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 OF *AMICUS CURIAE* COOK COUNTY IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTEREST OF AMICUS..... 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT..... 4

ARGUMENT..... 9

I. Under *Bell*, The Fourth Amendment Does Not Automatically Prohibit Blanket Visual Body Cavity Searches Of Arrestees Entering The Jail Population After Contact With Persons Outside The Jail 10

II. This Court Should Re-Affirm *Bell* And, In So Doing, Apply The First, Third and Fourth *Turner* Factors To Determine Whether Visual Body Cavity Searches Of Arrestees Are Permissible Under The Fourth Amendment..... 14

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

CASES

Barker v. Wingo,
407 U.S. 514 (1972) 19

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

Block v. Rutherford,
468 U.S. 576 (1984) 11, 13

Bull v. City and County of San Francisco,
595 F.3d 964 (9th Cir. 2010) (*en banc*) . . . . . *passim*

Carver v. Sheriff of La Salle County,
203 Ill. 2d 497, 787 N.E.2d 127 (Ill. 2003) 1, 3

Chapman v. Nichols,
989 F.2d 393 (10th Cir. 1993) 5

County of Cook ex rel. Rifkin v. Bear Stearns & Co.,
215 Ill. 2d 466, 831 N.E.2d 563 (Ill. 2005) 1

CTS Corp. v. Dynamics Corp. of America,
481 U.S. 69 (1987) 15

Cutter v. Wilkinson,
544 U.S. 709 (2005) 12

Cited Authorities

Page

Florence v. Board of Chosen Freeholders of Burlington,
621 F.3d 296 (3d Cir. 2010) 8

Holly v. Woolfolk,
415 F.3d 678 (7th Cir. 2005) 3, 6

Hudson v. Palmer,
468 U.S. 517 (1984) 12

Johnson v. Phelan,
69 F.3d 144 (7th Cir. 1995). 16

Jones v. N.C. Prisoners' Labor Union, Inc.,
433 U.S. 119 (1977). 11

Mary Beth G. v. City of Chicago,
723 F.2d 1263 (7th Cir. 1983) 2, 5

Masters v. Crouch,
872 F.2d 1248 (6th Cir. 1989). 5

O'Lone v. Estate of Shabazz,
482 U.S. 342 (1987) 17

Overton v. Bazzetta,
539 U.S. 126 (2003) 12

Pell v. Procunier,
417 U.S. 817 (1974) 11

Cited Authorities

Page

Powell v. Barrett,
541 F.3d 1298 (11th Cir. 2008) 8

Procunier v. Martinez,
416 U.S. 396 (1974) 11

Roberts v. State,
239 F.3d 107 (1st Cir. 2001) 5

Stewart v. Lubbock County,
767 F.2d 153 (5th Cir. 1985) 5

Swain v. Spinney,
117 F.3d 1 (1st Cir. 1997) 5

Turner v. Safley,
482 U.S. 78 (1987) . . . . . *passim*

United States v. $8,850,
461 U.S. 555 (1983) 19

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 14

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 2

Washington v. Harper,
494 U.S. 210 (1990) 16

Weber v. Dell,
804 F.2d 796 (2nd Cir. 1986) 5

Cited Authorities

Page

Young v. County of Cook,
2007 U.S. Dist. LEXIS 31086
(N.D. Ill. April 25, 2007) 2, 6, 14

Young v. County of Cook,
616 F. Supp. 2d 834 (N.D. Ill. 2009) . . . . . *passim*

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. I. 16

U.S. Const., amend. IV . . . . . *passim*

U.S. Const., amend. V 7

U.S. Const., amend. VIII. 16

STATUTES AND RULES

Sup. Ct. R. 37 4

Fed. R. Civ. P. 23(b)(3) 1, 2

55 ILCS 5/3-6017 (2011) 1

MISCELLANEOUS

Chicago Tribune, December 30, 2007, "Six Cook
County Inmates Injured In Brawl" 6

Page

Chicago Tribune, May 14, 2008, "11 Guards And 7 Inmates Injured In Cook Jail Brawl" 6

