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

OPPOSITION OF 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 IN RESPONSE TO FLORENCE'S PETITION FOR WRIT OF CERTIORARI

J. BROOKS DIDONATO
PARKER MCCAY
Three Greentree Centre
7001 Lincoln Drive West
P.O. Box 974
Marlton, NJ 08053
(856) 596-8900

ALFRED W. PUTNAM, JR.
Counsel of Record
D. ALICIA HICKOK
TARA S. SAROSIEK
DRINKER BIDDLE & REATH LLP
One Logan Square,
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alfred.Putnam@dbr.com

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The only question addressed by the Court of Appeals on the interlocutory appeal below was the question certified by the district court, to wit:

> 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.

As explained at greater length *infra*, Respondents perceive the question whether the Fourth Amendment permits searches of all persons *arrested* – the question posed by Petitioner – as different than the question whether the Fourth Amendment permits searches of all persons admitted to a jail facility's general population.

PARTIES TO THE PROCEEDING

Petitioner is Albert W. Florence. Respondents are the Board of Chosen Freeholders of the County of Burlington; Burlington County Jail; Warden Juel Cole, individually and in his official capacity as Warden of Burlington County Jail; Essex County Correctional Facility; Essex County Sheriff's Department; John Does 1-5 of Burlington County Jail, individually and officially; and John Does 6-8 of Essex County Correctional Facility, individually and officially.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No 10-945

ALBERT W. FLORENCE,
Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, *et al*.,
Respondents.

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

OPPOSITION OF 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 IN RESPONSE TO FLORENCE'S PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals [App. A] is reported at 621 F.3d 296. The opinion of the district court [App. D] is reported at 595 F. Supp. 2d 492. The district court's opinion certifying that decision

for immediate appeal [App. C] is reported at 657 F. Supp. 2d 504. The Court of Appeals' order accepting jurisdiction over the appeal [App. B] is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 2010. On December 10, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

By its terms, the Fourth Amendment protects against "unreasonable" searches and seizures. In this case, the Court of Appeals for the Third Circuit concluded that it is not unreasonable for an Adult County Correctional Facility to follow a policy of strip searching all persons upon their admission to the general population of the Facility. Petitioner argued below that the Facility should first make an individualized finding of reasonable suspicion that a person is carrying contraband as to each individual it wants to search – at least in those cases involving persons arrested for non-indictable offenses. Without refer-

ence to the merits of Petitioner's policy preference – a subject on which reasonable people have been known to differ – the proposition that the Fourth Amendment of the Constitution of the United States compels the adoption of his policy choice is effectively foreclosed by this Court's holding in *Bell v. Wolfish*, 441 U.S. 520 (1979) and its affirmation of the legitimacy of a jail's institutional interests in *Hudson v. Palmer*, 468 U.S. 517 (1984).

1. In March 2005, a New Jersey State Trooper arrested Petitioner on an outstanding warrant. Although initially booked at the State Police Barracks, Petitioner was ultimately delivered to the Burlington County Jail for placement in the general population. Six days later, he was picked up by employees of the Essex County Correctional Facility for transport to that Facility. Although the Petition seems to suggest otherwise, the conduct that was under scrutiny by the courts below had nothing to do with Petitioner's arrest, the actions of the State Police, or, for that matter, the criminal behavior that gave rise to the outstanding warrant. To the contrary, the only issue in the courts below related to the intake procedures followed by the Burlington County Jail and the Essex County Correctional Facility.[1]

2. According to the facts found by the district court, as part of his admission into the general

---

[1] The arrest warrant was related to a guilty plea in 1998, when Petitioner fled from a traffic stop and later pled guilty to Hindering Prosecution in the third degree, a crime in violation of N.J.S.A. 2C:29-3 [Dkt. 76 Ex. A; Dkt. 94]. Petitioner failed to make the requisite monthly payments, and in April 2003, Essex County issued a warrant for his arrest. Shortly after the warrant was issued, Petitioner paid the $1310 balance owing, but the warrant remained outstanding.

population at the Burlington County Jail, Petitioner was asked to remove his clothes, shower with a delousing shampoo and body soap, and don jail-issued clothing [App. 64a]. Same-sex correction officers observed him throughout this process [App. 53a-57a]. They conducted a visual inspection for sores and other indicia of illness, tattoos, other identifying marks and contraband [App. 53a; 64a]. This visual inspection was not accompanied by any physical contact [App. 53a-54a; 64a]. As the district court also recognized, the Strip Search Authorization form indicated that Petitioner was not strip-searched, consistent with Burlington County policy and the officers' understanding of what a strip search was [App. 53a-57a].

