No. 10-945

IN THE

Supreme Court of the United States

ALBERT W. FLORENCE,

Petitioner,

v.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Like both of the lower courts, "[r]espondents acknowledge that there are divisions in the courts of appeals" over the constitutionality of policies requiring blanket strip searches of all those admitted to a jail or prison. Essex BIO 8. The conflict moreover is no mere disagreement about verbal formulations: "It is certainly true that Courts of Appeals have *come to different results* on the question of which searches may be conducted without individualized suspicion without offending the Fourth Amendment." Burlington BIO 10 (emphasis added). Nor do respondents dispute that the question, which arises on a daily basis in jails across the country, has profound importance for the preservation of individuals' most basic rights and the administration of correctional facilities throughout the nation. Respondents are accordingly reduced to arguing that *eight* different courts of appeals will reverse themselves without this Court's intervention, and that this case is a poor vehicle for resolving the circuit conflict. Because neither assertion has merit, certiorari should be granted.

I. The Broad And Deepening Circuit Conflict Over The Constitutionality Of Blanket Suspicionless Strip Search Policies Requires This Court's Intervention.

The lower courts correctly recognized that this case directly implicates an eight-to-three circuit split. There is no prospect that the conflict will resolve itself.

1. Respondents' effort to pick around the edges of this well-recognized circuit conflict lacks merit.

Although Essex notes that *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983), involved searches of women, that fact had no bearing on the analysis of the Seventh Circuit, which has subsequently applied *Mary Beth* to the strip search of a man, *Campbell v. Miller*, 499 F.3d 711, 718 (7th Cir. 2007). Likewise, nothing in the Eighth Circuit's decision in *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985), provides any basis for Essex's odd suggestion (BIO 12) that the strip search in that case would have been upheld if the jail had only extended its unconstitutional practice to all arrestees.

The cases cited by Burlington (BIO 10) in claiming that some courts "have upheld practices very similar to the ones reviewed by the Court of Appeals here" are all in fact easily distinguishable: most involve significantly less intrusive searches,[1] and the rest arise in materially different contexts.[2] Critically, respondents omit that every one of the

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[1] *See Kelsey v. County of Schoharie*, 567 F.3d 54, 63 (2d Cir. 2009) (clothing exchange in which inmate allowed to conceal self behind towel and low wall); *Stanley v. Henson*, 337 F.3d 961, 966 (7th Cir. 2003) (clothing exchange policy that allowed inmates to retain underwear); *Schmidt v. City of Bella Villa*, 557 F.3d 564, 567-68, 572-74 (8th Cir. 2009) (suspect who gave false name required to unzip pants to allow photograph of tattoo "approximately two inches from [her] hipbone").

[2] *See Dobrowolskyj v. Jefferson County, Ky.*, 823 F.2d 955, 956 (6th Cir. 1987) (suspect charged with menacing subjected to strip search for weapons upon movement into higher security part of jail); *N.G. v. Connecticut*, 382 F.3d 225, 233, 237 (2d Cir. 2004 (strip search upon admission to juvenile facility upheld in light of special circumstance surrounding detention of children).

cases they cite expressly reaffirms circuit precedent prohibiting blanket strip searches of all adult arrestees.[3]

2. Unable to deny persuasively that the petition directly presents a broad and recurring circuit conflict, respondents instead argue simultaneously that the question has been percolating in the lower courts too long and not long enough to warrant this Court's review.

Although some circuits forbade blanket strip search policies before this Court decided *Turner v. Safley*, 482 U.S. 78 (1987), *see* Essex BIO 10-11, *Turner* would not change the result. Respondents admit that in the twenty-four years since *Turner* was decided, only one circuit has reversed course in light of that decision. *See* Essex BIO 11. The eight circuits adopting the majority view do not accept that "*Turner* implicitly overruled" their prior circuit precedent. *Shain v. Ellison*, 273 F.3d 56, 65 (2d Cir. 2001). They accordingly have repeatedly applied or reaffirmed circuit precedent after *Turner*.[4] Indeed, even circuits

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[3] *See Dobrowolskyj*, 823 F.3d at 957; *Kelsey*, 567 F.3d at 62; *Schmidt*, 557 F.3d at 572; *N.G.*, 382 F.3d at 232; *Stanley*, 337 F.3d at 965.