Chicago Tribune, May 29, 2008, "Three Inmates Seriously Hurt In Stabbing At Cook County Jail" 6

Chicago Tribune, August 6, 2009, "11 Injured In Fight At Cook County Jail," (http://archive.chicagobreakingnews.com/2009/08/at-least-6-stabbed-at-cook-county-jail.html) 6

Chicago Tribune, March 30, 2009, http://archive.chicagobreakingnews.com/2009/03/cops-man-hid-gun-from-police-after-arrest.html 3

Daily Southtown, March 22, 2007 (http://www.suffredin.org/news/newsitem.asp?language=english&newsitemid=2233) 6

Christopher Keleher, *Judges as Jailers: The Dangerous Disconnect Between Courts and Corrections,* 45 Creighton L. Rev. No. 1 (forthcoming 2011), available at http://ssrn.com/abstract=1910709 ..... 2, 5, 6, 10

INTEREST OF AMICUS

Amicus is the County of Cook, Illinois ("Cook County"), the second largest county in the United States. The State's Attorney of Cook County is the chief legal officer for Cook County and is constitutionally and statutorily charged with representing the County in all civil litigation. *County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 831 N.E.2d 563 (Ill. 2005). Cook County is responsible for paying settlements and judgments arising from constitutional and common law tort actions against county officials, including the Sheriff of Cook County (the "Cook County Sheriff" or the "Sheriff"). *Carver v. Sheriff of La Salle County,* 203 Ill. 2d 497, 787 N.E.2d 127 (Ill. 2003).

The outcome of this case will impact sheriffs throughout the nation who operate county jails. Under Illinois law, the Cook County Sheriff operates the Cook County Department of Corrections (the "Cook County Jail"). *See* 55 ILCS 5/3-6017 (2011) (stating that sheriffs in Illinois "have the custody and care of the courthouse and jail of his or her county").

In a recent federal lawsuit, detainees filed a Rule 23(b)(3) class action for damages against Cook County, the Cook County Sheriff and several individual defendants alleging that the practice of conducting blanket visual body cavity searches of arrestees entering the jail population after contact with persons outside the jail violated the Fourth Amendment. *See Young v. County of Cook*, 616 F. Supp. 2d 834 (N.D. Ill. 2009).

In *Young*, the district court held that "courts of appeal have generally ruled that a detainee held on a

misdemeanor charge not related to weapons or drugs may not be strip searched absent individualized reasonable suspicion that he or she is carrying such contraband." *Id.* at 846, In adopting and applying this legal principle, neither the Seventh Circuit in *Mary Beth G. v. City of Chicago* nor the district court in *Young* were faithful to the balancing test set forth in *Bell v. Wolfish*, 441 U.S. 520 (1979). *See Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272-1273 (7th Cir. 1983); *Young*, 616 F. Supp. 2d at 845-847.

The district court in *Young* certified a damages class. *Young v. County of Cook*, 2007 U.S. Dist. LEXIS 31086 (N.D. Ill. April 25, 2007).[1] Even though the defendants believed (and continue to believe) that neither *Mary Beth G.* nor *Young* properly applied *Bell*, the defendants paid $55 million to settle the *Young* lawsuit because of the extraordinary size of the class (over 250,000 members[2]) and the concomitant enormity of the County's potential exposure. *See* Christopher Keleher, *Judges as Jailers: The Dangerous Disconnect Between Courts and Corrections,* 45 Creighton L. Rev. No. 1 (forthcoming 2011) (hereinafter Keleher, *Judges as Jailers*), http://ssrn.com/abstract=1910709 at 2.