Upon Petitioner's transfer to Essex County, he underwent Essex County Correctional Facility's intake procedures. As the district court found, Petitioner was called into the shower area with two other arrestees, directed to remove his clothes, enter a separate shower stall and shower and then to don jail-issued clothing [App. 59a]. Same-sex correction officers observed while he undressed and examined the interior of his mouth, his ears, nose, hair and scalp, his fingers, hands, arms and armpits, and all body openings and the inner thighs [App. 57a]. The visual observation did not include physical contact [App. 57a-59a].

3. After Petitioner was released, he brought suit on behalf of himself and a class of persons who had been required to disrobe prior to admission into the general populations of the Burlington County Jail and the Essex County Correctional Facility. His complaint, as amended, asserts class action claims under 42 U.S.C. §§ 1983, 1985, and 1986, for alleged

violations of rights under the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution. The defendants responding here are: the Board of Chosen Freeholders of Burlington County; the Burlington County Jail; the Warden, in his official and individual capacity and certain unnamed officers said to have participated in the intake procedures complained of in this Petition. The Amended Complaint seeks declaratory and injunctive relief, compensatory and exemplary damages, and attorneys' fees and costs.

4. The district court certified a class on March 20, 2008. The court defined the class as:

> All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to 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.

5. Petitioner moved for summary judgment and injunctive relief on June 27, 2008. Burlington County and Essex County cross-moved. Burlington County sought relief on three grounds: (1) that the search was constitutional under the Fourth Amendment; (2) that the individual officers were entitled to qualified immunity even if the search were held to be unlawful; and (3) that because Burlington County was carrying out state-mandated policies rather than its own, it was entitled to Eleventh Amendment immunity (as were the officers acting in their official

capacities). The district court held that the search was unconstitutional, and it denied qualified immunity to the officers in their individual capacities. It also denied Eleventh Amendment immunity to the officers in their official capacities and to the counties. The district court stated expressly, however, that the denial of Eleventh Amendment immunity was without prejudice, and it invited the defendants to renew the motion.

In deciding the cross-motions for summary judgment, there were certain substantive disagreements that the district court concluded that it did not need to resolve in order to decide whether the search was constitutional. *First*, the evidence was in conflict as to whether Petitioner was asked to lift his genitalia during the intake process. The district court did not consider the dispute material. *Second*, Respondents considered the visual inspection of Petitioner to be something less than a "strip search" (indeed, the intake form in this case stated that Petitioner was not "strip searched"). The district court nevertheless applied the label "strip search" because in its view "even the undisputed procedures of instructing arrestees to remove all of their clothing and subject their naked bodies to visual inspection 'rose to the level of a strip search' under the Fourth Amendment" [App. 6a; 64a-65a]. *Finally*, the parties disagreed as to whether, if the observation in question were a strip search, the search was nonetheless authorized under state law. These differences of opinion are noted here because the Petitioner's view of these facts pervades the Petition, and these were factual disputes expressly not resolved by the district court in

answering the Fourth Amendment question that was certified to the Court of Appeals.[2]

In support of its cross-motion for summary judgment, Burlington County articulated three institutional concerns that justified searching everyone admitted to the Jail's general population: increasing threats from contagious disease, and in particular MRSA; the prevalence of and danger from gangs; and the introduction of contraband into the jail.[3] Given that *Bell* had already affirmed the penological importance of protecting against contraband, Burlington County attached exhibits that focused on the health and gang identification issues. Essex County attached exhibits documenting gangs and contraband in its facility [Dkt. 131-13 (Ex. K)]. The district court ultimately rejected all three rationales, holding that none was sufficient to justify a suspicionless search.

