests and the government's justification for the search" (emphasis added). *See Hudson v. Palmer*, 468 U.S. 517, 525 (1984) (Fourth Amendment's application in jails and prisons "as in other Fourth Amendment contexts" considers whether "a 'justifiable' expectation of privacy is at stake"); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (Fourth Amendment inquiry in prison context considers "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"). The two cases that respondents cite in support of their contrary argument do not involve searches of arrestees or otherwise shed light on the question presented by this case. *See Samson v. California*, 547 U.S. 843 (2006) (assessing searches imposed as condition of parole under traditional "reasonableness" inquiry); *Lanza v. New York*, 370 U.S. 139 (1962) (declining to decide constitutionality of intercepting jailhouse communication when communication was not introduced in prosecution of defendant).

b. If prison officials' invocation of "deference" is ever going to ring hollow – and if the judiciary has any genuine role to play in enforcing the Fourth Amendment's requirement of reasonableness – this is that case. The expert judgment of the correctional

community is that searches such as these are unnecessary and unreasonable. The widely respected comprehensive standards of the American Correctional Association – which is composed of correctional officials – thus provide that "[a] strip search of an arrestee at intake is only conducted when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband." Am. Corrs. Ass'n, *Core Jail Standards* § 1-CORE-2C-02; *see also* Am. Corrs. Ass'n, *Performance-Based Standards for Adult Local Detention Facilities* § 4-ALDF-2C-03 (4th ed. 2004). *See generally* Pet. Br. 15.

Most jails and prisons share that judgment, and respondents provide no reason that this Court should reject it. Many states (including New Jersey) apply it by statute. *See* Pet. Br. 15–16 & n.6.[2] The principal federal agencies that house detainees *all* forbid strip searches in these circumstances, and the Solicitor General's statement that "petitioner's approach finds no support in federal policy or practice" (Br. 9) is itself not just insupportable but inexplicable. The United States admits – although not until page 30 of its *amicus* brief, and then almost in passing – that the policies of both the Bureau of Prisons and U.S. Marshal's Service forbid the search in this case. *See also* Pet. Br. 14. The Bureaus of Immigration and Customs Enforcement (which of course houses large

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[2] It is noteworthy that, although states have significant incentives to advocate a narrower reading of the Fourth Amendment, only twelve have joined in an *amicus* brief in this case supporting respondents.

numbers of immigration detainees) and Indian Affairs adopt the American Correctional Association Standards and apply the same rule (*see* Pet. Br. 14–15), policies that go entirely unacknowledged by the government. Every federal institution would have forbidden this search.[3]

No less important, respondents' own practices refute their argument that this Court should defer to their supposed judgment that strip searching every arrestee is necessary to detect contraband. Both Essex and Burlington elide the important fact that depending on the circumstances they search arrestees in two materially different ways that have two different purposes. Both involve stripping the arrestee naked under the direct observation of a government official, triggering significant Fourth Amendment scrutiny. But in cases like this one – a minor offender who is not suspected of carrying contraband – respondents subject the arrestee to what they term a "visual observation."

The visual observation is conducted in a manner calculated to detect "scars, marks, and tattoos" (J.A.

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[3] The United States argues (at 30) that BOP's prohibition on suspicionless strip searches of persons jailed for civil contempt is irrelevant because BOP also requires that these arrestees be kept separate from the general jail population. But this attempt to suggest that BOP is concerned about smuggling by minor offenders is belied by the policies of every other division of the Department of Justice forbidding the searches undertaken in this case *without* requiring that minor offenders be separately housed. Further, jails are free to follow the same practice of requiring segregated housing, and many do. *See* Pet. Br. 33–34; *see also* J.A. 134a, 205a, 210a (Burlington Jail).

11a), *not* – contrary to the incorrect representation of the United States (at 3) – “contraband.” The arrestee must remove his clothes, turn around, and lift his genitals. But the officer importantly is not directed to study the arrestee’s body in detail, or to conduct any examination of body cavities, in a manner intended to locate contraband. Burlington thus explicitly *bans* any strip search for contraband absent “reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found.” Pet. App. 126a; *see also* J.A. 218a. As Burlington itself highlights in its brief to this Court (at 35 (quoting J.A. 390a)), “the standard form [documenting the search] itself stated that ‘visual observation was made for recent injuries.’” *Accord id.* at 16 (“The practice that is at issue here – visually observing a new detainee during kwelling [*i.e.*, shampooing for lice] – was the only practice that was followed during all intakes.”).