[4] *See Roberts v. Rhode Island*, 239 F.3d 107, 113 (1st Cir. 2001); *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997); *Hartline v. Gallo*, 546 F.3d 95, 100 (2d Cir. 2008); *Shain*, 273 F.3d at 65; *Walsh v. Franco*, 849 F.2d 66, 69 (2d Cir. 1988); *Amaechi v. West*, 237 F.3d 356, 364-65 (4th Cir. 2001); *Abshire v. Walls*, 830 F.2d 1277, 1279-80 (4th Cir. 1987); *Isbell v. Ray*, No. 98-6377, 2000 WL 282463, at *8 (6th Cir. Mar. 8, 2000) (unpublished); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Campbell*, 499 F.3d at 717; *McCabe v. Parker*, 608 F.3d 1068,

allowing blanket strip searches have declined to rely on *Turner*. *See* Pet. App. 18a n.5; *Powell v. Barrett*, 541 F.3d 1298, 1302-03 (11th Cir. 2008) (en banc). If *Turner* has not resolved the circuit conflict by now, it never will.

Alternatively, respondents assert that "the circuits are capable of resolving any meaningful conflict" themselves. Essex BIO 8. Although two circuits have reversed themselves en banc and the question is now pending before one other en banc court (*id.* at 9), there is no prospect that all of the eight circuits in the majority (but none of the three in the minority) will both take up the issue en banc and reverse course. Respondents fail to acknowledge that since the circuit conflict emerged in 2008, circuits in the majority have repeatedly reaffirmed their positions. *See, e.g.*, *Myers v. James*, 344 Fed. App'x 457, 460 (10th Cir. 2009) (unpublished) (expressly refusing to reconsider circuit precedent in light of Eleventh Circuit's contrary en banc decision), *cert. denied*, 130 S. Ct. 1735 (2010); *see also McCabe*, 608 F.3d at 1073 n.4; *United States v. Jones*, 341 Fed. App'x 176, 177-78 (7th Cir. 2009) (unpublished); *Hartline*, 546 F.3d at 100; *Archuleta*, 523 F.3d at 1284, 1286.

The recent decisions tread no new ground. They simply disagree with their sister circuits over the

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1073 n.4 (8th Cir. 2010); *Archuleta v. Wagner*, 523 F.3d 1278, 1284, 1286 (10th Cir. 2008); *Ellis v. Sharp*, No. 93-6242, 1994 WL 408129, at *2 (10th Cir. Aug. 4, 1994) (unpublished); *Cottrell v. Kaysville City, Ut.*, 994 F.2d 730, 734 (10th Cir. 1993); *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993).

best reading and implementation of this Court's decisions – particularly *Bell v. Wolfish*, 441 U.S. 520 (1979) – a disagreement that only this Court can resolve. *See* Pet. App. 17a-28a; *Powell*, 541 F.3d at 1303-08; *Bull v. City & Cnty of San Francisco*, 595 F.3d 964, 971-77 (9th Cir. 2010) (en banc).

II. This Case Presents An Ideal Vehicle For Resolving The Circuit Conflict.

This case presents an ideal vehicle to resolve the entrenched circuit conflict. The court of appeals squarely decided the question presented by the petition on the basis of a well-developed record that puts the constitutional question in stark relief. Respondents do not claim that they had any basis to suspect that petitioner was concealing weapons or contraband in his underwear when he was unexpectedly arrested on an invalid warrant during an unanticipated traffic stop. Respondents therefore defend their conduct, as they must, by claiming that the Fourth Amendment permits suspicionless strip searches of every arrestee admitted to the general population of a jail. *See* Burlington BIO 18; Essex BIO 13-14. That is precisely the claim that has been rejected by eight circuits and accepted by three.

By contrast, the only previous certiorari petition to attempt to raise the circuit conflict, No. 09-451, *Saulsberry v. Myers*, *cert. denied*, 130 S. Ct. 1735 (2010), was an exceptionally poor vehicle. Because the individual in *Saulsberry* was held in a "detox cell" for four hours without ever being introduced into the general population, *see* BIO, No. 09-451, at 11-12; *Myers v. James*, 344 Fed. App'x 457, 458-59 (10th Cir. 2009) (unpublished), the case did not implicate the

principal justification asserted for the strip searches at issue here: the need to prevent introduction of weapons and contraband into a jail's general population.