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1. The County and the Sheriff believed (and continue to believe) that the damage claims in *Young* were far too individualized to be suitable for class treatment. Unfortunately, this case concluded prior to this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Under *Wal-Mart*, certification of the *Young* plaintiffs' Rule 23(b)(3) class would have been particularly inappropriate, as commonality was lacking.

2. See the informational website of the plaintiffs' class counsel in *Young* at http://www.cookcountystripsearch.com.

Cook County paid this enormous settlement rather than face potential economic catastrophe. In this regard, Cook County could not risk a potential judgment in excess of $500,000,000.00 in the hope that the Seventh Circuit or this Court would reverse the district court's mis-application of *Bell*. Under such financial pressure, the County had no choice but to retreat from the battlefield of litigation.[3]

Yet, the Cook County Sheriff continues to operate the Cook County jail, a large and dangerous county jail. And the County is liable for any judgment entered against the sheriff. *See Carver,* 203 Ill. 2d at 522, 787 N.E.2d at 741 (Illinois counties are liable for judgments against the County sheriff); *see also Holly v. Woolfolk*, 415 F.3d 678, 680 (7th Cir. 2005) (describing Cook County Jail, the third largest jail in the nation, as "huge and unruly"). This appeal presents the exact same issue from *Young*: What test should courts employ when determining whether a policy of strip searching arrestees entering the jail population after contact with persons outside the

3. Subsequent to the resolution of *Young*, the Sheriff discontinued the policy of blanket strip searches. The Sheriff continues to do virtual strip searches using the L3 body scan technology and does strip searches for cause. It is significant to note that on March 19, 2009, after the blanket strip searches stopped at Cook County Jail, a detainee named Bennie Ellison smuggled a 38-caliber handgun into the Jail by tying the gun to the drawstring of his shorts and letting it dangle between his legs. Mr. Ellison feigned that he walked through the scanner, but walked around it and brought a gun into the Cook County Jail. *See Chicago Tribune*, March 30, 2009, article at http://archive.chicagobreakingnews.com/2009/03/cops-man-hid-gun-from-police-after-arrest.html.

jail violates the Fourth Amendment? Cook County has a strong interest in the resolution of this issue.

Amicus is the legal representative of a unit of state government. As a result, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Cook County, Illinois, therefore, respectfully submits this brief as *Amicus Curiae* in support of respondents in accordance with Supreme Court Rule 37.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented by respondents Board of Chosen Freeholders of the County of Burlington, Burlington County Jail, Warden Juel Cole, John Does 1-5 of Burlington County Jail, Essex County Correctional Facility and Essex County Sheriff's Department.

SUMMARY OF ARGUMENT

Bell held that a mandatory policy of body cavity searches for all detainees -- regardless of the reason for their incarceration -- at a federal short-term custodial facility after contact visits with outsiders does not violate the Fourth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 560 (1979). This Court reasoned that a "detention facility is a unique place fraught with serious security dangers," *Id.* at 559, the management of which "courts are ill equipped to deal with." *Id.* at 548.

In the 32 years since this Court decided *Bell*, several circuits[4] have virtually turned *Bell* on its head and held that the Fourth Amendment forbids strip searching misdemeanant arrestees in correctional facilities absent reasonable suspicion.[5] Some of these cases do not involve the practice of conducting searches prior to entry into a county jail or prison.[6] The cases applying the "reasonable suspicion" standard to challenges to strip searches in jails or prisons pay lip service to *Bell* but essentially ignore its holding.