Essex, by contrast, did conduct such a detailed strip search of petitioner (in front of several other inmates) intended to locate contraband. *See* Pet. Br. 6. But soon after the events in this case, Essex changed its practices to adopt the same rule as Burlington. Essex has thus made the express judgment that in cases such as this one it is appropriate to observe arrestees only for “tattoos,” “body vermin and disease,” and sores, wounds, and injuries. *See* J.A. 64a–65a.

By contrast, respondents both have a distinct search regime, which they apply only in cases of reasonable suspicion, that involves the “systematic” examination of the arrestee’s naked body to identify contraband, including inspecting body cavities. J.A.

11a (Burlington), 64a–65a (Essex). The Warden of the Burlington Jail thus testified in his sworn deposition that the facility conducts a detailed strip search for "contraband" such as "weapons, knives, drugs, et cetera" only when the "person is coming in with indictable charges. Drug charges. Or he's a known drug addict." J.A. 118a.

Respondents offer no way to bridge the wide gap between their actual practice of not searching individuals such as petitioner for contraband in the absence of reasonable suspicion and their rhetoric in this Court that a uniform suspicionless strip search policy is essential to interdict drugs. In determining whether to "defer" to correctional practices, actions speak louder than words. Given that respondents do not themselves think it is necessary to strip search all arrestees in a manner calculated to identify contraband, their position is actually that this Court should *reject* not only the expert judgment of the correctional community but also the practices they have themselves adopted for their own institutions.

c. Respondents' claim that the rule proposed by petitioner is inadministrable is similarly empty rhetoric that is contradicted by established practice and by their own actions. Burlington thus asserts (at 46) that an "individualized suspicion" standard "injects subjectivity into a process that should be generally applied." But of course respondents' own proposed rule – under which officers need not strip search every arrestee but instead have the power to strip search any individual of their choosing without regard to individualized suspicion – authorizes far more subjectivity.

In any event, the reasonable suspicion standard has long been applied in the great majority of the country without difficulty. It was in fact virtually the uniform rule – applied by eight consecutive decisions of the federal courts of appeals and also adopted by approximately eighteen states – until the Eleventh Circuit's decision in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc). *See* Pet. Br. 13 n.4, 15–16 n.6. The same standard is applied by the U.S. Marshals Service and the Bureau of Immigration and Customs Enforcement (for all detainees), as well as the U.S. Bureau of Prisons for individuals such as petitioner who have been arrested for civil contempt. *See id.* 14–15. Just as telling for purposes of this case, as discussed above, respondents *themselves* both apply a reasonable suspicion standard in determining whether to conduct a strip search for contraband as opposed to a "visual observation" of the naked arrestee. Respondents neither claim that they have experienced any difficulty applying that rule nor identify any evidence of problems in the many other jurisdictions that apply the same standard.

Respondents next complain that the nature of the individual's offense is not a reliable indicator of the likelihood that he will be carrying contraband, or that such a standard would at least be "extremely burdensome" to apply. Essex Br. 35. This case does not call on this Court to elaborate in detail the circumstances (including particular offenses) that will give rise to "reasonable suspicion" justifying a strip search. But it is worth noting that, once again, this line is widely drawn and applied, including by longstanding precedent, respondents, and the federal government. As the Solicitor General admits (at 27–

28), "the Burlington jail's policy distinguishes between individuals arrested for indictable and non-indictable offenses, see Pet. App. 53a, and federal policy distinguishes between persons arrested for felonies and those arrested for misdemeanors or civil contempt offenses." New Jersey law also requires the classification of inmates. *See* Pet. Br. 34.

