Nos. 09-3603 & 09-3661

In the United States Court of Appeals
for the Third Circuit

ALBERT W. FLORENCE, *Appellee*

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON; BURLINGTON COUNTY JAIL; WARDEN JUEL COLE, Individually and officially as Warden of Burlington County Jail; ESSEX COUNTY CORRECTIONAL FACILITY; ESSEX COUNTY SHERIFF'S DEPARTMENT; STATE TROOPER JOHN DOE, Individually and in his capacity as a State Trooper; JOHN DOES 1-3 of Burlington County Jail & Essex County Correctional Facility who performed the strip searches; JOHN DOES 4-5

Essex County Correctional Facility; Essex County Sheriff's Department, *Appellants in Case No. 09-3603*

Board of Chosen Freeholders of the County of Burlington; Warden Juel Cole, *Appellants in Case No. 09-3661*

On Appeal from the United States District Court for the District of New Jersey
No. 1-05-cv-3619 (JHR)

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

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INTEREST OF THE AMICI

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 fully consistent with the District Court's decision in the present case. *See infra* pp. 4-6. Mr. Del Tufo is currently of Counsel at Skadden, Arps, Slate, Meagher & Flom LLP. Deborah T. Porritz 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.

PRELIMINARY STATEMENT

As former Attorneys General of New Jersey, *amici curiae* 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 strikes 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).[1] The court's approach, focusing on reasonable suspicion, was appropriate. It was not only consistent with case law, but was also consistent with the Attorney

[1] *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).

General of New Jersey's Strip Search Requirements, American Bar Association standards, and the laws of numerous states that restrict the ability to conduct strip searches without reasonable suspicion. *See infra* pp. 4-8.

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," 595 F. Supp. 2d 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 court's narrow holding in this case does not prevent 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. 10-15. The District Court's decision therefore protects personal privacy without undermining jail security.

ARGUMENT

I. THE JAIL STRIP SEARCH POLICIES BEFORE THIS COURT VIOLATE THE NEW JERSEY ATTORNEY GENERAL'S STRIP SEARCH REQUIREMENTS AND OTHER WIDELY-ACCEPTED STANDARDS.

The Office of the Attorney General of New Jersey has essentially already weighed in on the issue before the Court, formally issuing standards controlling the circumstances under which police officers can (and cannot) strip search arrestees. Those standards closely mirror the conclusion of the District Court.[2]

New Jersey Statute 2A:161A-8(b) requires 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, New Jersey issued the Attorney General's Strip Search and Body Cavity Search Requirements and Procedures for Police Officers ("Attorney General's Strip Search Requirements").[3] The Attorney General's Strip Search Requirements permit strip searches of arrestees in municipal detention

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[2] The standards created by the Office of the Attorney General represent a policy determination that applies broadly, covering all persons taken to municipal detention centers and who are therefore subject to actions of local law enforcement over which the Attorney General has authority. As a matter of policy, the standards set forth in the Attorney General Strip Search Requirements are just as appropriate for application to county detention centers as they are to municipal centers.

[3] 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.

facilities only if: (1) officers obtain a warrant for the strip search, (2) the arrestee consents to the search, or (3) there is "[r]easonable suspicion to believe that the person is concealing a weapon, contraband or Controlled Dangerous Substances." Attorney General's Strip Search Requirements § II.B.1. To ensure that strip searches occur only under such circumstances, the Attorney General's Strip Search Requirements also impose reporting requirements on law enforcement officers:

> IV. Reporting Requirements
>
> A. Officer who performs strip search or has body cavity search conducted must report the reason for this search on the record of arrest. The report must include:
>
> 1. A statement of facts indicating the reasonable suspicion or probable cause for the search.
>
> 2. A copy of the search warrant, if appropriate.
>
> 3. A copy of the consent form, if appropriate.
>
> 4. The name of the officer in charge who authorized the search.
>
> 5. The names of the persons conducting the search.
>
> 6. An inventory of any items found during the search.

Id. § IV. The Attorney General's Strip Search Requirements, last revised in 1995, remain in effect today.

