

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 AMICI CURIAE OF DOMESTIC VIOLENCE
LEGAL EMPOWERMENT AND APPEALS
PROJECT, NATIONAL CLEARINGHOUSE FOR
THE DEFENSE OF BATTERED WOMEN, AND
CALIFORNIA COALITION AGAINST SEXUAL
ASSAULT IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST¹

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, its members, or its

The Domestic Violence Legal Empowerment and Appeals Project (“DV LEAP”) was founded in 2003 by one of the nation’s leading domestic violence lawyers and scholars. DV LEAP provides a stronger voice for justice by fighting to overturn unjust trial court outcomes, advancing legal protections for victims and their children through expert appellate advocacy, training lawyers, psychologists and judges on best practices, and spearheading domestic violence litigation in the Supreme Court.

DV LEAP is committed to ensuring that the Supreme Court understands the realities of domestic violence and the law when deciding cases with significant implications for domestic violence litigants. DV LEAP has regularly submitted *amicus* briefs to the Court in cases with potential consequences for victims of domestic violence. *See, e.g., Robertson v. U.S. ex rel Watson*, 130 S. Ct. 2184 (2010); *Abbott v. Abbott*, 130 S. Ct. 1983 (2010); *United States v. Hayes*, 555 U.S. 415 (2009); *Giles v. California*, 554 U.S. 353 (2008); *Hammon v. Indiana*, 547 U.S. 813 (2006); *Davis v. Washington*, 547 U.S. 813 (2006); *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005). DV LEAP collaborates regularly with the domestic violence community on litigation and law reform initiatives and works closely with the George Washington University Law School and a network of *pro bono* law firms.

The National Clearinghouse for the Defense of Battered Women works to increase justice for victims

counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

of domestic violence who are charged with or convicted of crimes. Founded in 1987, the National Clearinghouse provides specialized, case-specific technical assistance and information to battered defendants, defense attorneys, battered women's advocates, expert witnesses, and other professionals and community members. The organization is committed to ensuring that victims of battering who are charged with crimes receive the full benefit of all rights and protections that all defendants deserve, including fair and humane treatment throughout the criminal legal process.

The California Coalition Against Sexual Assault (CALCASA) has provided a unifying vision and voice speaking out against sexual violence in the State of California, nationally and internationally, since its inception in 1980. It began as a collaborative effort of rape crisis centers in California, which were among the first rape crisis centers in the nation. CALCASA works at the state and national level to bring justice and hope to victims and survivors of sexual assault and to support those who work to eradicate sexual violence. It seek to impact public policy, provide education, create systemic change, and ensure resources are available to those working to end sexual violence. CALCASA also works collaboratively with domestic violence and sexual violence coalitions around the country to support efforts to ensure appropriate advocacy on behalf of survivors, including through the judicial system.

The proper resolution of this case is a matter of concern to *amici*. Allowing a jail to strip search

every individual arrested for any offense—no matter how minor the offense, and no matter how little suspicion the individual raises with prison staff—would have particularly serious and traumatic consequences for the many, many women who have been victims of domestic violence or sexual assault. Statistics indicate roughly half of women in prison and a quarter of women in the general population fall into this category.

A strip search is unquestionably a dramatic invasion of a person's bodily integrity and security. It cannot be justified by an unsubstantiated governmental interest in avoiding contraband being smuggled into a prison. That is where the Court of Appeals erred. There is no evidence that strip searching women whom no one suspects have contraband and committed only a minor infraction will further a jail's desire to prevent smuggling of contraband into prison—but there is extensive evidence of the physically invasive and psychologically damaging effects of strip searches, especially for individuals who have been victims of domestic violence or sexual abuse.

ARGUMENT

I. ALLOWING SUSPICIONLESS STRIP SEARCHES OF INDIVIDUALS ARRESTED FOR MINOR OFFENSES WILL HAVE DEVASTATING CONSEQUENCES FOR VICTIMS OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT.

There can be no question that a strip search is at once “demeaning,” “humiliating,” and “terrifying.” *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). This Court has recognized the uniquely invasive context presented by a strip search, cautioning that strip searches “instinctively give us the most pause.” *Bell v. Wolfish*, 441 U.S. 520, 558 (1979). And while strip searches are highly intrusive to any person’s privacy and dignity, they are especially traumatic for individuals who have been victims of domestic violence or sexual assault. Those individuals constitute a significant portion—statistics indicate one in four women is a domestic violence victim and close to one in five women is a rape victim—of the general population. *Infra*, at 9-10.

Researchers have documented the profound effects that strip searches can have on such victims, triggering a wide variety of negative psychological reactions. The psychological impact of strip searches is a particularly relevant consideration when dealing with women, because of the high rates of domestic violence, rape, sexual assault, and childhood sexual abuse reported by women among both the general population and especially the prison population.