Those precise line-drawing decisions are the types of correctional judgments to which courts may reasonably defer, in contrast to respondents' broader argument that the judiciary should abdicate any review of the Fourth Amendment reasonableness of a categorical policy of strip searching every arrestee without regard to the circumstances. Although the nature of the offense has elements of over- and under-inclusiveness, it sensibly and reasonably narrows the categories of individuals who might be carrying contraband into the facility.[4]

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[4] The assertion by the United States that the "district court had considerable difficulty determining whether petitioner should be classified as an indictable or non-indictable offender" (Br. 28) is a significant overstatement. Although it found the question "not absolutely clear," the district court concluded: "there is no evidence in the record suggesting that Florence was charged with the variety of civil contempt that requires indictment . . . . Likewise, there is nothing to suggest he would have been subject to a sentence in excess of six months imprisonment or a $1,000 fine had he been found guilty of contempt." J.A. 28a.

III. The Interests Asserted By Respondents In Support Of Strip Searching All Arrestees Are Insubstantial.

a. As discussed above, respondents conduct a naked "visual observation" of all arrestees for the specific purpose of identifying scars, marks (such as tattoos), and disease. In this Court, respondents do not seriously argue that those interests justify such a dramatic intrusion on personal privacy – *i.e.*, they do not defend the policies on their own terms. Burlington notes (at 34) that it "discussed" those interests in the district court and that both respondents submitted isolated exhibits suggesting that their facilities include gang members (*id.* 36–37 n.20). But it is undisputed that neither respondent introduced any evidence in the district court that these specific searches were either necessary or effective to advance interests related to health or gang violence.

Respondents also make no effort to answer the contrary showing by petitioner's *amici*. Experts have explained that only medical professionals are qualified to assess an inmate's health and whether he carries a disease such as MRSA. *See generally* Br. of Med. Soc'y of N.J. et al. That is no doubt why jails require a medical examination after the inmate's intake. In addition, experts in gang behavior have refuted the suggestion that gang members hide identifying tattoos beneath their undergarments. *See generally* Br. of Academics on Gang Behavior.

b. Respondents instead argue that suspicionless strip searches are required to interdict contraband. That argument muddles several distinct points. They correctly note that drugs are a grave problem in

correctional facilities. But that says little about the question presented by this case, because of the other tools available to search arrestees and because it is well established that there are numerous other more significant sources of contraband such as smuggling by guards. *See, e.g.*, Pet. Br. 31 n.10.

With somewhat greater specificity, respondents note that arrestees have occasionally been found with contraband. But again, that says very little about the circumstances of this case, in which an individual with no criminal history involving drugs or weapons was arrested for a non-criminal offense – the failure to pay a fine. Respondents offer no reason to believe that these arrestees are a material source of contraband, or that other means are ineffective to locate what contraband exists.

When *that* more relevant question is asked, the evidence is overwhelming that strip searching such individuals plays no material role in limiting the introduction of contraband to jails. The expert standards of the American Correctional Association conclude that sufficient protection against contraband is provided by other tools such as pat down searches, requiring arrestees to strip to their undergarments, and the use of metal detectors and BOSS chairs. Further, the reasonable suspicion standard has been applied throughout the great majority of the country for decades. Respondents point to no evidence suggesting that facilities enforcing that rule experience greater levels of contraband. A report commissioned by the U.S. Department of Justice concluded that the "passionate[]" assertions of jail officials that suspicionless strip searches were necessary to protect

their institution proved incorrect in practice and in fact "exaggerate[d] a security threat." WILLIAM C. COLLINS, NAT'L INST. OF CORRS., U.S. DEP'T OF JUSTICE, JAILS AND THE CONSTITUTION: AN OVERVIEW 28–29 (2d ed. 2007). The most detailed assessment of the issue was undertaken by the district court in *Dodge v. County of Orange*, 282 F. Supp. 2d 41, 70 (S.D.N.Y. 2003), which was able to identify only a single instance among 23,000 arrests in which contraband would not have been discovered under a reasonable suspicion standard.