The standards set forth by the Attorney General are actually more protective of personal privacy than is the District Court's decision. The court's decision in this case would allow strip searches for anyone arrested for an indictable offense,

whereas the Attorney General's Strip Search Requirements place limitation on strip searches regardless of the reason for arrest. Yet the fundamental focus of both is appropriately the reasonable suspicion standard.

The focus on reasonable suspicion in the Attorney General's Strip Search Requirements echoes the same focus in the strip search laws of other states and in the model standards of the American Bar Association. Standards issued by the American Bar Association would forbid strip searching arrestees without articulable suspicion:

> **Search of facilities and prisoners**
> …
>
> (f) In conducting searches of a prisoner, correctional authorities should strive to preserve the privacy, dignity, and bodily integrity of the prisoner. In addition:
>
> …
>
> (iii) a search requiring a prisoner to disrobe, including a visual inspection of body cavities, should be conducted only when based upon an articulable suspicion that the prisoner is carrying contraband or other prohibited material.

American Bar Association, Legal Status of Prisoners Standards, Standard 23-6.10 (f), *available at* www.abanet.org/crimjust/standards/prisoners_status.html.

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 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 Strip Search Requirements issued by the New Jersey Attorney General hoped 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 the appellants in

this case contend 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; *see also Bull v. San Francisco*, 539 F.3d. 1193 (9th Cir. 2008) (stating that "the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record" may create reasonable suspicion), *reh'g en banc granted*, 558 F.3d 887 (9th Cir. 2009). 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.[4]

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.*

[4] 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.

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 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.").[5]

[5] *But see Way v. County of Ventura*, 445 F.3d 1157, 1162 (9th Cir. 2006) (finding a

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 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"). The ABA standards similarly provide: "[A] prisoner may be patted down to determine whether he or she is carrying contraband or other prohibited material." ABA Standard 23-6.10(f)(ii).

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strip search unreasonable where an arrestee was booked on misdemeanor charges for being under the influence of a controlled substance).

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"). According to the ABA standards, "correctional authorities should use nonintrusive sensors instead of body searches whenever possible." ABA Standard 23-6.10(f)(i).

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. 1994) (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 School 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.

Courts have described strip searches of jail detainees in similar terms, such as, "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission…" *Mary Beth G.*, 723 F.2d at 1272 (quotation 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) (quotation omitted). According to the Ninth Circuit, "[t]he intrusiveness of a body-cavity search cannot be overstated. Strip searches involving the visual exploration of body cavities are dehumanizing and humiliating." *Kennedy v. Los*

Angeles Police Dept., 901 F.2d 702, 711 (9th Cir. 1990), *abrogated on other grounds*, *Hunter v. Bryant*, 502 U.S. 224 (1991). Similarly, the Eleventh Circuit has stated: "[t]he experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening." *Justice*, 961 F.2d at 192 (quotation omitted). Detainees subjected to strip searches have described the experience as "humiliating" and "shameful," *Kelsey*, 567 F.3d at 66 (Sotomayor, J., dissenting), have been 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," *Mary Beth G.*, 723 F.2d at 1267, and have been left "weeping on the floor" after such searches, *Lucero v. Donovan*, 354 F.2d 16, 19 (9th Cir. 1965).

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, 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 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); *Mary Beth G.*, 723 F.2d at 1267 (blanket policy of strip searching all female misdemeanor arrestees).

By permitting strip searches where reasonable suspicion exists, the District Court's decision preserves the authority to conduct necessary strip searches while limiting needless humiliation. *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.

CONCLUSION

For the forgoing reasons, the judgment of the District Court should be affirmed.

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Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

I, David M. Shapiro, certify that I am an attorney in good standing of the bar of this Court.

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 37(a)(7)(B) because this brief contains 5,340 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief has been prepared in a proportionately spaced typeface using Microsoft Word in a 14-point Times New Roman font.

Dated: January 19, 2010

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CERTIFICATIONS PURSUANT TO LOCAL APPELLATE RULE 31.1(c)

I certify that this brief complies with L.A.R. 31.1(c) in that prior to it being electronically filed with the Court today it was scanned using the following software for virus detection and found to be free from computer viruses: Symantec Antivirus 1/18/2010 rev. 5. I further certify that the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical.

Dated: January 19, 2010

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CERTIFICATE OF SERVICE

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