In many ways, the watering down of *Bell* reached its zenith in *Young*, a case which held that the Cook County Sheriff violated the Fourth Amendment by conducting strip searches on all detainees entering the Cook County

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4. *See Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997) (holding that *Bell* requires officers to have a reasonable suspicion that a particular detainee harbors contraband prior to conducting a strip or visual body cavity search of detainees held in municipal jails for minor offenses); *Roberts v. State,* 239 F.3d 107, 112 (1st Cir. 2001) (applying the reasonable suspicion standard from *Swain* to strip searches at a State prison); *Stewart v. Lubbock County,* 767 F.2d 153, 156-57 (5th Cir. 1985) (applying the "reasonable suspicion" standard to strip searches of arrestees on minor misdemeanor or traffic violations); *Weber v. Dell,* 804 F.2d 796, 802 (2nd Cir. 1986) (same); *Chapman v. Nichols,* 989 F.2d 393, 395-96 (10th Cir. 1993) (same); and *Masters v. Crouch,* 872 F.2d 1248, 1255 (6th Cir. 1989) (same).

5. *See also* Keleher, *Judges as Jailers*, http://ssrn.com/abstract=1910709 at 3.

6. *See, e.g., Mary Beth G. v. Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (applying reasonable suspicion standard to determine whether strip searches in a municipal detention facility of persons arrested for traffic violations violated the Fourth Amendment).

Jail after contact with persons outside the jail. The district court in *Young* reached this conclusion even though the Sheriff cited safety and security as the reason for the strip search policy and presented substantial evidence of contraband being smuggled in the Cook County Jail despite the security measures in place. *See Young*, 2007 U.S. Dist. LEXIS 31086 at *26 (noting that the Sheriff submitted evidence of sixty-one separate instances where strip searches revealed attempted smuggling). Many brawls and stabbings occur at the Cook County Jail.[7] Despite this substantial evidence of violence at the Cook County Jail, the district court in *Young* gave no weight to the security concerns regarding contraband that

7. *See Holly*, 415 F.3d at 679 (extensively listing a series of serious stabbings, gang fights and altercations between detainees and noting that detainees in the Cook County Jail also attack jail guards, albeit not as often as other inmates); "Inmate stabs four while attempting escape at hospital," *Daily Southtown*, March 22, 2007, (article can be found at http://www.suffredin.org/news/newsitem.asp?language=english&newsitemid=2233) (while detainee Willis Reese from the Cook County Jail was receiving medical treatment at a hospital outside the jail complex, he went to the restroom, emerged with five inch long jailhouse made knife known as a shank and stabbed four people while trying to escape: he stabbed a corrections officer in the neck, he stabbed a nurse and a civilian in the arms and he stabbed the driver of a shuttle bus in the chest); Keleher, *Judges as Jailers*, http://ssrn.com/abstract=1910709 at 19, n. 145, *citing Chicago Tribune*, May 14, 2008 article "11 Guards And 7 Inmates Injured In Cook Jail Brawl;" *Chicago Tribune*, December 30, 2007 article "Six Cook County Inmates Injured In Brawl" and *Chicago Tribune*, May 29, 2008, "Three Inmates Seriously Hurt In Stabbing At Cook County Jail." *See also* "11 Injured In Fight At Cook County Jail," *Chicago Tribune*, August 6, 2009 (article posted at http://archive.chicagobreakingnews.com/2009/08/at-least-6-stabbed-at-cook-county-jail.html).

prompted strip searches of all arrestees coming into the Jail. In *Bell* (the case that *Young* purported to follow but did not), this Court recognized the importance of strip searches in securing a jail facility, even though the prison officials in *Bell* provided evidence of only one instance where an inmate smuggled contraband on his person:

> Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, App. 71-76, and in other cases. (citations omitted) That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.

Bell, 441 U.S. at 559. The stark differences between the legal standards applied in *Bell* and *Young* show the great distance to which some lower courts have strayed from *Bell*.[8]

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8. The *Bell* majority held that strip searches in prisons did not constitute punishment and, as a result, did not violate the Due Process Clause of the Fifth Amendment. *Bell*, 441 U.S. at 560-561. In dissent, Justice Stevens stated his view that strip searches violated due process, as they were "punitive in character" and "the least justifiable" of the measures challenged in *Bell*. *Id.* at 588, 594-595 (Stevens, J., dissenting). In *Young*, the district court likewise concluded that strip searches of groups of detainees at

