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 FORMER ATTORNEYS GENERAL OF NEW JERSEY ROBERT J. DEL TUFO, DEBORAH T. PORITZ, JOHN J. FARMER, JR., PETER C. HARVEY AND ZULIMA V. FARBER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The Attorney General of New Jersey is the State's highest-ranking law enforcement officer. As former Attorneys General of New Jersey, *amici curiae* were charged with maintaining the balance between civil liberties and effective law enforcement throughout the State.

Robert J. Del Tufo served as Attorney General of New Jersey from 1990 to 1993, during which time the Office of the Attorney General issued guidelines for strip searches that remain in effect today and are consistent with the District Court's decision in the present case. *See infra* at 5. Mr. Del Tufo is currently of Counsel at Skadden, Arps, Slate, Meagher & Flom LLP. Deborah T. Poritz served as Attorney General of New Jersey from 1994 to 1996 and as Chief Justice of the New Jersey Supreme Court from 1996 to 2006, and is currently Of Counsel at Drinker Biddle & Reath LLP. John J. Farmer, Jr., served as Attorney General of New Jersey from 1999 to 2002 and is currently the Dean of Rutgers School of Law. Peter C. Harvey served as Attorney General from 2003 to 2006 and is currently a Partner at Patterson Belknap Webb & Tyler LLP. Zulima V. Farber served as Attorney General during 2006 and is currently a member of the firm of Lowenstein Sandler P.C.

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[1] The parties have lodged blanket consents to the filing of *amicus* briefs with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

As former Attorneys General of New Jersey, *amici* recognize that "[a] detention facility is a unique place fraught with serious security dangers," and that law enforcement officers must conduct strip searches in some instances to prevent "smuggling of money, drugs, weapons, and other contraband" into jails. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). At the same time, "we do not underestimate the degree to which [strip] searches may invade the personal privacy of inmates." *Id.* at 560.

Amici submit that the District Court's decision in this case, unlike the Third Circuit's opinion, struck the proper balance between the substantial law enforcement interest in jail security and the substantial privacy interest in avoiding unnecessary strip searches. The District Court held, consistent with the overwhelming majority of federal courts, that the blanket strip search policies of the Burlington County Jail and Essex County Correctional Facility violate the Fourth Amendment. *Florence v. Bd. of Chosen Freeholders of the Cty. of Burlington*, 595 F. Supp. 2d 492, 504 (D.N.J. 2009).[2] The District Court's approach, focusing on reasonable suspicion, was

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[2] *See also Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Mary Beth G. v. Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984).

appropriate. Specifically, the District Court's decision required reasonable suspicion to conduct a strip search of a person arrested for a non-indictable offense. That focus on reasonable suspicion was not only consistent with case law, but was also consistent with New Jersey law, Attorney General of New Jersey's Strip Search Requirements, American Bar Association standards, and the laws of numerous states that restrict conduct of strip searches without reasonable suspicion. Accordingly, the judgment of the Third Circuit, which, despite acknowledging the intrusiveness of the search, rejected a reasonable suspicion standard and held that blanket strip search policies are not unreasonable under the Fourth Amendment, should be reversed.

Indeed, a policy of strip searching every detainee including, as the District Court put it, a "hypothetical priest or minister arrested for allegedly skimming the Sunday collection," *id.* at 512, contributes little to jail security and creates an intolerable risk of subjecting arrestees to needless humiliation. The reasonable suspicion standard, on the other hand, places stock in law enforcement officers' experience and observations and ensures that such strip searches can occur when there are legitimate security reasons for so doing. The District Court's narrow holding in this case would permit a strip search when the charges (such as felonies, drug crimes, and gun crimes) suggest the presence of contraband or when circumstances otherwise create reasonable suspicion. 595 F. Supp. 2d at 505; *see infra* pp.

18-20. These standards protect personal privacy without undermining jail security.

ARGUMENT

I. THE JAIL STRIP SEARCH POLICIES BEFORE THIS COURT VIOLATE NEW JERSEY LAW, STATE-WIDE REGULATIONS AND OTHER WIDELY-ACCEPTED STANDARDS.