A. Strip Searches Are Especially Intrusive And Traumatic For Victims Of Domestic Violence And Sexual Assault.

1. A strip search would be jarring for any person, but the “negative psychological impacts of strip searches are intensified” when they are carried out on those who have been physically, emotionally, or sexually abused. Jude McCulloch & Amanda George, *Naked Power: Strip Searching in Women’s Prisons* in *The Violence of Incarceration* 107, 122 (Phil Scraton & Jude McCulloch eds., 2009). That is because a strip search will often re-victimize or re-traumatize a person who has been abused in the past. This can cause the victim to experience “the emotional intensity of the original trauma” all over again. Jan Heney & Connie M. Kristiansen, *An Analysis of the Impact of Prison on Women Survivors of Childhood Sexual Abuse*, in *Breaking the Rules: Women in Prison and Feminist Therapy* 29, 30-31 (Judy Harden & Marcia Hill eds., 1998).

Such re-victimization can be terrifyingly real. A strip search may cause an abuse victim, particularly those who suffer from post-traumatic stress disorder (“PTSD”) as a result of their prior rape, abuse, or assault, to be re-traumatized. Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System* 8 (2003), available at <http://www.stephaniecovington.com/pdfs/4.pdf>. For these individuals, the strip search can trigger auditory and visual flashbacks to the previous abuse. Katherine Stuart van Wormer & Clemens Bartollas, *Women and the Criminal Justice System* 101 (2011); *Special Report on Female*

Offenders in Florida Prisons 18 (1999), available at <http://www.doh.state.fl.us/cma/reports/femalereport1999.PDF>. The abuse victim is therefore forced to process not only the humiliation and fear caused by a strip search, but also to relive their past abuses at the same time.²

2. For individuals with a history of abuse, the trauma induced by a strip search does not end with the search itself. A strip search often induces abuse victims to resort to coping or defense mechanisms as a means of self-protection. Lori B. Girshick, *Abused Women and Incarceration in Women in Prison: Gender and Social Control* 95, 105, 114-15 (Barbara H. Zaitzow & Jim Thomas eds., 2003). These self-protective coping mechanisms can include things like reacting to a strip search with aggression toward the officer or prison official conducting the search. *Id.* But such attempts at self-protection are likely to provoke physical or otherwise harsh responses from the prison official conducting the search and thereby make the strip search even more physically and psychologically difficult. *Id.*

² Fear of sexual abuse during strip searches may increase this re-traumatization, particularly among survivors of abuse. A recent Bureau of Justice Statistics report analyzing the results of a national survey of prison and jail inmates highlighted that “[r]eports of staff sexual misconduct were linked to strip searches.” Allen J. Beck *et al.*, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09* 24 (2010). In fact, the survey found that 30.8% of inmates who reported “sexual touching” by prison or jail staff reported that this touching occurred during strip searches. *Id.*

Strip searches can also trigger more severe coping mechanisms, such as self-injury and even suicide. *Id.* at 105; Heney & Kristiansen, *supra*, at 37. As one example, Paula Richardson, a twenty-three year-old inmate in an Australian prison, had been raped several months before her incarceration. Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness* 79 Fordham L. Rev. 2721, 2742 (2011) (citing McCulloch & George, *supra*, at 116-17). When Paula called her mother after a strip search, she was “inconsolable with distress.” *Id.* Paula’s prison records, as well as reports from prison officials and her parents, indicate that her mental state and behavior deteriorated following the strip search. *Id.* at 2742-43. Six weeks later, she hung herself with a shower curtain. *Id.* at 2743. Paula’s situation is not unusual. See, e.g., *Jordan v. Gardner*, 986 F.2d 1521, 1539 (9th Cir. 1993) (citing expert testimony that intrusive searches of victims of prior abuse could lead to increased suicide attempts); *Special Report on Female Offenders in Florida Prisons*, *supra*, at 1-3, 24-25 (describing the circumstances of a woman inmate who had a prior history of sexual abuse, was strip searched several times while in prison, and ultimately committed suicide).

3. Courts have specifically acknowledged the traumatic effects of strip searches on victims of physical and sexual abuse. See, e.g., *N.G. v. Connecticut*, 382 F.3d 225, 239 (2d Cir. 2004) (Sotomayor, J., concurring in part and dissenting in part) (acknowledging that a strip search can be more traumatic for a child who has been the victim of

sexual abuse than it would be for other children). One case that involved significant expert testimony and fact-findings on these issues is *Jordan* 986 F.2d at 1525-26. That case involved the constitutionality of a policy allowing male prison staff to conduct clothed pat searches of female inmates. *Id.* at 1530-31. Although it involved a different factual context and a different constitutional challenge, the court's decision focused on the same sorts of psychological affects just detailed. *See id.* at 1525-26; *supra*, at 5-7.³