---

[2] To the extent that this Court is curious about what the district court termed "ambiguity" in the state law (which it considered only with reference to its qualified immunity analysis [App. 96a]), the New Jersey Code at the time permitted strip searches upon admission of anyone lawfully confined in an Adult County Correctional Facility, *see* N.J. Code 10A:31-8.5(b)(1), and Petitioner was in that category. It also authorized searches of persons lawfully confined under other conditions as well, one of which (prior conviction of a crime) would also have brought Petitioner within the Code. N.J. Code 10A:31-8.5(b)(2)-(7). Rather than discussing these provisions, Petitioner cites to a different Code provision – N.J. Code 10A:31-8.4 – that limits the searches to be performed on non-indictable arrestees, and he lists only two of the reasons in 8.5 – as though neither applied to him [Pet. at 4].

[3] It might even be argued that those arrested on non-indictable or other "minor" offenses would be particularly anxious to be assured of protection from such threats.

6. Respondents asked the district court to amend its order to permit an interlocutory appeal of the constitutionality of the search pursuant to 28 U.S.C. § 1292(b). The Petitioner opposed the motion. The district court granted Respondents' motion and certified the following question to the Court of Appeals: "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" [App. 46a].

7. A panel of the Court of Appeals – Sloviter, J.; Hardiman, J.; and Pollak, J. (sitting by designation) reversed the district court in a 2-1 decision. Both the majority and the dissent applied *Bell*. Although the majority recognized the other two rationales (health issues and gang identification), it found the potential for smuggling contraband to be the "greatest security threat" [App. 20a]. Because it found the institutional need to detect and intercept contraband sufficient to warrant a search upon entry into a general population of a correctional facility without a need for individualized suspicion, the majority did not consider whether the other two rationales, singly or in combination, likewise justified the officers' observations of Petitioner [App. 20a-21a; 28a at n.9]. The dissent rejected only the contraband rationale and did not address the other two [App. 31a].

8. Following the decision of the Court of Appeals, the district court has proceeded with the other claims in the complaint. Petitioner has not sought to stay those claims. Given the decision by the Court of Appeals, Respondent has not needed to renew its motion for Eleventh Amendment immunity.

REASONS FOR DENYING THE WRIT

There is no good reason to grant certiorari here, and there are two excellent reasons to deny it. *First*, Petitioner has focused his Petition on extraneous facts that are unrelated to the specific interlocutory question that was certified to the Court of Appeals, thereby suggesting that the holding of that court is more far-reaching than it was and implying a procedural posture that is more final than it is. And *second*, the Court of Appeals did not apply the wrong law – and it did not apply the right law incorrectly.

I. THE QUESTION BEFORE THE COURT OF APPEALS (AND DISTRICT COURT) WAS NARROW AND INTERLOCUTORY.

The order sought to be reviewed here is interlocutory, and the case is still proceeding in the district court. Although this Court has jurisdiction to review § 1292(b) interlocutory orders under 28 U.S.C. § 1254(1), this Court has long held that the interlocutory status of a case "alone furnish[es] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Opinion of Scalia, J., concurring in denial of certiorari because there had not yet been a final judgment in the lower court); *see also Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 512 (1992) (following § 1292(b) certification of the preemption question to the Court of Appeals certiorari was denied; following trial, the Court of Appeals affirmed the district court's preemption rulings on remand, and the Supreme Court then granted certiorari); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488 n.6 (1968) (observing that certiorari was denied following the § 1292(b) appeal

but the issue was preserved and appealed post-trial). It is true that "[w]here there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review." *Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting from denial of certiorari). But this is not such a case.

