No. 10-945

IN THE

Supreme Court of the United States

ALBERT 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 FOR DRI *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Fourth Amendment permits a jail to conduct a suspicionless search of every individual arrested for any minor offense no matter what the circumstances.

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INTEREST OF DRI[1]

Amicus curiae DRI—the Voice of the Defense Bar, is a 22,500-member international association of defense lawyers who represent individuals, corporations, insurance carriers, and local governments involved in civil litigation. Committed to enhancing the skills, effectiveness and professionalism of defense lawyers, DRI seeks to address issues germane to defense lawyers and the civil justice system. DRI has long been a voice for a fair and just system of civil litigation, seeking to ensure that it operates to effectively, expeditiously, and economically resolve disputes for litigants. To that end, DRI participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

DRI's interest in this case stems from its members' need to advise local government clients regarding the rules for implementing strip searches in correctional institutions and the associated risk of litigation. DRI members are also involved in defending these local governments, many of whom are under severe financial strain, from burdensome, distracting, and time consuming litigation. DRI's concern is that moving from a bright-line rule of strip searching every individual as part of the process of entering the general prison or jail population to requiring jail personnel to search those arrested on a

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

misdemeanor only with a showing of reasonable suspicion, opens the door to profiling and other abuses of discretion and leaves local governments vulnerable to lawsuits on equal protection grounds. Additionally, because courts will be given discretion to review searches on a case-by-case basis under a reasonable suspicion standard, the resulting uncertainty in the law will increase the difficulty of advising clients on developing and implementing strip search policies that decrease the risk of litigation. DRI's members are involved in litigation in state and federal courts all over the country, and therefore, DRI is well-positioned to assist the Court by offering insight into the impact of the decision at issue here.

SUMMARY OF ARGUMENT

The Third Circuit in this case, as well as the Eleventh Circuit in *Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir. 2008) (en banc) and the Ninth Circuit in *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc) have correctly determined that a blanket policy of strip searching all arrestees admitted to a general jail population is reasonable under *Bell v. Wolfish*, 441 U.S. 520 (1979). All three cases recognize that *Bell* addressed a general policy, not individual searches. The visual body-cavity search policy at issue in *Bell* applied to all detainees, regardless of the crime committed, and it applied as well to some who did not commit any crime. The Supreme Court in *Bell* recognized the special security needs of correctional institutions, as well as the discretion traditionally afforded to prison administrators, and did not mandate individualized suspicion as a prerequisite for visual body-cavity searches.

In addition to addressing security and administrative concerns in prisons, a blanket strip search policy minimizes challenges to searches conducted by police and correctional officers that would undoubtedly be raised if they are forced to operate under a less-definite reasonable suspicion standard. Furthermore, when courts have the discretion to determine the reasonableness of these searches on a case-by-case basis, the calculus can be extremely complex, and the resulting uncertainty in the law makes it harder to develop and implement strip search policies that avoid the risk of litigation. The resulting litigation, moreover, will necessarily be based on a multiplicity of facts, making it harder to resolve at the motion stage. This means expensive, distracting and often unpredictable litigation with all its consequent problems is likely to increase.

Finally, and most importantly, this Court has approved the use of bright-line rules allowing searches in several situations in which government interests in performing a search outweigh any intrusion on an individual's privacy. In these situations, reasonable suspicion is not required, rather, individuals are searched based on their participation in an activity or membership in a class. The decisions announcing these bright-line rules recognize *amicus curiae* DRI's concern that implementing a reasonable suspicion standard is often impractical and the discretion it affords can result in abuse and unfairness to certain groups. Indeed, a correctional facility presents an even stronger case for dispensing with an individualized suspicion requirement than in most "special needs" cases in which this court already has done so.

ARGUMENT I

A BLANKET STRIP SEARCH POLICY IS REASONABLE AND THEREFORE CONSTITUTIONAL PURSUANT TO *BELL V. WOLFISH*.