The record in *Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc), is not to the contrary. The finding of the district court in *Bull* that jail officials had found a substantial amount of contraband generally "in and on arrestees' bodies" over the course of six years, *id.* at 969, once again does not address the more specific question whether suspicionless strip searches of minor offenders materially limit the introduction of contraband. Much of the contraband in *Bull* was located in searches of persons in so-called "safety cells" rather than upon the inmate's admission to the jail, *see Bull v. City & Cnty. of San Francisco*, No. C 03-01840-CRB, 2006 WL 449148, at *2 (N.D. Cal. Feb. 23, 2006), or was found on individuals pursuant to the "reasonable suspicion" standard endorsed by petitioner, which the jail adopted in 2004, *see* Def.'s Opp'n to Pl.'s Mot. Summ. J. at 4. In many other instances, the contraband was found in locations that did not require a strip search (such as the individual's mouth, ear, jacket, or waistband), or through a strip search that would have been authorized as a result of the crime of arrest

(involving drugs, weapons, or violence) or the defendant's criminal history. *See* Brin Decl., *Bull v. City & Cnty. of S.F.*, 2006 WL 449148 (No. C 03-01840-CRB) (N.D. Cal. Feb. 23, 2006).

In this case, the district court found that respondents had submitted no evidence of a smuggling problem in their facilities. Pet. App. 87a. Respondents argue to the contrary (*e.g.*, Essex Br. 34, 37–38, 51) that they submitted a report by George Camp, who last worked in a correctional facility in 1977. But it is not surprising that the court found that report unpersuasive. It is devoid of any actual evidence to support its assertions, as Camp failed to identify an example anywhere in the United States of an arrestee charged with a minor offense attempting to smuggle contraband into a jail. It would in any event be hard to identify a more discredited expert in the field, so much so that three separate federal courts have gone to the trouble of writing opinions that call attention to Mr. Camp's unreliability. The court in *Marria v. Broadus* excluded Camp's report after finding it "misleading," "thoroughly unhelpful to the trier of fact," and "founded on biased and therefore unreliable evidence." 200 F. Supp. 2d 280, 291 (S.D.N.Y. 2002). The court in *Goff v. Harper* found Camp's calculations "less than accurate" and "somewhat deceptive." 1997 WL 34715292, at *10 (S.D. Iowa June 5, 1997). And the court in *Benjamin v. Malcolm* found some of Camp's conclusions "questionable" and "discounted" others because he had made potentially faulty assumptions. 564 F. Supp. 668, 680–81 (S.D.N.Y. 1983).

Essex County (at 3, 50) and the Solicitor General (at 19) also invoke a memorandum written by an

assistant warden of the Essex County Correctional Facility to Essex County's attorney. *See* J.A. 70a–71a. But again, it is plain why the court gave that document no substantial weight. Not only is it completely self-serving (having been prepared for the obvious purpose of defending this lawsuit), but the memo asserts only that over an entire year Essex initiated "fourteen investigations of inmates being processed into our facility with contraband being found on their persons . . . ." *Id.* 70a. So far as the memorandum reveals – and the author had every reason to put forward any examples that would help respondents' case – Essex could not identify *any* instances (including from the records of the fourteen cited examples) in which it found contraband on a person who would not have been subject to search under a reasonable suspicion standard, or indeed that would not have been discovered using procedures (such as pat downs) that are less intrusive than a strip search.

c. Essex makes two further arguments. It contends (at 52) that the search of petitioner was justified because he was transferred from another facility. But the mere fact that a misdemeanor offender was housed in a jail is not a sufficient basis to justify an intrusive strip search. If it were, then every arrestee could presumably be strip searched every day. But in any event, this Court need not resolve this argument, which Essex did not raise in the court of appeals, and which can be decided on remand to the extent it has been properly preserved. That is particularly true because disputes remain regarding petitioner's claim that he was

unreasonably searched in front of multiple other inmates.

Essex also (at 4) makes the new assertion that, because it has chosen to place arrestees in "a waiting room or holding cell in the pre-booking area that can hold dozens of other" arrestees, a misdemeanor offender could be given contraband to conceal. Notably, it cites no evidence of this scenario ever occurring. But in any event, the government cannot justify a search by forcibly placing individuals in the very circumstances that are supposed to give rise to suspicion. The police cannot arrest someone, place him in a room full of drug offenders, and then use that fact to strip search him.