Petitioner bases much of his argument on what he characterizes as a clear-cut and fixed split between the circuits. It is certainly true that Courts of Appeals have come to different results on the question of which searches may be conducted without individualized suspicion without offending the Fourth Amendment. But – as is true with Fourth Amendment analysis in general – the decisions of the Courts of Appeals are not quite as "black and white" as Petitioner contends. Indeed, that is to be expected when an analysis is by its terms fact- and situation-specific. Courts have upheld practices very similar to the ones reviewed by the Court of Appeals here as reasonable even within some of the circuits Petitioner lists as uniformly holding such practices unconstitutional. *See, e.g., Kelsey v. Cnty. of Schoharie*, 567 F.3d 54, 65 (2d Cir. 2009) (clothing exchange for detained misdemeanants does not require individualized suspicion); *N.G. v. Connecticut*, 382 F.3d 225, 237-38 (2d Cir. 2004) (upholding strip searches upon entry into juvenile custody – though not afterwards – without individualized suspicion, even as to persons admitted as truants, runaways, or members of "families with service needs"); *Dobrowolskyj v. Jefferson Cnty.*, 823 F.2d 955, 958 (6th Cir. 1987) (upholding policy of strip-searching detainees who were required – for whatever reason – to be moved into a general jail population); *Stanley v. Henson*, 337 F.3d 961,

967 (7th Cir. 2003) (upholding clothing exchange characterized as a strip search, even though the detainee was allowed to retain underwear); *Schmidt v. City of Bella Villa*, 557 F.3d 564, 573 (8th Cir. 2009) (upholding male officer's requirement that a female arrestee unzip her pants so that he could photograph a tattoo).[4] And in that regard, it is significant that some of the facts that have been found material by those and other courts were sharply disputed in the district court. The district court decided that it did not need to resolve those facts (including what Petitioner was required to do) in order to reach the legal issue before it. The absence of such factual findings here could hinder the Court's ability to draw a bright line to guide other courts.

---

[4] It is also true that many of the cases cited by the Petitioner were decided in the early 1980s, and the increased threats that society faces may have affected the public perception of when strip searches are reasonable. That perception may well have had an impact on courts such as the Ninth and Eleventh Circuit Courts of Appeal as they have reconsidered their positions *en banc*. *See Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (*en banc*); *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (*en banc*), *remanded*, No. 05-16734, 2009 U.S. App. LEXIS 974 (11th Cir. Jan. 20, 2009) (for directed factual development). As this Court explained in *United States v. Knotts*, 460 U.S. 276 (1983), the Fourth Amendment is implicated only if a person has a "justifiable," "reasonable," or "legitimate" expectation of privacy – one that is not just self-perceived but that "society is prepared to recognize as 'reasonable." *Id*. at 280-81. *Cf., Los Angeles Cnty. v. Rettele*, 550 U.S. 609, 613-16 (2007) (not unreasonable to require two persons who were not of the same race as the persons identified in a warrant to remain undressed while police searched the room for weapons); *BNSF Ry. Co. v. U.S. Dep't of Trans*., 566 F.3d 200, 208 (D.C. Cir. 2009) (upholding requirement that transportation employees who failed or refused a drug test be directly observed giving samples, with genitalia fully exposed).

Given this situational sensitivity, it is significant that the question the Petitioner has presented to this Court is different than the question that was reviewed by the Court of Appeals. Certainly one can imagine a circumstance in which the holding of a Court of Appeals goes beyond (or is narrower than) the question certified to it, and in such a case a Petitioner might craft a question to reflect the holding of the Court of Appeals rather than the question certified to that court. But in this case the Court of Appeals addressed directly and squarely the question presented to it. It is Petitioner who wants to ask a different question.

This Court has no reason to pass on a question that is not encompassed within a district court or Court of Appeals holding. *See United States v. Cherokee Nation*, 480 U.S. 700, 702 n.1 (1987) (recognizing that the "duty to engage in fair and honorable dealings" pressed by the Cherokee Nation was not the takings question addressed by the district court or certified to or considered by the Court of Appeals). Instead of addressing whether a strip search is constitutional upon any arrest, the Court of Appeals was asked whether a strip search is constitutional upon the admission of an inmate into a Correctional Facility's general population. With all due respect, those questions are quite different – both in the institutional justifications for the search and in the balance between state and arrestee interests. The Court of Appeals was not presented with (and thus had no occasion to consider) whether a policy that allowed – as one example – for disrobing and observation of persons who were merely taken to a police station, booked, and then released would be constitutional – or the even more extreme circumstance where a person is strip-searched in a public or

exposed location. *See 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).[5] Yet both of those searches would be encompassed within Petitioner's suggested question, which purports to cover "every individual arrested for any minor offense no matter what the circumstances."

