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 THE TEXAS ASSOCIATION OF COUNTIES, THE TEXAS MUNICIPAL LEAGUE, THE TEXAS MUNICIPAL LEAGUE INTERGOVERNMENTAL RISK POOL, THE TEXAS CONFERENCE OF URBAN COUNTIES, AND THE TEXAS CHIEF DEPUTIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2, the Texas Association of Counties ("TAC" or "the Association"), the Texas Municipal League ("TML"), the Texas Municipal League Intergovernmental Risk Pool, the Texas Conference of Urban Counties, and the Texas Chief Deputies Association ("TCDA"), as amicus curiae, respectfully submit this Brief in support of Respondents. These amici request that the Court consider the specific safety concerns relating to local correctional facilities in determining whether conducting strip searches for contraband of all persons being booked into jails is reasonable pursuant to the requirements of the Fourth Amendment.

TAC is a non-profit corporation which serves counties across Texas. It was formed in 1969 with the purpose of creating a unified voice to represent county interests in the legislative process and inform and educate counties regarding issues that might affect them. Since its formation, TAC's mission has expanded to include providing educational resources to counties and their officials, acting as a liaison between the counties and other governmental entities, and providing technical assistance, and cost-effective risk management services. TAC's membership is made up of the counties themselves, rather than individual officials. TAC's legislative arm serves as the main link

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this Brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed written consent to the filing of *amicus* briefs pursuant to Rule 37.

between county officials and the State's elected officials by voicing members' concerns to legislators and by gathering, analyzing, and distributing vital information on legislative issues affecting county government. TAC assists counties with legal issues by providing members with a toll-free member hotline to assist officials in legal research relevant to counties' legal issues, and by distributing legal guides discussing issues such as election laws, open meetings, economic development, and constitutional issues. The Association also provides members with a wide variety of training opportunities relevant to the challenges governmental officials face. Additionally, TAC administers the TAC Risk Management Pool, whereby counties band together to self-insure against a broad range of potential liabilities including liabilities arising from the operation of county jails. The TAC Risk Management Pool is owned and managed by member counties, and has grown into a stable, sustainable resource of protection which has saved taxpayers millions of dollars over the years.

As a full-service organization providing support services of all kinds to Texas counties, TAC is in a unique position to observe and understand the security issues facing county jails and county officials. In providing educational, legal, and risk-management services to county sheriffs and county law enforcement officers, TAC has developed a significant understanding of the security problems and pitfalls which county jails face. These security problems include the daily smuggling of contraband into county jails by offenders of all categories. In an effort to ensure the security of both county officials and those detained in county jails, the types of searches which the Third Circuit found to be reasonable in this case

are necessary to ensure the safety of detention facilities.

The TML is a non-profit association of over 1,100 incorporated cities that provides legislative, legal, and educational services to its members. Approximately 350 of TML's member-cities operate some sort of detention facilities. As such, the holding in this case could significantly impact TML's members.

The Texas Municipal League Intergovernmental Risk Pool is a self-insurance risk pool created by over 2,600 participating governmental entities in the State of Texas under the provisions of the Interlocal Cooperation Act. TEX. GOV'T CODE ANN. § 791.001, et seq. (Vernon 2004). Of these participating governmental entities, over 1,100 are municipalities which self-insure their liabilities through the Texas Municipal League Intergovernmental Risk Pool. Many of these municipalities operate municipal jails.

The Texas Conference of Urban Counties is a nonprofit organization composed of thirty seven member counties, representing approximately eighty percent of the population of the State of Texas. The Texas Conference of Urban Counties was organized to provide services to its members, and regularly represents the interests of its members before governmental entities. All member counties of the Texas Conference of Urban Counties operate jails, and the operation of those jails will doubtlessly be significantly impacted by the decision of the Court in the present Appeal.

The TCDA is an organization made up of chief deputies and sheriffs from all over the State of Texas.