Essex can also solve this dilemma of its own making. Like hundreds of other institutions, it can segregate groups of arrestees, supervise them while together, or complete the intake process (including strip searches of persons for whom there is reasonable suspicion) before placing them in a common room.

IV. Respondents' Remaining Arguments For Applying Lessened Fourth Amendment Scrutiny Lack Merit.

a. The court of appeals erred in concluding that it was compelled to uphold suspicionless strip searches of all arrestees by this Court's decision in *Bell v. Wolfish*. By its terms, *Bell* requires a "balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559. The "need" in *Bell* was far greater than in this case. In *Bell*, inmates arranged loosely supervised contact visits that the

government represented were a unique opportunity for smuggling contraband. *See id.* at 559–60. The prospect of a strip search accordingly played a substantial deterrent role. *See id.* at 559. This case, by contrast, involves an unexpected arrest and therefore no comparable risk of purposeful smuggling.[5]

So too, on the other side of the Fourth Amendment balance, *Bell* involved a lesser "invasion of personal rights." The inmates in *Bell* elected to submit themselves to a strip search in exchange for the opportunity to engage in contact visits without close supervision. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (totality of circumstances may

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[5] The Solicitor General asserts to the contrary (at 25) that "[i]ndividuals arrested for non-violent, non-drug offenses often have attempted to smuggle contraband into prisons and jails." But the weak basis for that statement is striking. The United States operates by far the largest correctional system in the nation – among the largest in the world. The Solicitor General in turn generally does not hesitate to make assertions based on data supplied by various federal agencies – assertions that could be tested through a request under the Freedom of Information Act. With months to gather that information, the government makes no representations to this Court that the actual data from the federal prison system would support such a sweeping claim. The best that the Office of the Solicitor General can do is to make extensive use of Westlaw to identify seven cases reported in newspaper articles over the course of five years in the entire country (*id.* at 25 n.15), none of which describes an actual effort to smuggle materials into jail. That thin evidence does not remotely support the counterintuitive claim that individuals in petitioner's position who are arrested for misdemeanor offenses "often have" attempted to engage in smuggling.

establish consent to waiver of privacy rights). There is no comparable voluntary sacrifice of arrestees' right to privacy in this case. It is therefore not surprising that for decades in the wake of *Bell* the courts of appeals uniformly held that suspicionless strip searches of minor offenders violate the Fourth Amendment. *See* Pet. Br. 13 n.4.

b. Respondents make two other passing arguments for lessened constitutional scrutiny. Neither has merit.

In contrast to the United States' acknowledgement that the Fourth Amendment requires a balancing of individual and governmental interests, respondents make other passing arguments for lessened constitutional scrutiny. None has merit. Both respondents invoke the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987). But this Court has not previously applied *Turner* to Fourth Amendment claims, much less to Fourth Amendment claims of pre-trial detainees who, in many cases, may not even have been subject to a probable cause determination by a magistrate, much less been convicted of a crime. Respondents argue that *Turner* implicitly overruled the balancing test applied in *Bell v. Wolfish*, but their only evidence for that assertion is that *Turner* cited *Wolfish*. However, respondents ignore that the citation upon which they rely was only to *Bell*'s discussion of the First Amendment, not its analysis of the prisoners' Fourth Amendment claim. *See Turner*, 482 U.S. at 87.

Likewise, respondents ignore that in the wake of *Turner*, this Court has applied traditional Fourth Amendment balancing to individuals more akin to arrestees than are the convicted prisoners to whose

rights this Court spoke in *Hudson v. Palmer*, 468 U.S. 517 (1984). *See Samson v. California*, 547 U.S. 843, 848–850 (2006) (applying traditional Fourth Amendment balancing, while taking into account parolee's convicted status, to suspicionless search of parolee's home); *Griffin v. Wisconsin*, 483 U.S. 868, 876–77 (1987) (same for probationer). Surely, the Constitution does not afford greater protection for the privacy of convicted felons who remain within the "'continuum' of state-imposed punishments," *Samson*, 547 U.S. at 850 (citation omitted), than it does for individuals simply believed by the police to have committed a minor offense and whose innocence is presumed (and often, as in this case, never rebutted through a criminal conviction).[6] Instead, the unique context of the correctional environment is appropriately taken into account by incorporating it