A. Bell addressed a general policy applicable to all detainees and did not require individualized suspicion.

In *Bell*, this Court upheld the lawfulness of a policy that required visual body-cavity searches of all pretrial detainees after contact visits at the Metropolitan Correctional Center in New York City. *Bell v. Wolfish*, 441 U.S. 520, 523-524 (1979). The MCC is a federally operated short-term custodial facility in New York City designed to house pretrial detainees, as well as convicted prisoners and witnesses in protective custody. *Id*. The Court recognized that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id*. at 546. The Court also acknowledged that "[s]muggling . . . money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record . . . and in other cases." *Id.* at 559. As a result, prison administrators should be accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id*. at 547.

In light of these considerations, this Court held that the visual body-cavity searches were reasonable and did not violate the Fourth Amendment. In so doing, the Court articulated a balancing test, wherein determining "reasonableness under the Fourth Amendment . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559. Under this test, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

The Court's specific conclusion in *Bell* was that visual body-cavity inspections "as contemplated by the MCC rules" could be conducted on less than probable cause. 441 U.S. at 560. Leaving no doubt that a blanket strip search policy is thus constitutional, Justice Powell's dissent lamented that "at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case." *Id.* at 563 (Powell, J., dissenting).

B. Three federal circuits, including the Third Circuit in this case, have correctly determined that individualized suspicion is not required for the strip searches at issue here

Three federal circuits, including the Third Circuit in this case, have correctly determined that *Bell* does not require individualized suspicion for strip searches of all arrestees admitted to a jail's general population. In *Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir. 2008) (en banc), the Court held that, pursuant to *Bell*, a policy of strip searching all arrestees as part of the process of

booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible. Addressing the precedent set in *Bell*, the court explained, "[t]he security needs that the Court in *Bell* found to justify strip searching an inmate re-entering the jail population after a contact visit are no greater than those that justify searching an arrestee when he is being booked into the general population for the first time." *Id.* at 1302. In fact, the court observed that any factual differences with intake searches were immaterial because, "an inmate's initial entry into a detention facility might be viewed as coming after one big and prolonged contact visit with the outside world." *Id*. at 1313. Further, the visual body cavity searches conducted in *Bell* "were more intrusive, and thereby impinged more on privacy interests" than the visual strip searches at issue in *Powell* and in this case. *Id*. at 1302.

The 11th Circuit also noted that the Supreme Court in *Bell* "addressed a strip search policy, not any individual searches conducted under it," and "[t]he Court spoke categorically about the policy, not specifically about a particular search or an individual inmate." *Powell,* 541 F.3d at 1307. In short, the policy at issue in *Bell* was a blanket policy, which "applied to all inmates, including those charged with lesser offenses and even those charged with no wrongdoing at all who were being held as witnesses in protective custody. The policy did not require individualized suspicion." *Id*. at 1307.

Similarly, in *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc), the court upheld the San Francisco jail system's policy requiring the

strip search of all arrestees who were to be introduced into the general jail population for custodial housing. *Id.* at 966, 975. The policy was implemented "[t]o address a serious problem of contraband smuggling in the jail system . . . ." *Id.* In a class action lawsuit challenging this policy on its face, the district court held that it violated the Fourth Amendment rights of the persons searched. *Id.* The district court certified a class under Federal Rule of Civil Procedure 23(b)(3) and defined the class as including all persons who "were arrested on any charge not involving weapons, controlled substances, or a charge of violence, and not involving a violation of parole or a violation of probation . . . and who were subjected to a blanket visual body cavity strip search . . .without any individualized reasonable suspicion that they were concealing contraband." *Id.* at 969.

Citing *Bell*, the Ninth Circuit recognized that "the scope, manner, and justification for San Francisco's strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in *Bell*." *Bull*, 595 F.3d at 975. The court further acknowledged that "[t]he record reveals a pervasive and serious problem with contraband inside San Francisco's jails, as well as numerous instances in which contraband was found during a search . . . ." *Id.* Thus, "under *Bell*, San Francisco's strip search policy was reasonable and therefore did not violate the class members' Fourth Amendment rights." *Id.*