The purpose of the TCDA is to equip chief deputies with the skills necessary to assist sheriffs in the formation of operational policies for counties. Educational services provided by the TCDA include informing members about legal developments and education regarding a wide variety of topics related to the administration of county jails in Texas. Many of TCDA's members are charged with the administration of county jails, and will be affected by the decision of the Court in the present Appeal.

SUMMARY OF THE ARGUMENT

The Fourth Amendment safeguards the individual's right to be free from unreasonable searches and seizures. This Court has previously held that an individual's right to be free from unreasonable searches must be balanced against the need for a particular search. *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). In addition to considering the privacy interests of the individual, courts must also consider factors such as the justification for the search. *Id*.

The types of searches which are at issue in the present Appeal are overwhelmingly necessary to maintain the safety of jails and correctional facilities. As discussed more fully, *supra*, these searches regularly uncover contraband which threatens the safety of both the inmates housed in jails and the law enforcement officers who work there. The safekeeping of those housed in correctional facilities and the safety of its employees weighs in favor of allowing the types of searches at issue in this Appeal. Any alternative methods of attempting to detect contraband on incoming inmates are technologically inadequate and

financially unworkable. Additionally, the Court should not rely on the American Correctional Association's ("ACA") Standards for searches. Jails are not required to follow the ACA's standards, and ACA accreditation is entirely voluntary. Furthermore, courts have declined to apply the ACA standards in determining if correctional facilities are subject to liability for alleged violations of individuals' constitutional rights.

There is an unmistakable and clear justification for the types of searches that are at issue in this Appeal. The rights of individuals to be safely housed in jails and the safety of the facility itself clearly weigh in favor of the types of searches which the Third Circuit found to be constitutionally sufficient.

ARGUMENT

a. Concerns for the safety of staff and inmates within correctional facilities outweigh individual privacy interests of those housed in them, and therefore render strip searches of all persons booked into jails reasonable under Fourth Amendment standards.

This Court has long acknowledged that jails are inherently dangerous places. *See Farmer v. Brennan*, 511 U.S. 825, 833, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (noting the proclivity amongst incarcerated persons toward violent and anti-social behavior); *Bell*, 441 U.S. at 559, 99 S. Ct. 1861 (jails are "unique place[s] fraught with serious security dangers"); *Baxter v. Palmigiano*, 425 U.S. 308, 321-23, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) (limiting the right of

confrontation and cross-examination in prison disciplinary hearings due to the inherent dangers and hazards present in a correctional facility). Despite the grave dangers which are inherent in jail environments, corrections officials are charged with taking "reasonable measures to guarantee the safety of the inmates" as well as providing for their own safety. *Hudson v. Palmer*, 468 U.S. 517, 526-27, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). Against this backdrop of inherent danger, this Court has recognized that "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence," and that attempts to smuggle such contraband into jails have been thoroughly documented. *Bell*, 441 U.S. at 559, 99 S. Ct. 1861. Clearly, smuggling of contraband into correctional facilities compromises the security of such facilities and poses an extreme risk of danger to detainees and corrections officers. The prevention of such smuggling is paramount.

The dangers related to the smuggling of contraband into jails are particularly obvious when considered in light of the large number of detainees who could potentially smuggle contraband into jails–and the relatively small number of jailers who are charged with keeping contraband out of jails. There are approximately 245 jails in Texas which are operated by counties. Adan Muñoz, *Tex. Comm'n on Jail Standards Agency Briefing Interim Charge #4, Prepared for the Tex. Senate Comm. on Criminal Justice*, p. 6, (Sept. 2010). Additionally, approximately 350 of the 858 police departments in Texas operate some sort of municipal detention facility. *Id*. at 9. As of August 1, 2011, approximately 70,120 inmates were being detained in county jails in Texas. Tex. County Jail Population Summ. Report, http://www.tcjs.state.

tx.us/docs/popsum.pdf (last visited Aug. 23, 2011). Texas' inmate population in August, 2011, represented an increase of 1,729 inmates from the previous month. *Id*. The average daily population of inmates in Texas jails as of August 16, 2011, was 60,938. Tex. Comm'n on Jail Standards Incarceration Report, p. 9 (Aug., 2011). In stark contrast, there are only 26,172 jailers currently permitted to work in Texas jails by the Texas Commission on Law Enforcement Officers Standards and Education. *See* http://www.tcleose.state.tx.us (last visited on Aug. 23, 2011).