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[6] Even in the context of convicted inmates, the Court has not reflexively applied *Turner* to every constitutional claim. For example, in *McKune v. Lile*, 536 U.S. 24 (2002), the Court reviewed a prison rule that impinged on the Fifth Amendment right against self-incrimination of convicted prisoners. The Court recognized that "the fact of a valid conviction and the ensuing restrictions on liberty are essential to the Fifth Amendment analysis," *id*. at 36, but did not therefore apply only the rational basis scrutiny of *Turner*. To the contrary, the Court held that a prison program impinging on the right against self-incrimination must both "bear a rational relation to a legitimate penological objective" – *i.e.*, satisfy *Turner* – and ensure that the "adverse consequences an inmate faces for not participating" in the program be "related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." *Id*. at 37-38. *See also*, *e.g.*, *Johnson v. California*, 543 U.S. 499, 512 (2005) (equal protection claims not subject to *Turner* analysis).

an important element of the assessment of the Fourth Amendment "reasonableness" of a challenged practice. *Hudson*, 468 U.S. at 527; *Bell*, 441 U.S. at 559–60.[7]

Next, Essex alone contends (at 39–41) that suspicionless strip searches are governed by the "special needs" doctrine. But respondent never explains the consequence of this argument, and there is none, because (as even Essex acknowledges) under the "special needs" framework a suspicionless search still violates the Fourth Amendment if it produces an "invasion of personal rights" that outweighs the "need for the particular search." Essex Br. 40 (quoting *Bell*, 441 U.S. at 559).

The mere presence of "special needs" thus does not validate an otherwise unconstitutional suspicionless search. A "search may be reasonable despite the absence of [individualized] suspicion" only when two conditions are met: first, "where the privacy interests implicated by the search are minimal," and second, "where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 624 (1989).

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[7] Further, whatever standard applies to claims by convicted inmates, genuine Fourth Amendment scrutiny is required with respect to the initial detention of minor offenders. Generally speaking, at the time an arrestee is admitted to jail, a judge will not have determined that the detention is proper and that the individual should be remitted to the custody of correctional officials.

Neither of those conditions is met here. First, unlike the cases Essex cites involving urine samples collected for drug tests, it is self-evident that the "privacy interest[] implicated" by compelling an arrestee to strip naked in front of prison guards is far from "minimal." Second, intake searches are nothing like the cases Essex cites with respect to the impact that an individualized suspicion requirement would have on government interests. In *Skinner*, for instance, this Court observed that it was "most impracticable" to require employers to obtain evidence that employees were impaired by drugs in the immediate and "chaotic" aftermath of a serious railroad accident. 489 U.S. at 631. Here, by contrast, experience demonstrates in federal and state institutions throughout the country that a requirement of individualized suspicion hardly jeopardizes the government's claimed interests.

c. Finally, although Essex contends that its position is supported by history, it comes nowhere near establishing a "clear practice . . . approving . . . the type of search at issue, at the time the constitutional provision was enacted." Essex Br. 16 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)). Respondent thus omits the conclusions of its principal source that "the constitutionality of searching prisoners and other persons was ill-defined when the Fourth Amendment appeared. Statutes, case law, and centuries of protest literature had little to say on the subject." 3 WILLIAM J. CUDDIHY, FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 1552. And "[n]either the Amendment nor its most proximate evidence provided a sure indication of the kinds of body-

searches that Americans thought reasonable in 1789-91 or the circumstances in which they thought them so." *Id.* at 1553. *See also id.* at 1552–53 n.394 ("outrage at body-searches was common . . . . Statutes that permitted general searches rarely mentioned persons.").[8]

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[8] Essex notes (at 16) that early in the nation's history individuals were subject to an extensive search upon "arrest" (as opposed to admission to jail), a distinct circumstance that is governed by different Fourth Amendment principles. Respondent also notes (at 17) that in some early jails, inmates (as opposed to jail officials) stripped new arrivals in a "ceremony of ablution" that had nothing to do with an effort to intercept contraband and that accordingly does not inform the question presented here.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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