Specifically, in *Jordan*, numerous experts testified about the severe psychological impact that searches can have on abused women. *Id.* at 1525-26. One expert psychologist emphasized that the unwilling submission to bodily contact (even when clothed) would likely cause a woman with a history of abuse to feel re-victimized and result in a number of symptoms of post-traumatic stress disorder. *Id.* at 1526. Another expert psychologist testified that intrusive searches could lead to re-victimization, anxiety, depression, and possibly increased suicide attempts in women who are the survivors of male violence. *Id.* at 1539. And, a psychiatric social worker characterized the searches as an almost

³ Moreover, while *Jordan* involved male prison staff conducting pat searches of women inmates, research shows that strip searches can be traumatizing even when conducted by people of the same gender. *See, e.g.*, Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse* 88 Marq. L. Rev. 751, 787-88 (2005) (explaining that women detainees feel deeply humiliated even when female guards perform searches).

“unendurable psychological threat and stress” for those with a history of abuse. *Id.* at 1539-40.

The expert testimony presented in *Jordan* was corroborated by the testimony of several inmates. *Id.* at 1526. In particular, one of the inmates who had a long history of sexual abuse suffered extreme distress when she was subjected to a clothed pat search. *Id.* at 1523. The distress was so severe that she had to have her fingers pried loose from bars she had grabbed during the search and she vomited after returning to her cell. *Id.*

Other courts have similarly recognized the traumatic effect that strip searches (and pat searches) can have on victims of physical or sexual abuse. *See, e.g., N.G.*, 382 F.3d at 232 (citing expert testimony that a strip search would be especially severe for a child who has been the victim of sexual abuse); *Colman v. Vasquez*, 142 F. Supp. 2d 226, 232-33 (D. Conn. 2001) (citing the particular vulnerabilities of victims of sexual abuse as being “a crucial factor” in assessing the viability of plaintiff’s claim concerning the constitutionality of cross-gender pat searches).

B. Victims Of Domestic Violence And Sexual Assault Make Up A Significant Portion Of The General Population And Women In Prison.

The privacy intrusion and negative psychological impact caused by strip searches on victims of domestic violence and sexual assault is not merely a hypothetical concern. Rape and sexual assault is far

more common than many people realize. Researchers estimate that roughly one in four women in the United States are physically assaulted by a partner or ex-partner in her lifetime. Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, National Institute of Justice & the Centers for Disease Control and Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* iv (2000). In addition, about 18% of women—nearly one in five—report having been raped at some point in their lives. *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. On Crime and Drugs of the S. Comm. On the Judiciary* 2 (2010) (statement of Susan B. Carbon, Director of the Office on Violence Against Women).

These numbers are even higher among women arrested and imprisoned. According to the bipartisan National Prison Rape Elimination Commission, for example, studies have shown that 31% to 59% of female inmates reported having been sexually abused as children, while 23% to 53% reported having been sexually abused as adults. *National Prison Rape Elimination Commission Report* 71 (2009). Similarly, according to a Department of Justice Bureau of Justice Statistics investigation, 44% of female inmates reported having

been victims of physical and/or sexual abuse. Stuart van Wormer & Bartollas, *supra*, at 103-104.⁴

As these statistics make clear, given the sheer number of women in the general population who have suffered from physical abuse, rape, or sexual assaults, a policy that generically permits suspicionless strip searches of individuals arrested for minor offenses will affect many such survivors—causing extreme psychological harm to women caught up in minor offenses who raise no suspicion.

II. THERE IS NO GOVERNMENT INTEREST THAT OUTWEIGHS THE INTRUSIVENESS OF SUSPICIONLESS STRIP SEARCHES.

In the decision below, the Third Circuit held that strip searches of those who raise no suspicion and are involved in a minor offense (which would include such things as parking violations, moving violations, and vehicle equipment violations) are needed to prevent smuggling of contraband into prisons. *Florence v. Board of Chosen Freeholders*, 621 F.3d 296, 307-08 (3d Cir. 2010). That concern was unsupported by any record evidence. *Id.* at 309. The negative effects of strip searches on victims of domestic violence or sexual assault are all too real

⁴ These statistics may underreport the number of women in prison who have been abused. “Large, government-sponsored studies do tend to find rates of prior abuse among female inmates to be around 50%. However, other studies, typically using more in-depth research methods, find much higher rates.” National Clearinghouse for the Defense of Battered Women, *Abuse History Among Incarcerated Women* 1 (2011) (citing studies).

and have been carefully researched and documented. The traumatic invasion of bodily integrity and personal security caused by suspicionless strip searches cannot be outweighed by a governmental interest which is unsupported and purely speculative. Pet. Br. 27-31.

CONCLUSION

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

Respectfully submitted,

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