As did the 11th Circuit, the Ninth Circuit recognized that, in *Bell*, "[t]he Supreme Court did not require MCC officials to consider the individual characteristics of the persons subject to the strip search policy. Nor did the Court

require MCC officials to articulate their suspicions that a particular person subject to the policy was smuggling contraband." *Bull*, 595 F.3d at 978. Moreover, "*Bell* did not require MCC officials to modify the strip search policy based on whether a detainee had been charged with a serious or minor offense." *Id.* Thus, a blanket strip search policy applicable to all persons who had contact visits is "categorically reasonable" under the circumstances in the detention facility. *Id.*

Likewise in this case, the Third Circuit observed that "[b]ecause the scope, manner, and place of the [strip] searches" at issue were "similar to or less intrusive" than the visual body cavity searches in *Bell*, "the only factor on which Plaintiffs could distinguish this case is the Jails' justification for the searches." (Pet'r App. 20a). Of the reasons cited by the jails in justifying the searches, "the potential for smuggling of weapons, drugs, and other contraband poses the greatest security threat." *Id.* The court found that "the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*." *Id.* at 21a.

The Third Circuit correctly observed that "the *Bell* court explicitly rejected any distinction in security risk based on the reason for detention . . . . Instead, the security risk was defined by the fact of detention in a correctional facility." (Pet'r App. 21a). Further, "*Bell* did not require individualized suspicion for each inmate searched; it assessed the facial constitutionality of the policy as a whole, as applied to all inmates at MCC." *Id.* at 22a. Finally, in a footnote, the court observed that

"[t]he absence of an individualized suspicion requirement in *Bell* is consistent with the Fourth Amendment doctrine of special needs searches," which are permissible, even without reasonable suspicion when "a search furthers a 'special governmental need' beyond that of normal law enforcement . . . ." *Id.* n 8, quoting *Neumeyer v. Beard*, 421 F.3d 210, 214 (3d Cir. 2005).

Because *Florence* correctly interpreted *Bell*, this Court should affirm the decision.

ARGUMENT II

A BRIGHT-LINE RULE ALLOWING BLANKET STRIP SEARCHES OF ALL ARRESTEES ADMITTED TO A JAIL'S GENERAL POPULATION CREATES LESS AMBIGUITY, IS EASIER TO ADMINISTER, AND AVOIDS THE POTENTIAL FOR MANIPULATION INHERENT IN A REASONABLE SUSPICION STANDARD.

A. A bright-line rule allowing a blanket strip search policy is easier for correctional institution personnel to administer and results in less ambiguity in the law when decisions to search are reviewed by courts.

This issue before this Court is whether to affirm the constitutionality of a bright-line rule allowing blanket strip searches of all persons admitted to a jail's general population, or instead require jails to implement a reasonable suspicion standard, which will then be reviewed

on a case-by-case basis on appeal.[2] *Amicus curiae* DRI agrees with the Third Circuit's assessment that a blanket strip search policy

> will help to avoid potential equal protection concerns in the strip search process as it removes officer discretion in selecting which arrestees to search. The potential for abuse in a 'reasonable suspicion' scheme is high, particularly where reasonable suspicion may be based on such subjective characteristics as the arrestee's appearance and conduct at the time of arrest. Subjecting all arrestees to the same policy promotes equal treatment. [*Florence*, 621 F.3d at 310-11.]

Judge Kozinski's concurring opinion in *Bull*, also cited in *Florence*, succinctly articulates the dangers of replacing the bright-line rule of a blanket strip search policy with a reasonable suspicion standard. In Judge Kozinski's view, the issue is "whether federal judges can force government officials to subdivide classes of people subject to a valid

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2. In federal circuits where reasonable suspicion is required for strip searches, the courts employ a case-by-case consideration of the circumstances to determine after the fact whether reasonable suspicion existed for a strip search. See e.g. *United States v. Barnes*, 506 F.3d 58, 62 (1st Cir. 2007) (In evaluating whether the suspicion was reasonable, court looks at the totality of the circumstances of each case to see whether the detaining officer had a particularized and objective basis for suspecting legal wrongdoing.); *Hill v. Bogans*, 735 F. 2d. 391, 394 (10th Cir. 1984) (After reviewing the circumstances surrounding the search, the court reversed the trial court's ruling that the search complied with the Fourth Amendment.)