The State of New Jersey has, in essence, already weighed in on the issue before the Court, passing legislation in 1991 to address the circumstances under which officers at adult county correctional facilities can (and cannot) strip search arrestees. The standards set forth in that legislation closely mirror the approach of the District Court.[3]

Pursuant to N.J. Stat. 2A:161A-1, persons who have "been detained or arrested for commission of an offense other than a crime shall not be subjected to a strip search" unless (1) authorized by a warrant or consent, (2) a recognized exception to the warrant requirement exists and there exists probable cause that a weapon, drug, or evidence of a crime will be found, or (3) the person is confined in a municipal

[3] While a search in violation of state law does not result in a per se violation of the Fourth Amendment, *Virginia v. Moore*, 553 U.S. 164, 168, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008), the focus on "reasonable suspicion" in the New Jersey statute is consistent with Fourth Amendment jurisprudence. *See* Point II *infra*.

detention facility or an adult county correctional facility and there exists reasonable suspicion that a weapon, drug, or contraband will be found.

New Jersey Stat. 2A:161A-8(b) required the Attorney General of New Jersey to issue guidelines for law enforcement officers "governing the performance of strip and body cavity searches." N.J. Stat. 2A:161A-8(b). Pursuant to this statutory mandate, in 1993, the Attorney General's Strip Search and Body Cavity Search Requirements and Procedures for Police Officers ("Attorney General's Strip Search Requirements") were issued.[4] The Attorney General's Strip Search Requirements permit strip searches of arrestees in municipal detention facilities only in the limited circumstances delineated in the statute. Attorney General's Strip Search Requirements § II.B.1.

Similarly, New Jersey Stat. 2A:161A-8(a) required the Commissioner of the Department of Corrections, after consultation with the Attorney General, to promulgate regulations "governing strip and body cavity searches of persons detained in … adult county correctional facilities." *Id.* Consistent with that requirement, the Department of Corrections promulgated N.J.A.C. 10A:31-8.4, which authorizes searches of those confined for offenses other than crimes only when:

> 1. The search is authorized by a warrant or valid documented consent;

[4] The Attorney General's Strip Search Requirements are available on the State of New Jersey's website, at www.state.nj.us/lps/dcj/agguide/3strpsch.pdf.

> 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 a reasonable suspicion 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; 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.

N.J.A.C. 10A:31-8.4.

To ensure that strip searches occur only under the prescribed circumstances, both the Department of Corrections regulations and the Attorney General's Strip Search Requirements

also impose reporting obligations on those conducting searches. Both the regulations and the Requirements mandate that the authorized person who performs the strip search file a written report that includes "[a] statement of facts indicating the reasonable suspicion or probable cause for the search." N.J.A.C. 10A:31-8.4(c)1; Attorney General's Strip Search Requirements § IV. The Department of Corrections regulations were readopted, effective July 6, 2010, and will remain in force until January 21, 2016. The Attorney General's Strip Search Requirements, last revised in 1995, remain in effect today.

The standards set forth by the Attorney General and Department of Corrections are actually more protective of personal privacy than is the District Court's decision. The Attorney General Strip Search Requirements place limitations on strip searches regardless of the reason for arrest, even if for a crime. The regulations promulgated by the Department of Corrections provide a different standard for strip searches of people confined for the commission of a crime than for people who are not, but strip-searches of both the former and the latter groups are limited. *See* N.J.A.C. 10A:31-8.4 (setting standards for those arrested or detained for commission of an offense other than a crime), N.J.A.C. 10A:31-8.5 (setting standards for those arrested or detained for the commission of a crime). The District Court's decision in this case would only limit strip searches of a person arrested for a non-indictable offense. Yet the fundamental focus of the New Jersey regulations

and of the District Court decision all rest appropriately on the "reasonable suspicion" standard.

The focus on reasonable suspicion in the District Court's decision and the New Jersey legislation and regulations echoes the same focus in the strip search laws of other states and in the standards of the American Bar Association.

Standards issued by the American Bar Association forbid strip searching arrestees without articulable suspicion:

> **Search of prisoners' bodies**
>
> (a) In conducting a search of a prisoner's body, correctional authorities should strive to preserve the privacy and dignity of the prisoner. Correctional authorities should use the least intrusive appropriate means to search a prisoner. Searches of prisoners' bodies should follow a written protocol that implements this Standard.
>
> * * *
>
> (d) Visual searches of a prisoner's private bodily areas, whether or not inspection includes the prisoner's body cavities, should:
>
> * * *

> (ii) be permitted only upon individualized reasonable suspicion that the prisoner is carrying contraband, unless the prisoner has recently had an opportunity to obtain contraband, as upon admission to the facility, upon return from outside the facility or a work assignment in which the prisoner has had access to materials that could present a security risk to the facility, after a contact visit, or when the prisoner has otherwise had contact with a member of the general public; *provided that a strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence and the proposed strip search is upon the prisoner's admission to a correctional facility or before the prisoner's placement in a housing unit.*

American Bar Association, Legal Status of Prisoners Standards, Standard 23-7.9, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-7.9 (emphasis added).