Three recent circuit decisions, however, have followed *Bell*: *Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir. 2008) (*en banc*) (holding that strip searches of arrestees that are no more intrusive than those upheld in *Bell* are constitutionally permissible; *Bull v. San Francisco*, 595 F.3d 964, 975 (9th Cir. 2010) (*en banc*) (holding that "the scope, manner, and justification for San Francisco's strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in *Bell*" and thus was constitutionally permissible) and the decision below, *Florence v. Board of Chosen Freeholders of Burlington*, 621 F.3d 296 (3rd Cir. 2010). *Powell*, *Florence* and *Bull* are consistent with the spirit and holding in *Bell*.

Nonetheless, petitioner asks this Court to reverse the Third Circuit decision below and to apply the reasonable suspicion standard, (Pet. Br. 11, 20) a standard that cannot be reconciled with the holding in *Bell*. This standard is problematic in another important respect: it is inflexible and unworkable, as it attempts to install a "one size fits all solution" to the question of whether a policy of strip searching arrestees entering a correctional facility violates the Fourth Amendment. *Amicus* submits that the application of *Bell* and the multi-factor test from *Turner*, as set forth in *Bull*, is the superior approach for determining whether strip searches are constitutionally permissible in a given situation.

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the Cook County Jail constituted punishment and violated due process. *Young*, 616 F.Supp.2d at 854-855. The district court found that conducting strip searches of male detainees without privacy screens "greatly enhanced their discomfort and humiliation." *Id.* at 851. It is, therefore, apparent that the district court in *Young* did not follow the holding in *Bell* but choose instead to follow Justice Stevens' dissent.

Unlike the reasonable suspicion standard (which considers whether a jailer has reason to believe that a particular arrestee is smuggling contraband), application of the *Turner* factors necessitate consideration of: (1) whether the strip search policy is related to legitimate penological interests, (2) whether a rational connection exists between the policy and the legitimate governmental interest, (3) what effect accommodation of the asserted constitutional right will have on guards and other inmates and (4) the availability of prison resources. *Bull*, 595 F.3d at 973. The *Turner* factors provide courts with the flexibility to determine whether a policy of strip searching all arrestees entering a jail setting is reasonable under the circumstances.

Consequently, and for the reasons set forth below, the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

ARGUMENT

The reasonable suspicion standard poses several significant problems. First, it is contrary to the balancing test from *Bell*. Second, in contravention of *Bell*, it excessively focuses on the crime charged against the arrestee in determining reasonable suspicion. Third, the reasonable suspicion standard is neither flexible nor workable, as it does not provide any guidance regarding the balancing of interests that *Bell* requires. *See Bell*, 441 U.S. at 559 (recognizing that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.")

The Third Circuit decision below should be affirmed, as it follows the holding in *Bell*.

I. Under *Bell*, The Fourth Amendment Does Not Automatically Prohibit Blanket Visual Body Cavity Searches Of Arrestees Entering The Jail Population After Contact With Persons Outside The Jail.

The reasonable suspicion cases from various circuits have muddied the waters regarding the scope of strip search policies in correctional facilities that are permissible under the Fourth Amendment. These cases do not provide any guidance to lower courts or prison officials because, at heart, the cases cannot be reconciled with *Bell*.[9]

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9. One commentator has observed that:

> Lower courts have misread *Bell* in numerous ways. Requiring reasonable suspicion and consideration of a person's charges for a strip search when *Bell* required neither. Asserting the persons searched in *Bell* were serious offenders when the policy encompassed persons arrested for contempt and witness protection participants. Downplaying the "wide-ranging deference" to correctional officials emphasized in *Bell* and its progeny. Concocting criteria for the contraband found by defendant officials. Finally, ignoring the deterrence element of strip searches. The source of these flaws is simple: an interpretation of what judges want *Bell* to say, not what it does.