This Court has also taught that the weight a court should accord to the government's interest varies by setting and by posture. It has drawn that distinction between a random stop and an arrest based upon a warrant. *See, e.g., United States v. Robinson*, 414 U.S. 218, 227-28 (1973) (explaining the "fundamental difference" between a search in the absence of probable cause to arrest – which must be "strictly circumscribed by the exigencies which justify its initiation" and a search incident to arrest); *see also Virginia v. Moore*, 553 U.S. 164, 177 (2008) ("The state officers arrested Moore, and therefore faced the risks that are 'an adequate basis for treating all custodial arrests alike for purposes of search justification.'" (citation omitted)). There is no less of a distinction between the institutional interests attendant upon an "arrest" and the institutional interests that Burlington County articulated – all of which were related to the special concerns of the "myriad of 'institutional needs

---

[5] In *Campbell*, the Court of Appeals for the Seventh Circuit upheld the decision to conduct a strip search but required "a higher threshold for reasonableness" because the arrest was non-custodial, and the only rationale for the search was to preserve evidence – a rationale that required reasonable suspicion. *Id*. at 717. It found, however, that the exposure was public and unwarranted – and thus that the manner of the search was unreasonable. *Id*. at 718.

and objectives' of prison facilities." *Samson v. California*, 547 U.S. 843, 862 (2006) (Breyer, J., Stevens, J., Souter, J., dissenting, objecting to the application of institutional concerns to evaluate a search of parolees).[6]

Inasmuch as the question raised by the Petition – as opposed to the question addressed by the Court of Appeals – is outside the "context of meaningful litigation" and posed "abstractly," there is no reason to grant a writ of certiorari to consider such a question. *The Monrosa v. Carbon Black Export, Inc.*, 359

---

[6] Petitioner draws on snippets excerpted from a number of only partially apposite cases discussing the Fourth Amendment's application to schoolchildren and to employee drug testing to support his contention that searches *of this nature – i.e.*, upon entry to the general population of a jail – are proscribed under the Fourth Amendment. Thus, Petitioner (1) characterizes the intrusiveness of the search based on the assessment this Court made when reviewing a search of a middle-school girl thought to have brought prescription or over-the-counter medication to school in the past, *see Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. ___, 129 S. Ct. 2633, 2643 (2009) (discussed at Petition at 17, 18); (2) discusses individualized suspicion in the context of a warrantless search, *see Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968) (discussed at Petition at 19); and (3) relies heavily on other purely civil drug testing cases*: Chandler v. Miller*, 520 U.S. 305, 309 (1997) (reviewing Georgia's drug test requirement for candidates for state office); *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 606 (1989) (reviewing Federal Railroad Administration regulations mandating drug and alcohol testing of railroad employees involved in train accidents); *Schmerber v. California*, 384 U.S. 757, 766-72 (1966) (reviewing blood testing of individual arrested for driving under the influence of alcohol). Perhaps because Petitioner does not like the outcome, he does not cite to the similarly partially apposite suppression case permitting evidence uncovered during a clothing exchange to be admitted. *See United States v. Edwards*, 415 U.S. 800 (1974).

U.S. 180, 184 (1959); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107-08 (2001) (dismissing writ as improvidently granted where challenge in the Supreme Court was to programs beyond those considered by the Court of Appeals); *Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (question posed concerned an officer engaged in private conduct; instead, the officer was engaged in official conduct).

II. THE COURT OF APPEALS CORRECTLY IDENTIFIED AND APPLIED *BELL v. WOLFISH*, 441 U.S. 520 (1979) TO THE FACTS BEFORE IT.

As noted above, in an interlocutory case such as this, certiorari would be warranted only if there were a clear-cut error in identifying or applying the proper standard. Here, Petitioner recognizes that this Court's precedent in *Bell* required the Court of Appeals to consider "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. And that is precisely what the Court of Appeals did. Because the Petitioner is not taking issue with the standard the Court of Appeals applied, but instead merely disagrees with the result it reached, there is no reason for this Court to grant the writ. As the decisions discussed above show, the answers to *Bell*'s questions can lead to the classification of certain searches as "reasonable" or "unreasonable" under the Fourth Amendment based on search-specific nuances. "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967) (upholding building code inspections

on an area-wide basis). Of necessity, where and under what circumstances a search is conducted is critical to the determination of the reasonableness of the search. *See, e.g., Illinois v. Lafayette*, 462 U.S. 640, 645 (1983) (recognizing that a search that would be impractical, unreasonable, or embarrassingly intrusive done on the street can be performed more readily and privately at the police station).