Numerous other states have also enacted laws that limit strip searches of jail detainees accused of minor offenses, all of them fully consistent with the District Court's limited

holding. *See, e.g.*, Conn. Gen. Stat. 54-33*l* (a) ("No person arrested for a motor vehicle violation or a misdemeanor shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or contraband."); Tenn. Code. Ann. 40-7-119(b) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or other contraband."); Mo. Stat. Ann. § 544.193(2) ("No person arrested or detained for a traffic offense or an offense which does not constitute a felony may be subject to a strip search or a body cavity search by any law enforcement officer or employee unless there is probable cause to believe that such person is concealing a weapon, evidence of the commission of a crime or contraband."); Iowa Code Ann. § 804.30 ("A person arrested for a scheduled violation or a simple misdemeanor shall not be subjected to a strip search unless there is probable cause to believe the person is concealing a weapon or contraband."); 725 Ill. Comp. Stat. Ann. 5/103-1(c) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance."); Ohio Rev. Code § 2933.32 (B)(1) ("A body cavity search or strip search may be conducted if a law enforcement officer or employee of a law enforcement agency has probable cause to believe

that the person is concealing evidence of the commission of a criminal offense, including fruits or tools of a crime, contraband, or a deadly weapon … that could not otherwise be discovered."); *see also* Va. Code Ann. § 19.2-59.1; Colo. Rev. Stat. § 16-3-405(1); Cal. Penal Code § 4030(f); Fla. Stat. 901.211(2); Mich. Comp. Laws 764.25a; Wash. Rev. Code. § 10.79.130.

The strip search policies of the Burlington County Jail and Essex County Correctional Facility, as described by the District Court, 595 F. Supp. 2d at 498-99, would therefore violate New Jersey law, Department of Corrections regulations, the Attorney General's Strip Search Requirements, the ABA Standards, and the state laws cited above. They would do so by compelling strip searches of every arrestee, regardless of whether reasonable suspicion exists. It was this very type of indiscriminate police conduct that the State of New Jersey sought to prevent.

II. THE REASONABLE SUSPICION STANDARD STRIKES THE PROPER BALANCE BETWEEN PRIVACY AND JAIL SECURITY, AS THE STANDARD BOTH PRESERVES AUTHORITY TO CONDUCT SEARCHES IN APPROPRIATE SITUATIONS AND PREVENTS NEEDLESS HUMILIATION.

A. Requiring Reasonable Suspicion for Strip Searches Does Not Compromise Jail Security.

In *amici*'s view, the reasonable suspicion standard strikes the appropriate balance between the substantial law enforcement interest in jail security and the substantial invasion of privacy caused by strip searches. While respondents contended below that requiring reasonable suspicion will undermine jail security, such fears are overstated. As noted above, it was not the position of the Attorney General of New Jersey, nor was it our experience during our respective terms as Attorney General of New Jersey, that requiring reasonable suspicion for strip searches created a significant and undue security threat.

As explained by a leading authority on jail security in a United States Department of Justice publication:

> [I]t is easy to exaggerate a possible security threat. Several years ago, the standard practice in jails was to strip search every arrestee at the time of booking, regardless of who the arrestee was, what the arrest

> was for, or the behavior of the arrestee. The ostensible reason for this practice was to prevent the introduction into the jail of drugs or weapons that had not been discovered through routine pat searches.
>
> In a series of lawsuits around the country, no jail was able to convince a court that persons arrested for minor offenses, such as unpaid traffic tickets or other minor misdemeanors were likely enough to be carrying contraband around in a body cavity to constitutionally justify this type of search. Officials passionately believed that not being able to strip search all arrestees entering the jail would result in major security problems because of dramatic increases in contraband entering the jail.
>
> *However, these problems did not develop. The legal rulings did not cause the catastrophe many predicted.*

William C. Collins, National Institute of Corrections, United States Department of Justice, *Jails and the Constitution: An Overview* 28-29 (2d ed. 2007) (emphasis added), *available at* nicic.org/Downloads/PDF/Library/022570.pdf.