Keleher, *Judges as Jailers*, http://ssrn.com/abstract=1910709 at 11, *citing Bell*, 441 U.S. at 524.

Bell, to be sure, cautioned that because "problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions . . .[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547. *See Block v. Rutherford,* 468 U.S. 576, 589 (1984) (courts may not engage in "an impermissible substitution of [our] view on the proper administration of [a correctional facility] for that of the experienced administrators of that facility"); *see also Jones v. N.C. Prisoners' Labor Union, Inc.,* 433 U.S. 119, 128 (1977); *Procunier v. Martinez,* 416 U.S. 396, 404-05 (1974).

Bell further held that "[s]uch 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." (emphasis added) *Id.* at 547-548; *citing Pell v. Procunier,* 417 U.S. 817, 827 (1974).

As to *Bell*'s first factor, this Court recognized that the policy of the Metropolitan Correctional Center (the "MCC") of conducting visual, and sometimes digital, searches of a detainee's anus and genitals after every contact visit was a "gross violation of personal privacy." *Id.* at 558. In regard to the second factor, the Court did not "doubt… that on occasion a security guard may conduct the search in an abusive fashion." However, the Court bypassed concerns regarding abuses that occurred during particular searches to uphold the policy as a

whole because the issue was not whether the individual searches were unreasonable, but "whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause." *Id.* at 560 (emphasis provided)

In addressing the third and forth factors, *Bell* placed substantial weight on both the justification for the searches (security), and the location of where those searches took place (a correctional facility). This Court stated that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546; *see also Hudson v. Palmer*, 468 U.S. 517, 524 (1984) (holding that a correctional facility "carries with it the circumscription or loss of many significant rights as… a practical matter, to accommodate a myriad of institutional needs and objectives of prison facilities, chief among which is internal security"); *Cutter v. Wilkinson,* 544 U.S. 709, 724 (2005) (prison security is a compelling state interest and deference is due to institutional officials' expertise in this area); and *Overton v. Bazzetta,* 539 U.S. 126, 133 (2003) (internal security is "perhaps the most legitimate of penological goals").

In a separate opinion, Justice Powell stated that "some level of cause, such as a reasonable suspicion, should be required to justify" body-cavity searches of inmates. *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part). The *Bell* majority did not adopt Justice Powell's view and did not require the MCC to show individualized suspicion, or to distinguish between detainees and prisoners to justify their search

policy. This Court reasoned that an individual is in custody does not indicate what type of risk they would pose to jail security and order.[10] *Id.* at 547; *see also Block*, 468 U.S. at 587 (adopting *Bell*'s reasoning where it held that "[i] t is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits.")

Moreover, *Bell* held that the single instance of attempted smuggling,[11] along with the remote possibility that detainees could smuggle contraband in a body cavity in these circumstances,[12] did not undermine MCC's justification for their search policy because the absence of a record could easily be construed as evidence of the

10. The Court noted that pretrial detainees at the MCC, like detainees at the CCDOC, may "pose a greater risk of escape than convicted inmates…where resided convicted inmates have been sentenced to only short terms of incarceration and many of the detainees face the possibility of lengthy imprisonment if convicted." *Id.* at 547.

11. In dissent, Justice Stevens emphasized that the MCC failed to provide *any* examples where a detainee attempted to smuggle contraband into Jail after a contact visit. *Bell*, 441 U.S. at 591 (Stevens, J., dissenting).

12. In dissent, Justice Marshall argued MCC's "security concern" was unfounded because the following security measures made smuggling contraband in a detainee's body cavity a virtual impossibility: (1) visitors and their packages were thoroughly searched by a metal detector, fluoroscope, and by hand; (2) the contact visits occurred in a glass-enclosed room that was continuously monitored by correctional officers; and (3) the detainees wore a one-piece jumpsuit that zipped in the front. *Bell,* 441 U.S. at 577-578 (Marshall, J., dissenting).

policy's successful deterrent effect. *Bell*, 441 U.S. at 559. Finally, *Bell* disregarded a "less intrusive" means of detecting contraband through metal detectors as untenable because [the] logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers. *Id.*, *citing United States v. Martinez-Fuerte,* 428 U.S. 543, 556-557 (1976).