It is clear that some type of search of detainees upon entry into correctional facilities is both necessary and reasonable. The breadth of such searches is at issue here. As noted above, analysis of an individual's rights under the Fourth Amendment "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails[, including] . . . 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." *Id*. In *Bell*, this Court held that strip searching inmates–including witnesses in protective custody who were not charged with crimes–was reasonable under the Fourth Amendment in light of the facility's need to prevent the smuggling of contraband into the facility. *Id*. at 524, 528, 99 S. Ct. 1861. Although this Court noted that "this practice instinctively gives us the most pause," it held that such searches do not violate the Fourth Amendment. *Id*. By definition, these searches were not based on reasonable suspicion. *See, e.g.*, *Powell v. Barrett*, 541 F.3d 1298, 1306 (11th Cir. 2008) (en banc) (*citing Bell*, 441 U.S. at 558, 99 S. Ct. 1861). *Bell* did not approach the constitutionality of these searches by first determining whether the offense for

which the inmate was arrested was minor, major, a misdemeanor, or a felony. *Id*.

The same factors that weighed in favor of allowing blanket strip searches in *Bell* also favor applying that general rule to all detention facilities. Indeed, the facilities' interest in safekeeping of inmates and protection of staff greatly outweighs individual privacy interests which may follow detainees into these inherently dangerous environments.

b. The security of jail facilities is compromised by easily-secreted contraband such as drugs, money, and cellular telephones.

It is a constant battle for correctional staff to keep contraband out of jail facilities. As noted, *infra*, the smuggling of contraband–especially drugs–is not limited to career criminals incarcerated for felony offenses. A brief internet search of news sources reveals several cases in the month of August, 2011, in which officers in both rural and metropolitan areas uncovered contraband during strip searches of non-felony detainees. On August 6, 2011, for instance, a twenty-eight year old woman was arrested and booked into the jail in Gaston County, North Carolina, for driving while her license was revoked and for failure to appear. Kevin Ellis, *Jail Strip Search Turns Up Drugs*, GASTON GAZETTE, Aug. 9, 2011. During a strip search of that individual, the suspect handed the searching officer a plastic wrapper containing thirty-four Alprazolam pills, commonly known as Xanax. *Id*. Overdoses of Alprazolam have been linked to deaths. At a jail in Zephyr Hills, Florida, Pasco County Sheriff's Deputies strip searched a woman who had

been arrested for false identification and possessing trace amounts of methamphetamine. Eric Waxler, *Deputies Find Drugs, Paraphernalia, and More During Strip Search of Woman*, *available at* http://www.abcactionnews.com/dpp/news/local_news/water_cooler/Deputies-find-drugs-paraphenalia-and-more-during-strip-search-of-woman (last visited Aug. 18, 2011). During the search, deputies found several bags of methamphetamine hidden in the suspect's brassiere, three syringes in her vagina and anus, and a ball of tin foil and spoon in her vagina. *Id*. In Memphis, Tennessee, jail officials conducting a routine strip search of a woman arrested for assault and disorderly conduct uncovered a piece of a paper bag containing crack cocaine in the woman's vagina. Stephanie Scurlock, *Jail Strip Search Reveals Drugs in Private Parts*, *available at* http://www.wreg.com/wreg-strip-search-drugs-story,0,6218047.story (last visited on Aug. 18, 2011).

In the aforementioned instances–and in many other such cases–jail officials would not have uncovered dangerous contraband had reasonable suspicion been necessary to conduct the strip searches. In the case in North Carolina, for instance, the Alprazolam which was discovered in the strip search could have caused a potentially lethal overdose to at least one person. The broad and recurring discoveries of contraband in the body cavities of "minor" offenders demonstrates a need for the types of searches at issue in the present appeal.