As discussed below, requiring reasonable suspicion did not cause the sky to fall for at least

four reasons. First, the reasonable suspicion standard places stock in the training and experience of law enforcement officers. Second, in some cases, the nature of the charges creates reasonable suspicion *per se*. Third, where reasonable suspicion does not exist, non-strip searches suffice to maintain jail security. Fourth, arrest generally comes as a surprise, limiting opportunities to conceal contraband.

1. The Reasonable Suspicion Standard Gives Appropriate Weight to the Training and Experience of Law Enforcement Officers.

The reasonable suspicion standard allows law enforcement officers to assess whether a strip search is necessary in a given case, drawing on their training and experience. Courts assessing reasonable suspicion allow law enforcement officers to "make inferences from and deductions about the cumulative information available" and to "draw on their own experience and specialized training" to analyze factors that "'might well elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)); *State v. Davis*, 517 A.2d 859, 865 (N.J. 1986) ("The evidence collected by the officer is seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. A trained police officer draws inferences and makes deductions ... that might well elude an untrained person. The

process does not deal with hard certainties, but with probabilities.") (quotations omitted).

When assessing whether reasonable suspicion exists to strip search a jail detainee, courts consider a range of factors such as "the particular characteristics of the arrestee, and/or the circumstances of the arrest." *Weber*, 804 F.2d at 802. The New Jersey Supreme Court has explained the reasonable suspicion standard as follows:

> [A]pplication [of the reasonable suspicion standard] is highly fact sensitive and, therefore, not readily, or even usefully, reduced to a neat set of legal rules. Facts that might seem innocent when viewed in isolation can sustain a finding of reasonable suspicion when considered in the aggregate, so long as the officer maintains an objectively reasonable belief that the collective circumstances are consistent with criminal conduct.

State v. Nishina, 816 A.2d 153, 159 (N.J. 2003).

The extensive set of factors that may inform a finding of reasonable suspicion in the current context includes "the effect of intermingling the detainee with the larger prison population, the nature of the crime charged, characteristics of the detainee, lack of information about the detainee, criminal record, and period of time before a search where officials did not find any security concerns presented by the detainee,

as well as whether officials could have performed less intrusive alternatives." Gabriel M. Helmer, Note, *Strip Searches and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. Rev. 239, 283 (2001) (citing *Wachtler v. County of Herkimer*, 35 F.3d 77, 81 (2d Cir. 1994); *Watt v. City of Richardson*, 849 F.2d 195, 198 (5th Cir. 1988); *Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 958-59 (6th Cir. 1987); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984)).

Indeed, a reasonable suspicion standard is a very low burden, especially compared to other Fourth Amendment safeguards such as the warrant requirement or a showing of probable cause. As one court noted in a strip search case, "[r]easonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress …" *Spear v. Sowders*, 71 F.3d 626, 631 (6th Cir. 1995).

Courts have found that jail officials satisfied reasonable suspicion and properly conducted strip searches in a range of cases. For example, in *Kraushaar v. Flanigan*, 45 F.3d 1040, 1045-46 (7th Cir. 1995), the plaintiff was strip searched after committing a traffic offense, and the court found reasonable suspicion because an officer thought he saw the plaintiff conceal

something. Similarly, in *Doe v. Balaam*, 524 F. Supp. 2d 1238, 1243-44 (D. Nev. 2007), the Court held that the authorities had reasonable suspicion to strip search a man arrested for misdemeanor destruction of property because he had a rolled up sock in his clothing. *See also Justice v. City of Peachtree*, 961 F.2d 188, 194 (11th Cir. 1992) (finding reasonable suspicion to strip search detainees because, among other reasons, an arrest occurred in an area where drinking and drug activity regularly took place, and an officer saw one arrestee hand an object to another arrestee); *Campbell v. Miller*, 499 F.3d 711, 718 (7th Cir. 2007) (holding that law enforcement officers had reasonable suspicion to conduct a strip search because the defendant fit the description of a person just involved in a drug deal and the police officer observed the defendant drop a bag of marijuana); *Cea v. O'Brien*, 161 Fed. Appx. 112, 113 (2d Cir. 2005) (finding reasonable suspicion to strip search a woman who was in an agitated state after refusing to surrender a handgun); *Bradley v. Village of Greenwood Lake*, 376 F. Supp. 2d 528, 536 (S.D.N.Y. 2005) (finding reasonable suspicion to strip search arrestee where, among other factors, an informant said that the arrestee possessed heroin).