Petitioner is simply incorrect in contending that this Court has mandated "individualized suspicion" when arrestees are placed in the general jail population. Instead, this Court has stated (and reaffirmed on several occasions) that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976) (citing cases); *Samson*, 547 U.S. at 855 n.4 ("The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion."); *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (recognizing that safety and administrative regulations are instances when governmental interests may justify searches "without any measure of individualized suspicion"). Accordingly, although individualized suspicion is the ordinary justification for searches, there are exceptions when there are "special needs, beyond the normal need for law enforcement." *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997).[7] Prison administration is one such "special need." *See, e.g., Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 619-20 (1989) (listing *Bell* among the cases

[7] In the Petition, Petitioner characterizes *Chandler* – a case in which this Court determined that Georgia could not mandate drug testing for every candidate for public office – solely as recognizing the "normal requirement of individualized suspicion" [Pet. at 19].

authorizing special needs searches that do not require individualized suspicion). As this Court explained in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) – there, upholding drug testing of certain customs officials – the special needs analysis applies particularly when the Government is seeking to "prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Id*. at 668.

Petitioner's assertion that this Court has mandated individualized suspicion to justify a strip search for a minor offense, Pet. at 16-22, is also flatly inaccurate. In *Bell*, the Court upheld a "body cavity" search, which is more intrusive than a "strip search" – regardless of whether "strip search" is used as a term of art or as a broad descriptor of any sort of inspection of a disrobed or partially disrobed person. The Court upheld that search as to all persons – including without distinction witnesses, contemnors, pretrial detainees and inmates awaiting transport or trial – upon their return to the general population following contact visits. 441 U.S. at 524. And this Court affirmed the fact that *Bell* did not require individualized suspicion when it allowed for suspicionless testing of public school athletes for drugs. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664 n.3 (1995).

Petitioner's repeated reliance on cases from other settings, *see supra* n.6, ignores this Court's instruction that any evaluation of a search requires the balancing of "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." *Bell*, 441 U.S. at 559. In this regard, it

is notable that in the speedy trial context – an analysis that likewise calls for a "balancing test" – the Court has explained that it would not ordinarily review a case that assessed the reasonableness of an application of such a test, and it has made exceptions only when a Court of Appeals or a state Supreme Court committed clear error. *See, e.g., Vermont v. Brillon*, 556 U.S. __, 129 S. Ct. 1283, 1291 (2009) ("[T]he balance arrived at in close cases ordinarily would not prompt this Court's review. But the Vermont Supreme Court made a fundamental error in its application of *Barker* [*v. Wingo*, 407 U.S. 514 (1972)] that calls for this Court's correction"); *Moore v. Arizona*, 414 U.S. 25, 26 (1973) (finding Arizona Supreme Court was "in fundamental error in its reading of *Barker v. Wingo*").

Here, there has been no such fundamental error warranting the Court's attention. Instead, the Court of Appeals engaged in a straightforward application of the well-recognized *Bell* factors as they applied to the particular situation at hand – a situation that is not at all apparent from the Petition. The people who were observed by correctional officers were arrestees who were being admitted to the general population of the Burlington County Jail and the Essex County Correctional Facility. The visual observation was part of a process whereby the person showered and put on jail-issued clothing. Nowhere does Petitioner acknowledge that the reasons articulated by Burlington County in the district court and the Court of Appeals for conducting that observation extended beyond a concern over contraband. The summary judgment record documented the threats the institution was seeking to address and the ways in which the threats have become more pronounced in recent years [Dkt. 130-1-15]. These included both health

threats and the increasing need to identify gang members upon their entry into the institution. The Court of Appeals did not need to consider these other rationales, because contraband was a sufficient reason for the search in *Bell* and the Court of Appeals considered it sufficient in this case as well [App. 12a].