The *Bell* majority did not adopt the reasonable suspicion standard for visual strip searches in correctional facilities that Justice Powell proposed in *Bell* and that petitioner now urges this Court to adopt. (Pet. Br. 20, 21.) The better and more flexible approach is the application of *Bell* and the *Turner* factors that the Ninth Circuit applied in *Bull* when it considered whether San Francisco's strip search policy violated the Fourth Amendment. *Bull*, 595 F.3d at 975.

II. This Court Should Re-Affirm *Bell* And, In So Doing, Apply The First, Third and Fourth *Turner* Factors To Determine Whether Visual Body Cavity Searches Of Arrestees Are Permissible Under The Fourth Amendment.

Amicus Police Accountability Project argues that the district court in *Young* "found that the jail officials were unable to show that persons entering the jail on minor charges 'routinely possessed contraband.'" (Pol. Account. Proj. Br. 10.) This argument presents an incomplete picture. The defendants in *Young* established that strip searches recovered contraband that detainees attempted to smuggle into the jail. *See Young*, 2007 U.S. Dist. LEXIS 31086 at *26. The Sheriff simply did not know

who possessed such contraband prior to the searches. And that is precisely the point. Blanket strip searches help secure large correctional facilities by limiting the flow of contraband into such facilities and by providing a deterrent to smuggling. *Bell* recognized the penological need to conduct such strip searches and held that these searches did not violate the Fourth Amendment. *Bell*, 441 U.S. at 560-561.

The reasonable suspicion cases post-*Bell* unjustifiably undermine this important security measure. In dwelling exclusively on the interests of persons charged with misdemeanors or lesser offenses -- something that *Bell* does not command -- the proponents of the reasonable suspicion standard "see the trees but not the forest." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 100 (1987) (White, J., dissenting). A blanket strip search policy protects all persons in the jail community: detainees charged with lesser or greater offenses, jail guards and staff.

Cook County Jail often has over 9,000 detainees and inmates in custody. On any given day, thousands of detainees enter jail, leave jail or return to jail after appearing in court. Other jails throughout the nation have varying sizes, varying jail populations and varying resources. Consequently, this Court should adopt an approach that considers these variables when balancing the individual rights of persons entering a jail and the security concerns of jailers. As *Bell* noted:

> The test of reasonableness under the *Fourth Amendment* is not capable of precise definition or mechanical application. In each case it

> requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must 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.

Bell, 441 U.S. at 559. In balancing these interests, the Ninth Circuit in *Bull* applied not only principles from *Bell* but also the multi-factor test from *Turner* to determine the reasonableness of a prison regulation.

While *Turner* itself did not address the constitutionality of a strip search policy in a jail or prison, this Court recognized that the standard of review of prison regulations "adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990). *See also Johnson v. Phelan*, 69 F.3d 144, 146 (7th Cir. 1995), *citing Turner*, 482 U.S. at 89 (applying the *Turner* standard in plaintiff's Fourth and Eighth Amendment challenges to jail regulations regarding monitoring of inmates and detainees to determine "whether the regulation [was] reasonably related to legitimate penological interests"). *Turner* addressed claims under the First Amendment and the Due Process Clause. Yet, nothing in *Turner* limits its application to only cases brought under those constitutional provisions.

Under *Turner*, prison regulations that infringe a prisoner's constitutional right are valid so long as they are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. This is true even when

the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review. *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349 (1987). *Bell* teaches that securing a correctional facility is a top priority for jail and prison officials:

> A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record . . . we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.

Bell, 441 U.S. at 559-560 (emphasis in the original).