2. In Some Cases, the Charges Against An Arrestee Create Reasonable Suspicion *Per Se*.

The nature of some charges may create reasonable suspicion *per se*, regardless of any other particularized facts. Indeed, the District Court's decision does not limit the authority of jail officials to conduct strip searches when an arrestee is charged with a misdemeanor that involves weapons, drugs, or violence, or with any felony whatsoever – even when particularized suspicion does not exist. Specifically, the District Court noted that a prior decision from the same judicial district "reasoned that a policy that mandates strip searches for all individuals charged with felonies or drug-related/weapons-related misdemeanor offenses may be upheld because such a policy contains an implicit recognition of a reasonable suspicion." 595 F. Supp. 2d at 505 (citing *Davis v. City of Camden*, 657 F. Supp. 396, 400-01 (D.N.J. 1987)). In this respect, the District Court's ruling affords law enforcement authorities even greater leeway than the Attorney General's Strip Search Requirements, which require reasonable suspicion even when an individual is charged with an indictable offense.[5]

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[5] Memorandum from Robert T. Winter, Director, Division of Criminal Justice, forwarding Attorney General's Strip Search Guidelines (stating that the Attorney General's Strip Search Guidelines apply to both indictable and non-indictable offenses), *available at* www.state.nj.us/lps/dcj/agguide/3strpsch.pdf. While *amici* do not necessarily agree that a *per se* rule allowing strip searches of all detainees charged with indictable offenses is

Like the District Court, other courts generally have held that there is no need for further factual analysis when the nature of the charges provides a categorical basis for suspicion and makes the search reasonable. Numerous courts have held that misdemeanor charges involving drugs, guns, weapons, or other contraband – as well as any felony charge – create reasonable suspicion *per se*. *Masters v. Crouch,* 872 F.2d 1248, 1255 (6th Cir. 1989) ("It is objectively reasonable to conduct a strip search of one charged with a crime of violence before that person comes into contact with other inmates"); *Dufrin v. Spreen,* 712 F.2d 1084, 1089 (6th Cir. 1983) (strip search of female detainee justified where a detainee was arrested and formally charged for felonious assault); *Dubrowolskyj v. Jefferson County*, 823 F.2d 955, 958 (6th Cir. 1987) (strip search for detainee arrested for menacing held constitutional because the offense, although a misdemeanor, was associated with weapons); *Hicks v. Moore*, 422 F.3d 1246, 1252 (11th Cir. 2005) (finding reasonable suspicion based on battery charges); *Campbell*, 499 F.3d at 718 (finding reasonable suspicion based on possession of narcotics); *Davis*, 657 F. Supp. at 400 (suggesting that jails may adopt a "policy that permits only those persons arrested on felonies or on charges involving weapons or contraband to be searched without individualized suspicion"); Robin Lee Fenton, Comment, *The*

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constitutional, the District Court's decision is fully consistent with the case law described below.

Constitutionality of Policies Requiring Strip Searches of All Misdemeanants and Minor Traffic Offenders, 54 U. Cin. L. Rev. 175, 185-86 (1985) ("The reasonable scope of a search of a misdemeanant who has been brought into the station house should be more limited because one who is arrested for an outstanding parking ticket is much less likely to be carrying a dangerous weapon than is one who is arrested for an armed robbery.").[6]

3. Less Intrusive Searches Maintain Jail Security When Reasonable Suspicion Does Not Exist.

When reasonable suspicion does not exist based on the particular circumstances, and when the nature of the charges does not create reasonable suspicion *per se*, law enforcement officers would still have the authority to conduct non-strip searches. Nothing in the District Court's decision or the Attorney General's Strip Search Requirements limits non-strip searches, and such searches provide an important means of maintaining jail security, even when the reasonable suspicion standard cannot be met.

First, officers may conduct a pat-down search upon arrest. *United States v. Robinson*, 414 U.S. 218, 235 (1973) ("It is the fact of the lawful arrest which establishes the authority to

[6] *But see Way v. County of Ventura*, 445 F.3d 1157, 1162 (9th Cir. 2006) (finding a strip search unreasonable where an arrestee was booked on misdemeanor charges for being under the influence of a controlled substance).

search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (stating that upon lawful arrest, police officers may make a "full search of petitioner's person"). *See also* ABA Standard 23-7.9(c)(acknowledging the use of patdown searches but noting that they "should be brief and avoid unnecessary force, embarrassment, and indignity to the prisoner.")