Respondents make no such claim here and their other objections to this case as an appropriate vehicle for resolving the circuit conflict do not withstand scrutiny.

First, although this is formally an interlocutory appeal, *see* Essex BIO 9; Burlington BIO 14, the relevant point is that the Fourth Amendment question in the case has been finally decided. The pending district court proceedings will have no bearing on petitioner's strip search claims, which were conclusively resolved by the Third Circuit's decision. Respondents do not even attempt to suggest that a trial on petitioner's false arrest and conditions of confinement claims would shed any further light on the question presented by the petition.

In similar circumstances, when waiting for final judgment would serve no purpose, this Court has not hesitated to grant certiorari to review an interlocutory appeal. *See generally* Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) (noting that certiorari may be granted "to review a nonfinal judgment where there is a conflict on a question of law with another court of appeals . . . , that would justify review of a final decree or judgment"); *see also, e.g.*, *Sossamon v. Texas*, 130 S. Ct. 3319 (2010) (granting interlocutory petition); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2440 (2010) (deciding case on

interlocutory appeal); *Forest Grove School Dist. v. T.A.*, 129 S. Ct. 2484, 2490 (2009) (same).

Second, Essex argues that there is a factual dispute whether petitioner was subject to a "visual body cavity search," Essex BIO 16, by being required to "lift his genitals" and "squat and cough" in front of prison officials, *id.* at 3-4, n.1, 16 n.5. But as the court of appeals explained (Pet. App. 6a), "the District Court concluded that, while there were facts in dispute – such as whether non-indictable male arrestees at BCJ were required to lift their genitals during the search – these disputes were immaterial" to the question decided by the courts below and posed by this petition: whether the Fourth Amendment permits a jail policy requiring all "arrestees to undress completely and submit to a visual observation of their naked bodies before taking a supervised shower." Pet. App. 19a. And in the court of appeals, the "Jails d[id] not challenge the District Court's factual findings regarding the scope of the strip search policies." *Id.* at 6a n.3.[5]

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[5] Respondents imply that there is a genuine factual dispute as to whether petitioner was even strip-searched at all. Essex BIO 2-4 & n.1, 16 & n.5; Burlington BIO 4. But the district court easily and correctly rejected that claim. It found that Burlington's attempt to draw a verbal distinction between a "strip search" and "visual inspection" was "of no consequence" to the constitutional question. Pet. App. 65a. And it directly rejected Essex's attempt to "raise a question of fact as to whether the strip searches even occurred," finding that "there is no genuine issue of material fact to prevent summary judgment in favor of Plaintiffs." Pet. App. 66a-67a.

Third, Essex argues that petitioner's transfer to its facility from another jail is a factual complication that counsels against review. Essex BIO 15. But that is a compelling reason to *grant* review in this case, as it will allow the Court to provide much needed guidance in the two most common circumstances in which jails conduct searches: admission from the street and admission from another facility. *Compare*, *e.g.*, Pet. App. 28a (permitting suspicionless strip searches in both contexts) *with N.G.*, 382 F.3d at 233-34 ("Whatever the justification for strip searches upon initial admission to a first detention facility, we see no state interest sufficient to warrant repeated strip searches simply because of transfers to other facilities."); *id.* at 238 (Sotomayor, J., concurring in part and dissenting in part) (same).

Fourth, Burlington suggests that this case is a poor vehicle because the Third Circuit did not pass on Burlington's assertion that blanket strip searches were justified to identify gang members and detect disease. BIO 18-19. Nothing prevents respondents from raising those arguments in this Court on the merits, but they do not seriously contribute to the legal inquiry. Respondents cannot substantiate any claim that gang members regularly tattoo themselves in places hidden by their underwear, where the tattoo cannot serve its purpose of telegraphing gang affiliation to others. And petitioner has raised no objection to requiring arrestees to disrobe for examinations by medical personnel, a process which entails a far lesser infringement on privacy than strip searches by correctional officers. *See* Pet. 17.