To balance these interests, *Turner* set forth the following four factor test: (1) whether there is a rational relationship between the regulation and the legitimate government interest advanced; (2) whether the inmates have alternative means of exercising the restricted right; (3) whether and the extent to which accommodation of the asserted right will impact prison staff, inmates' liberty, and the allocation of limited prison resources; and (4) whether the contested regulation is an "exaggerated response" to prison concerns and if there is a "ready

alternative" that would accommodate inmates' rights. *Turner*, 482 U.S. at 89-91. *Bull* recognized that the second *Turner* factor (whether the inmates have alternative means of exercising the restricted right) is not applicable to a strip search policy. *Bull*, 595 F.3d at 973, n. 9.

Once again, this Court recognized that prison security is a "core function of prison administration" and judgments "regarding prison security 'are peculiarly within the province and professional expertise of corrections officials.'" *Turner*, 482 U.S. at 86, 92 (citations omitted). As such, the Court held that in the "absence of *substantial* evidence in the record to indicate that officials have *exaggerated* their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id.* at 86 (emphasis added). Consequently, under the first *Turner* factor, a blanket strip search policy is rationally related to the legitimate government interest of securing a correctional facility by eliminating or at least reducing the amount of contraband within the facility. *Ibid.*

The application of the third and fourth *Turner* factors will vary from facility to facility, resulting in a flexible, *ad hoc* approach to the sometimes difficult question of whether a particular strip search policy is permissible under the Fourth Amendment. In contrast, the reasonable suspicion standard does not provide any meaningful guidance to lower courts or jailers on the permissibility of strip searches under various circumstances at correctional facilities. Prisons and jails throughout the nation vary in size and the number of detainees held on felony charges as opposed to misdemeanor charges or other minor offenses.

In determining whether security measures such as strip searches are constitutionally valid and permissible, application of the third and fourth *Turner* factors is not only more faithful to *Bell* than the "one size fits all" reasonable suspicion standard that petitioner proposes but is also the superior approach. Under these *Turner* factors, consideration of variables such as the size of the jail, the number of detainees at the jail, the number of detainees transported in and out of the jail on a daily basis and the nature of the jail population (how many persons arrested for felonies or misdemeanors) would determine whether the accommodation that petitioner seeks (*i.e.*, discontinuation of strip searches in county jails) would impact the safety and security of guards, staff and detainees. In addition, a court evaluating a constitutional challenge to a strip search policy would need to consider a reasonable allocation of available resources would allow for alternative methods of conducting searches. Courts would also have to consider whether such alternative methods properly secure the jail or prison.

In another context, this Court applied a flexible approach over a more rigid one to determine whether the delay from a warrantless seizure of property in an *in rem* civil forfeiture action violated due process. *See United States v. $8,850*, 461 U.S. 555 (1983) (holding that applying the flexible "speedy trial" factors from *Barker v. Wingo*, 407 U.S. 514 (1972) on an *ad hoc* basis was "an appropriate inquiry for determining whether the flexible requirements of due process have been met"). In a similar vein, this Court should apply the flexible *Turner* factors, as this approach will guide those who attempt to balance serious security concerns with the right of detainees and prisoners under the Fourth Amendment.

Petitioner, however, argues against the application of the *Turner* factors, stating that "[t]here is no substantial justification for strip-searching all detainees." (Pet. Br. 40, n. 14.) Petitioner's position cannot be reconciled with *Bell*, which upheld a blanket strip search policy. Moreover, and cardinally, petitioner's position does little more than inform jailers that they cannot conduct strip searches to stop or reduce the flow of contraband into their facilities. *Bell* did not mandate the elimination of this security measure in jails and prisons. This Court should re-affirm this holding in *Bell* and adopt a standard that applies the principles of *Bell* and *Turner* to future constitutional challenges to jail or prison strip search policies.

CONCLUSION

Amicus respectfully requests that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

Respectfully submitted,

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