Second, metal detectors may provide a less intrusive means of identifying contraband. *See Kelsey v. Cty. of Schoharie*, 567 F.3d 54, 70 (2d Cir. 2009) (Sotomayor, J., dissenting) (stating that jail's "clothing exchange" procedure violates the Fourth Amendment because other jail policies "allow[ ] pat searches and searches with a hand-held metal detector upon intake").

Third, jail officials may conduct random searches of pretrial detainees' cells in order to preserve institutional security and uncover contraband. *Bell*, 441 U.S. at 557 ("No one can rationally doubt that room searches represent an appropriate security measure … Detainees' drawers, beds, and personal items may be searched …"); *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (upholding jail's policy of conducting "irregular or random 'shakedown' searches of the cells of detainees while the detainees are away at meals, recreation, or other activities").

4. Arrest Generally Comes as a Surprise, Limiting Opportunities To Conceal Contraband.

Requiring reasonable suspicion to conduct strip searches during booking also will not undermine jail security because arrestees generally have limited opportunities to hide contraband on their person. As the District Court stated, "most arrests are a surprise to the arrestee. Such a surprise does not give the arrestee an opportunity to plan a smuggling enterprise." 595 F. Supp. 2d at 509.

The District Court noted that strip searches following "planned contact visits" are "quite different from the instant matter" because such visits may not be a surprise, creating opportunities for advance planning. *Id* at 511. Given such opportunities for planning, the law enforcement interest in conducting a strip search is far greater after a planned visit than after an arrest.

The distinction drawn by the District Court is fully consistent with the weight of authority, which distinguishes between unexpected arrests and planned visits. *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d at 111 (smuggling contraband is far less likely to occur during arrest than visitation because the suspect is handcuffed and arrest is unplanned); *Justice*, 961 F.2d at 192 (arrests for minor offenses are "quite likely to take that person by surprise") (quotation omitted).

The difference between visitation and arrest also separates this case from the Supreme Court's decision in *Bell v. Wolfish*, which addressed strip searches only after visitation. 441 U.S. at 558. Because arrest generally comes as a surprise, the overwhelming weight of authority holds that *Bell* does not countenance a blanket strip search policy during booking. *See Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) ("*Bell* authorized strip searches after contact visits, where contraband often is passed. It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices. Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something.") (citation omitted); *Giles v. Ackerman,* 746 F.2d 614, 617 (9th Cir. 1984) (stating that, in contrast to the visitation at issue in *Bell*, arrest and confinement are unplanned events), *overruled on other grounds by Hodgers-Durgin v. De la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Allison v. GEO Group, Inc.*, 611 F. Supp. 2d 433, 454 (E.D. Pa. 2009) (finding that because arrest and detention are generally "unplanned events," most arrestees have little opportunity to plan or carry out smuggling activities); *Thompson v. County of Cook*, 412 F. Supp. 2d 881, 890 (N.D. Ill. 2005) ("[I]t is a relatively safe assumption – at least in the absence of evidence to the contrary – that only a negligible portion of arrestees have concealed contraband in body cavities *prior to* their encounter with law enforcement.").

While the Eleventh Circuit has departed from the other Courts of Appeals in questioning the distinction between arrest and visitation and asserting that detainees may anticipate arrests, *Powell v. Barrett*, 541 F.3d 1298, 1313-14 (11th Cir. 2008) (en banc), it bears repeating that the current case involves non-indictable infractions, such as speeding, disorderly conduct, trespass, simple assault, and driving without insurance. Here, as in *Powell*, the assertion "that pretrial detainees booked on petty misdemeanor charges might anticipate their arrests … is unwarranted speculation." *Id.* at 1318 (Barkett, J., dissenting).

Moreover, the limited instances when an individual expects to be arrested are no reason to jettison reasonable suspicion in all cases. After all, a voluntary arrest itself may help create reasonable suspicion in a given case, even when a detainee is charged with a misdemeanor unrelated to contraband or violence. *See Miller v. Yamhill County*, 620 F. Supp. 2d 1241, 1246 (D. Or. 2009) (reasonable suspicion existed to strip search individual who self-reported to jail where, among other factors, he anticipated being taken into custody and had been incarcerated at the same jail before).

The District Court's decision thus gives due weight to the law enforcement interests at stake in this case. The holding has no effect on post-visitation strip searches, allows strip searches based on reasonable suspicion or the nature of the charges, and does not limit the authority to maintain jail security through less intrusive

means, including pat-down searches, cell searches, and metal detectors.