Finally, respondents argue that review is not required because blanket suspicionless strip searches are already prohibited by present jail policy and state law. Essex BIO 18; Burlington BIO 22. But petitioner's claim for damages obviously is not moot, and the legal issue continues to arise around the country. Further, as the facts of this case demonstrate, state law and jail policies have shown themselves to be entirely ineffective at protecting New Jersey residents from unconstitutional strip searches. *See* Pet. 4-5. Moreover, even today, Essex cannot bring itself to admit that suspicionless strip searches are illegal, acknowledging only the "*alleged* requirements of New Jersey law." BIO 18 (emphasis added). And Burlington has argued all along that requiring inmates to strip nude for visual examination by corrections officers does not constitute a "strip search." *See* Pet. App. 64a-65a.[6]

III. Respondents' Policies Violated The Fourth Amendment.

The ruling below conflicts with this Court's precedents and with basic Fourth Amendment principles. Respondents cannot dispute that a strip search represents a dramatic intrusion upon personal privacy. The question in most Fourth Amendment cases is the reasonableness of the government entering or viewing spaces – such as a residence or a vehicle – that are not in fact exclusively private, as

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[6] Respondents' recalcitrance flies in the face of the plain text of N.J. Admin. Code § 10A:31-8.4. *See* Pet. 4; Pet. App. 95a-97a (rejecting respondents' claim that search was authorized by state regulations).

individuals will otherwise open them to friends and families. But a strip search is a vastly greater intrusion upon personal privacy and (equally important) individual dignity: forcibly depriving the individual of all his clothes exposes to view parts of our bodies that will otherwise be seen only by intimate partners and medical professionals, and moreover does so under a humiliating command by jail officials that necessarily implies a judgment that the individual is a common and dangerous criminal.

A strip search accordingly stands "in a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). Absent special justification, it is subject to "the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 318 (1997). As the petition explained but respondents conspicuously ignore, it is well-settled that sufficient individualized suspicion in the context of admission to a jail can arise from either the nature of the offense (such as a crime involving violence, weapons, or drugs) or the individual's own personal history of involvement in such dangerous activities. *See* Pet. 19-20. Jails also may require all arrestees to strip to their underwear and submit to pat downs, metal detectors, and body scanners. Given this array of tools to combat smuggling, it is unnecessary to strip search each and every jail admittee. *Id.* at 21-22. That is not mere speculation: categorical strip search policies have long been forbidden in most of the country, New Jersey itself bans them, and the federal Bureau of Prisons does as well. *See* Pet. 28-30. In this case, petitioner was arrested for failing to pay a fine, has

no history of violence or drug use, and obviously was not attempting to smuggle anything into jail because he constantly (and correctly) protested that he should not be arrested in the first place. Forcibly strip searching him – twice – was not "reasonable."

The petition explained that the Third Circuit and respondents err in their contrary reliance on *Bell v. Wolfish*, 441 U.S. 520 (1979). *See* Pet. 22-30. That case held that a strip search was reasonable "under the circumstances" in which prison inmates could *coordinate* smuggling through contact visits that were not closely supervised by jail personnel. 441 U.S. at 558. Further, the detainees in *Bell* made the voluntary decision to subject themselves to the searches in that case. This Court did not announce a categorical rule authorizing strip searches in jails but recognized the fact-specific nature of the inquiry, which "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. Respondents do not seriously dispute that the admission into jail of persons such as petitioner – who was arrested without notice, and who pleaded not to be taken to jail – does not give rise to the same governmental interest in preventing smuggling.

Respondents equally err in their reliance on other precedents – such as *Turner v. Safley*, 482 U.S. 78 (1987) – involving the Constitution's application to prisons. Even if applicable here, those decisions do not grant prison officials *carte blanche*. Prison regulations must be "reasonably related to legitimate penological objectives," rather than an "exaggerated response." *Turner*, 482 U.S. at 87 (internal quotation marks omitted). Accordingly, the constitutionality of

such measures turns on whether officials "show[] more than simply a logical relation, that is, whether [they] show[] a *reasonable* relation." *Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion). Here, respondents have failed to prove any reasonable relationship between a categorical policy of strip searching all admittees regardless of the circumstances and the needs of jail administration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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