Unfortunately, these types of discoveries are becoming an all-too-common fixture during searches in local jails. Clearly, law enforcement officers have a keen interest in intercepting drugs and drug

paraphernalia before they are introduced to the jail's population. A brief review of news articles from the past year reveals why. In San Antonio, Texas, the family of an inmate recently sued the facility in which he was housed after he allegedly died from a heroin overdose. Guillermo Contreras, *Heroin Overdose in Federal Jail Prompts Lawsuit*, *available at* http://www.mysanantonio.com/news/local_news/article/Heroin-overdose-in-federal-jail-prompts-lawsuit-1241677.php (last visited on Aug. 18, 2011). In March, 2011, a man who was detained in the Sevier County, Tennessee, Jail for a charge of driving under the influence allegedly died of a hydrocodone overdose. *Autopsy Shows Sevier County Inmate Died of Drug Overdose*, *available at* http://www.wate.com/story/14305078/autopsy-shows-sevier-county-inmate-died-of-drug-overdose (last visited Aug. 18, 2011).

In short, the realities of criminal justice demand a policy of permitting strip searches of all inmates being booked into jails, regardless of the offense for which they are arrested or the presence of reasonable suspicion. Jails are faced with unprecedented numbers of detainees, and these detainees attempt to smuggle contraband into jails at alarming rates. Common experience dictates that it is reasonable to expect inmates to attempt to smuggle dangerous contraband into jails. Strip searching all incoming detainees is reasonable under the Fourth Amendment in light of the fact that jails are inherently dangerous places, jail officials are charged with the safekeeping of inmates, and many of the inmates attempt to smuggle dangerous contraband into jails. *See Bell*, 441 U.S. at 559, 99 S. Ct. 1861; *Hudson*, 468 U.S. at 526-27, 104 S. Ct. 3194. In balancing the benefit of these types of searches against the facility's need to

maintain the safety of inmates and staff, the overwhelming need to promote safety must prevail.

c. The suggested alternatives to strip searches are not feasible in light of the economic and practical realities of correctional facilities.

In the present appeal, Petitioner has suggested that alternatives to strip searches such as pat-down searches, metal detectors, and inventory searches may suffice to prevent the introduction of contraband into jail facilities. (Pet'rs Br., pp. 9-10.) This Court in *Bell*, however, questioned the usefulness of such alternatives by noting that "[m]oney, drugs, and other nonmetallic contraband still could easily be smuggled into the institution," despite the use of costly metal detection and body-scanning devices. *Bell*, 441 U.S. at 559 n. 40, 99 S. Ct. 1861 n. 40. Further, "the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Id*. (quoting *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n. 12, 96 S. Ct. 3074, 3082 n. 12, 49 L. Ed. 2d 1117 (1976)) (internal brackets omitted).

Such alternatives, by their very nature, would not detect significant amounts of dangerous contraband. Furthermore, they are unworkable in light of current shortfalls in jail funding. Many jails across the country are experiencing severe budget shortfalls. In Androscoggin County, Maine, for instance, county officials are working to cut spending at the county jail in light of a $130,000 budget shortfall. Daniel Hartill, *Androscoggin County Tackles Jail Budget Shortfall*, THE SUN JOURNAL, June 24, 2011. Officials in Yakima,

Washington, project that their jail will encounter a $650,000 budget shortfall by the end of the year. Mark Morey, *Overflowing and Over Budget–Jail Faces $650K Shortfall*, THE YAKIMA HERALD, Aug. 7, 2011. Jail officials also project that cuts in community-based mental health programs will stretch their budgets even further. Brandi Grissom, *Jail Officials: Mental Health Cuts Hurt Everyone*, THE TEXAS TRIBUNE, Feb. 4, 2011. Jails are experiencing budget shortfalls which may prevent them from purchasing the types of equipment contemplated by Petitioner. Even if jails could devote resources to purchasing such equipment, however, it would still be insufficient to protect inmates and corrections officers from nonmetallic contraband.