B. Strip Searches Must Not Occur Without Justification Because They Cause a Severe Invasion of Personal Privacy.

Reasonable suspicion strikes the appropriate balance between privacy and jail security not only because the standard preserves authority to conduct searches in numerous situations but because it prevents humiliation through needless strip searches. The right to privacy has been described as "the right most valued by civilized men," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), and the Supreme Court recently discussed the humiliation caused by a strip search in *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S.Ct. 2633 (2009):

> The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

> Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating.

Id. at 2641.

The courts of appeals have without exception recognized the "feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers." *Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 1135, 1136 n. 1 (9th Cir.) (*en banc*) (citation omitted), *cert. denied*, 79 U.S.L.W. 3594 (2011).[7] They have described strip searches in terms such as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission…" *Mary Beth G.*, 723 F.2d at 1272 (citation omitted)(internal quotation marks omitted). Strip searches have been said to constitute a "severe if not gross interference with a person's privacy," *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983) (Breyer, J.), an "extreme intrusion," and "an offense to the dignity of the individual," *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996) (citation omitted), and "[o]ne of the clearest forms of degradation in Western Society." *Canedy v.*

[7] *See also id.* at 1143 ("[W]e have consistently recognized the frightening and humiliating invasion occasioned by a strip search, even when conducted with all due courtesy.") (citations omitted)(internal quotation marks omitted).

Boardman, 16 F.3d 183, 185 (7th Cir. 1994) (alteration in original) (citation omitted).[8]

The accounts of those subjected to strip searches make clear the extraordinary humiliation and invasion of privacy this practice entails. Judith Haney, arrested at a political demonstration in Miami in 2003, described her experience:

> After I removed all my clothes, the guard told me to turn around, bend all the way over, and spread my cheeks [which] exposed my genitalia and anus to a complete stranger, who had physical authority over me, so that she could visually inspect my body cavities. . . . The guard's next set of instructions were to squat - and then - to hop like a bunny.

Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 Law and Contemp. Probs. 65, 67 (2008)(alteration in original). All charges against Haney were eventually dropped. *Id*. *See also Way v. County of Ventura*, 445 F.3d

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[8] *See also Chapman v. Nichols,* 989 F.2d 393, 396 (10th Cir. 1993) ("The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state . . . can only be seen as thoroughly degrading and frightening"); *Justice*, 961 F.2d at 192 (same); *Hunter v. Auger,* 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from [the] view of strangers … is impelled by elementary self-respect and personal dignity").

1157, 1159 (9th Cir. 2006) (jail detainee forced to "spread her labia … to allow a check of the vaginal area"); *Mary Beth G.*, 723 F.2d at 1267 (detainee forced to "squat two or three times facing the detention aide and to bend over at the waist to permit visual inspection of the vaginal and anal area").

Detainees subjected to strip searches have described the experience as "humiliating" and "shameful," *Kelsey*, 567 F.3d at 66 (Sotomayor, J., dissenting), and have been left "weeping on the floor" after such searches, *Lucero v. Donovan*, 354 F.2d 16, 19 (9th Cir. 1965). The effects are sometimes severe and long lasting. One district court described the consequences suffered by a young woman after being strip searched in order to visit her brother in prison:

> During the strip searches, Blackburn . . . panicked, perspired heavily and shook uncontrollably to the extent that she was barely able to stand. . . . Following the strip searches, Blackburn developed symptoms of post-traumatic stress syndrome. She regressed, becoming guilt ridden and depressed. She gained approximately forty pounds, had nightmares about the strip searches and had trouble sleeping. She also became phobic about sex. Shortly after the strip searches, Blackburn ended her sexual relationship. She stopped working, attempted suicide, and eventually dropped out of college, which she was within months of finishing. She never

> returned to school. . . . When she attempted to have sexual relations with [her husband] she experienced muscle spasms, rigidity and physical pain. The symptoms of sexual dysfunction continued throughout her marriage. She had never experienced these physical reactions prior to the strip searches.

Cole v. Snow, 586 F. Supp. 655, 666 (D. Mass. 1984), *aff'd sub nom. Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985). *Cole* is not an outlier; the federal courts are replete with testimonial examples of the psychological trauma caused by strip searches. *See, e.g., Lee v. Ferraro*, 284 F.3d 1188, 1192 (11th Cir. 2002) (plaintiff plagued by pervasive fear following a strip search causing depression and marital problems); *Simpson v. City of Maple Heights*, 720 F. Supp. 1306, 1310 (N.D. Ohio 1989) (plaintiff suffered vomiting, diarrhea, inability to sleep, eat, or swallow, and loss of self-esteem, self-worth, and self-dignity as a result of being strip searched).