But the fact that the Court of Appeals did not need to rely on the additional rationales does not change the reality that Burlington County faces multiple and increasing challenges in meeting the needs of all the persons it is charged to protect. In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Court recognized that administrators were to "take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors." *Id*. at 526 (upholding a prison cell search).

> They are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves. They must be ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today; they must prevent, so far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize.

Id. at 526-27. And they are required "to maintain as sanitary an environment" as possible. *Id*. at 527.

Although the district court did not find the threat of contagious diseases sufficient to support the search, Courts of Appeals have recognized the legitimacy of that interest – and the potential consequences if prisoners are not protected. *E.g., Dunn v. White*, 880 F.2d 1188, 1195 (10th Cir. 1989) (uphold-

ing mandatory AIDS testing without any demonstration of individualized suspicion). As the Court of Appeals for the Tenth Circuit explained, applying *Bell*, the generalized interest of the state in protecting public health is balanced against the intrusiveness of the search (in that case, blood tests) but the fact that the person is in custody "changes the relative weight accorded each interest." *Id*. at 1194 (discussing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).[8] The institutional need to protect inmates also has constitutional implications. *See 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).[9] The applicability of the recogni-

---

[8] *Turner* is one of a number of cases designed to "ensure that courts afford appropriate deference to prison officials," *Washington v. Harper*, 494 U.S. 210, 224 (1990) – even when constitutional rights are at issue; *see also Shaw v. Murphy*, 532 U.S. 223, 232 (2001) (observing that a challenge must overcome the presumption that administrative action was within broad discretion). 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). Moreover, the Court refused to require officials "to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Turner*, 482 U.S. at 90-91.

[9] As with medical care, the Burlington County Jail and its officers have been subjected to litigation about whether they adequately protected against gangs. *See Paulino v. Burlington*

tion in *Von Raab* that states need to "prevent the development of hazardous conditions" and "detect violations that rarely generate articulable grounds for searching any particular place or person" takes on significance in these contexts. 489 U.S. at 668.

The Petition reflects frustration, and, given the circumstances of the case, perhaps Petitioner's frustration is understandable. That frustration, however, has nothing to do with the Fourth Amendment. Petitioner may well be frustrated with a system that continues to show a warrant as outstanding even after it has been satisfied. But this litigation does not purport to address – much less

---

Cnty. Jail, No. 07-5315 (RBK), 2010 U.S. Dist. LEXIS 132509, at *1-2 (D.N.J. Dec. 14, 2010) (dismissing on summary judgment lawsuit brought by pretrial detainee awaiting trial assaulted by gang members). Here, Petitioner suggests that even the contraband rationale should have been rejected as pretextual and unsupportable – an odd position to take given this Court's recognition of such concerns as valid in *Bell* and *Hudson*. In any event, this Court has established the opposite presumption: the burden is not on the jail, because these 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." *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 128 (1977) (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (First Amendment right of association)). Asking whether an infringement of a constitutional right is reasonably related to a legitimate penological interest "ensures the ability of corrections officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration' and avoids unnecessary intrusion of the judiciary into problems particularly ill suited to 'resolution by decree.'" *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50 (1987) (superseded in part by 42 U.S.C. § 2000cc-2).

resolve – that problem. It could also be that Petitioner is frustrated at the state law gap between N.J. Code 10A:31-8.4 and 8.5. If so, the New Jersey legislature has already addressed the ambiguity (in July 2010) – and has limited the persons who can be searched under Section 8.5 to "persons lawfully confined for commission of a crime." N.J. Code 10A:31-8.5 (emphasis supplied). Strip searches of persons detained or arrested for commission of an offense other than a crime are now authorized only under N.J. Code 10A:31-8.4 and only under specific limited circumstances.[10] It goes without saying, of course, that a state can enact laws more protective of privacy than the Fourth Amendment requires, in accordance with its values, but "its choice of a more restrictive option does not render the less restrictive