In sum, the ineffectiveness of alternative methods of detecting contraband weighs in favor of a broad policy allowing strip searches to be conducted on all inmates being booked into jails. The alternatives simply do not offer the types of protection necessary to ensure the safety of inmates or staff.

d. The ACA Jail Standards are not binding on the Court or jails, and current ACA Standards should not be considered in this Court's decision.

This Court should not consider the ACA Standards as evidence that the types of searches ratified by the Third Circuit are *per se* unreasonable. First, the ACA has not filed a brief in support of Petitioner in the present Appeal. Second, this Court has not made a practice of relying on the ACA's opinions in previous decisions. In *Bell*, this Court held that the ACA Standards "simply do not establish the constitutional

minima; rather, they establish goals recommended by the organization in question." *Bell*, 441 U.S. at 543 n. 27, 99 S. Ct. 1861 n. 27. The Fifth Circuit has held that "it is absurd to suggest that federal courts should subvert their judgment as to alleged Eighth Amendment violations to the ACA whenever it has relevant standards." *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004). The ACA guidelines are simply not binding to this Court.

The ACA's non-binding recommendation that its members only conduct strip searches upon reasonable suspicion is not persuasive. It is predictable that the ACA would recommend that its members only conduct strip searches upon reasonable suspicion of the presence of contraband in light of the unsettled state of the law regarding these types of searches. *See, e.g., Roberts v. State of R.I.*, 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), *cert. denied*, 483 U.S. 1020, 107 S. Ct. 3263, 97 L. Ed. 2d 762 (1987); *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 621 F.3d 296 (3d Cir. 2010) (en banc); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 942, 102 S. Ct. 1435, 71 L. Ed. 2d 653 (1982); *Kelly v. Foti*, 77 F.3d 819 (5th Cir. 1996); *Watt v. City of Richardson Police Dep't*, 849 F.2d 195 (5th Cir. 1988); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984); *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc). The ACA may be concerned that a contrary recommendation to jails would result in litigation for both the ACA and the jails it advises. A clear

statement from this Court that strip searches on intake are lawful would provide guidance for the ACA as well as the entities that operate these facilities.

Additionally, the ACA has both mandatory and non-mandatory guidelines. ACA, *Standards & Accreditation–Overview of the Process*, *available at* https://www.aca.org/standards/seeking/seeking_overview.asp (last visited on Aug. 18, 2011). The ACA does not require that facilities be in compliance with non-mandatory guidelines to be accredited. *See Spotts v. United States*, 613 F.3d 559, 571-72 (5th Cir. 2010). The ACA guidelines governing strip searches of arrestees are non-mandatory. ACA Guideline 4-ALDF-2C-03 (4th Ed. 2004) and 1-CORE-2C-01 (2010). Additionally, ACA "accreditation is entirely voluntary" and the ACA "has no authority to require that a correctional facility adopt or change any procedures." *Estate of Williams v. Am. Corr. Ass'n*, No. 1:06cv196LG–JMR, 2008 U.S. Dist. LEXIS 6306, at *2-3 (S.D. Miss. Jan. 27, 2008). It is also important to note that the ACA's standards permit strip searches if the inmate has had "contact with the public or exposure to public areas," seemingly regardless of the absence of reasonable suspicion. 1-CORE-2C-01; 4-ALDF-2C-03.

In short, this Court need not defer to the ACA's guidelines regarding strip searches. It is predictable that the ACA would advise members not to conduct suspicionless strip searches in light of the unsettled state of the law surrounding this issue. Even so, however, the ACA guideline regarding strip searches is non-mandatory. Therefore, the ACA's standards are not relevant to the Court's decision in this matter.

CONCLUSION

The types of searches at issue in this appeal are overwhelmingly justified in light of the dangerous nature of jails and the repeated instances of all types of offenders attempting to smuggle contraband into secured areas. Detainees' right to be safely housed in jail facilities–and the security of these facilities themselves–far outweigh the privacy interest of individuals being booked into jails. The need for safety and security of jails clearly weighs in favor of the types of searches which the Third Circuit found to be constitutionally sufficient. These types of searches comply with the Fourth Amendment. For the reasons stated above, the judgement of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully Submitted,

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