A strip search "is a demeaning and humiliating experience for any human being, male or female."[9] But there is reason to believe

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[9] *Women in Prison: A report by the Anti-Discrimination Commission Queensland* 72 (2006). *See also* Michael S. Schmidt, *City Reaches $33 Million Settlement Over Strip Searches*, New York Times, March 22, 2010, http://www.nytimes.com/2010/03/23/nyregion/23strip.html?scp=1&sq=strip%20searches%20at%20Rikers%20Island&st=cse (thirty-nine year old man describes being "horrif[ied]" and "humiliated" when required to "squat and spread his buttocks" during strip search).

the practice may have a disproportionately harmful effect on women. One commentator has noted that many challenges to strip-search policies "allege that women are singled out for more invasive search procedures than men, perhaps because jail authorities believe that vaginal smuggling is easier (or more common) than anal smuggling, and therefore that there is a greater need for highly intrusive searches of women." Schlanger, *supra*, at 75 (footnotes omitted). In addition,

> women may well feel more harmed than men by a visual body-cavity search. After all, given the gender distribution of jail workforces, women arrestees may be more likely than men to have the search done or observed by someone of the opposite sex; they may be menstruating or pregnant, both conditions that may render searches particularly objectionable; and they may care more about bodily privacy than men.

Id. at 75-76 (footnotes omitted).

Moreover, women – particularly incarcerated women – have far higher rates of previous physical and sexual abuse than men. More than 50% of women detained in jails report being physically or sexually abused – a rate five times that of male jail detainees.[10] For a woman

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[10] Doris J. James, Bureau of Justice Statistics Special Report: Profile of Jail Inmates, 2002, at 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf. *See also* TERRY KUPERS, M.D., PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 114 (1999) ("Approximately 80 percent of women

who has been sexually abused, "strip searching can be more than a humiliating and undignified experience. In some instances, it can re-traumatize women who have already been greatly traumatized by childhood or adult sexual abuse." *Women in Prison*, *supra* n.9, at 72.[11]

The extreme invasion of personal privacy caused by a strip search may be necessary to maintain jail security where reasonable suspicion exists. Blanket policies, however, result in intrusions without justification, as in this case, where jail policies required officials to subject Mr. Florence to two strip searches in less than a week, forcing him to squat and cough while naked, and to open his mouth and lift his genitals in front of an officer sitting an arm's length away – all because Mr. Florence had been arrested, in error,

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behind bars have been the victims of domestic violence and physical or sexual abuse at some time prior to their conviction"); *Jordan v. Gardner*, 986 F.2d 1521, 1525 (9th Cir. 1993) (*en banc)* (noting the "shocking histories of verbal, physical, and, in particular, sexual abuse endured by many of the [female] inmates prior to their incarceration;" eighty-five percent of inmates at women's prison reported "a history of serious abuse . . . including rapes, molestations, beatings, and slavery").

[11] *See also* Louise Bill, *The Victimization . . . and . . . Revictimization of Female Offenders*, Corrections Today (1998) ("The powerlessness that most of these women already feel as the result of their previous abuse and exploitation is further exacerbated by the necessity to comply with [strip searches]"); Kupers, *supra* n.10, at 135 (humiliating treatment of incarcerated women can cause emotional disturbances and make postrelease adjustment difficult).

for a fine he already had paid. 595 F. Supp. 2d at 496-98. Allowing indiscriminate strip searches guarantees that similar needless searches will continue to occur. *See Mary Beth G.*, 723 F.2d at 1267 (blanket policy of strip searching all female misdemeanor arrestees); *Tinetti v. Wittke*, 479 F.Supp. 486, 488 (E.D. Wis. 1979) (strip search of woman arrested for speeding); Paul R. Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. Marshall L. Rev. 273, 274 (1980) (noting that teachers in Wisconsin were strip searched after being charged with disorderly conduct during a strike).

Amici believe that the reasonable suspicion requirement correctly balances "the need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559. The reasonable suspicion standard preserves the authority to conduct necessary strip searches while limiting needless humiliation.

CONCLUSION

For the reasons set forth above, this Court should hold that reasonable suspicion is required for jail officials to conduct a strip search, at least of those persons arrested for non-indictable offenses. As such, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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