---

[10] *See* N.J. Code 10A:31-8.4 ("(a) A person who has been detained or arrested for commission of an offense other than a crime and who is confined in an adult county correctional facility shall not be subject to a strip search unless: (1) The search is authorized by a warrant or valid documented consent; (2) A recognized exception to the warrant requirement exists and the search is based on probable cause that a weapon, controlled dangerous substance, contraband or evidence of a crime will be found and the custody staff member authorized to conduct the strip search has obtained the authorization of the custody staff supervisor in charge; (3) The person is lawfully confined and the search is based on reasonable suspicion that a weapon, controlled substance, contraband or evidence of a crime will be found, and the custody staff member authorized to conduct the strip search has obtained the authorization of the custody staff supervisor in charge; or (4) Emergent conditions prevent obtaining a search warrant or authorization of the custody staff supervisor in charge and such emergent conditions require custody staff to conduct a strip search in order to take immediate action for purposes of preventing bodily harm to the officer, person or others.")

ones unreasonable, and hence unconstitutional." *Virginia v. Moore*, 553 U.S. 164, 174 (2008); *see also Arkansas v. Sullivan*, 532 U.S. 769 (2001).

It may also be that Petitioner's frustration is with New Jersey's determination that all arrestees can be sent to jail. But not only does the Fourth Amendment not demand establishing "worthiness" prior to a search, such a policy would be flatly inconsistent with the Fourth Amendment. As this Court explained in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), "we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Id*. at 347; *see also Illinois v. Andreas*, 463 U.S. 765, 772-73 (1983) (recognizing that a Fourth Amendment standard must be (1) "workable for application by rank-and-file, trained police officers;" (2) reasonable; and (3) "objective, not dependent on the belief of individual police officers"). Indeed, if jailers were required to identify which persons were "likely" to be gang members or to be ill, such a subjective determination would raise concerns under the Equal Protection Clause of the Fourteenth Amendment. *See Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 983-88 (9th Cir. 2010) (*en banc*) (concurring opinion) (discussing at length the problems – including Equal Protection concerns – with exempting certain persons or categories of persons from a search regime); *Johnson v. California*, 517 U.S. 806, 813 (1996) (noting in context of Fourth Amendment traffic stop inquiry that intentionally discriminatory application of laws would also implicate Equal Protection Clause); *Whren v. United States*, 543 U.S. 499, 507-10 (2005) (strict scrutiny is

to be applied where upon admission to a jail inmates were initially segregated by race and nation of origin to avoid commingling rival gang members).

The fact is that the Court of Appeals properly applied *Bell* to balance the needs of jail administration against the privacy interests of those entering into that population. That is what the Fourth Amendment requires. Any state law ambiguity does not implicate the Constitution and, in any event, has been addressed by the state legislature. All of which suggests that if this Court were to grant certiorari here and now, its decision would at best be of the sort of "isolated significance" that counsels against review. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 76-77 (1955).

CONCLUSION

New Jersey had a practice that its jail administrators believed – and continue to believe – properly recognized the valid concerns of staff and inmates and balanced those against the privacy interests of persons newly admitted to custody. Nothing in the Fourth Amendment or this Court's jurisprudence construing that Amendment discounts the importance of the penological interests at stake here. Nor does anything in this Court's jurisprudence require a jail to ask for individualized determinations whether a person has enough "risk factors" to warrant a search for gang identification, contagious disease, or contraband before placing that person in the general population. The Fourth Amendment does not require that federal courts micromanage jail administration or demand individualized assessments beyond assuring that a search is "reasonable" – *i.e.*, that the legitimate penological concerns of the jail are

balanced against the privacy interests of those who are taking up residence within it. It follows that this Court should deny the Petition.

Respectfully submitted.

J. BROOKS DIDONATO
PARKER MCCAY
Three Greentree Centre
7001 Lincoln Drive West
P.O. Box 974
Marlton, NJ 08053
(856) 596-8900

ALFRED W. PUTNAM, JR.
Counsel of Record
D. ALICIA HICKOK
TARA S. SAROSIEK
DRINKER BIDDLE
& REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alfred.Putnam@dbr.com

Counsel for Respondents