Fourth Amendment search into sub-classes that present a materially different Fourth Amendment calculus." *Bull*, 595 F.3d at 982-983 (Kozinski, J., concurring).

Several factors counsel against creating these sub-classes of individuals "as to which a different Fourth Amendment balance must be struck." *Bull*, 595 F.3d at 984 (Kozinski, J., concurring). "First, there's a degree of subjectivity that attends any classification," and "in a democracy there is a very important value, enshrined in the Equal Protection Clause, in treating everyone who stands on the same footing alike." *Id*. Second, "lines drawn by courts rather than dictated by the functional requirements of an activity tend to be ambiguous, subject to manipulation and difficult to administer." *Id. Bull* demonstrated this point because "[t]he district court carved out a class of people to exempt from the strip search policy consisting of all those arrested on a charge not involving (a) weapons, (b) controlled substances, or (c) violence, and (d) as to whom there was not individualized reasonable suspicion." *Id*. at 985. As Judge Kozinski observed, however, "[e]ach criterion is porous and subjective; there can be endless quarrels (and lawsuits) as to whether someone did or did not fall into any of the categories." *Id*.

"[T]he most troublesome category," in Judge Kozinski's view, involves "cases where the deputies determine there's individualized suspicion for a search." *Bull*, 595 F.3d at 986 (Kozinksi, J., concurring). As is the concern of *amicus curiae* DRI, "[h]ow, exactly, are deputies to know what does and does not amount to individualized suspicion, and who ultimately decides?" *Id*. It is clear that, "[n]ot only will courts have to draw these difficult lines; jails will have to guess how courts will draw them." *Id*.

In fact, the arguments advanced by petitioner and his amici have the potential to exacerbate this problem. Specifically, they suggest that criminal history—not merely the offense giving rise to arrest—might alone trigger individualized suspicion. See Pet'r Br. 33 ("prior criminal history" seemingly without even requirement of conviction); NACDL Br. 8; Former Jail and Corrections Professional Br. 12-13; Cert. Petition 20 (NJ allows strip searches on "individuals who have a history of violence"). DRI suggests that it would be unworkable at best to implement a policy that requires guards to determine if someone has a "history of violence," or evaluate a person's criminal record to determine if, for example, (i) an assault charge or conviction years before, (ii) a recent drug offense, or (iii) even a marijuana arrest while the arrestee was in college is enough to trigger suspicion in a particular case.

With a reasonable suspicion standard, *amicus curiae* DRI's members cannot definitively advise their local government clients in advance what a court will decide, and the concern is that, "[b]eing the subject of a court order and risking personal liability, deputies will probably err on the side of caution, to the detriment of prisoners faced with an increased risk of harm from smuggled contraband." *Bull*, 595 F.3d at 986 (Kozinksi, J., concurring). Moreover, it is likely that "those involved in operating the institution will be devoting most of their time and energy to averting liability rather than running the institution effectively." *Id.* at 988. A jailer's job is not to distinguish between categories of offenders; doing so would effectively second-guess the legislature's wisdom in making certain offense categories subject to arrest (rather than citation) and second-guess the courts for

denying bail to certain misdemeanants or incarcerating other individuals for civil contempt. Rather, the jailer's duty is to run the facility in the safest manner for all confined there.

An additional worry is that, when a search ends up in court, it will be difficult for officers to prove that they had individualized suspicion. *Bull*, 595 F.3d at 986 (Kozinski, J., concurring). "By its nature, individualized suspicion will rely on observations and diagnoses that will be hard (if not impossible) to record and relay to judges and juries months or years after the event." *Id.* at 987. The inevitable result is that, "the judicial creation of sub-classes exempt from a search regime . . . will likely . . . require far too much judicial involvement in the administration of the sub-class." *Id.* at 987. In short, "every strip search will become a potential federal case." *Id.*

Courts and commentators have recognized the problems posed by such standards in this and other contexts as well. This Court has addressed suspicion-based drug search policies in a public school context, and its conclusions apply equally to the circumstances of this case. First, "[s]uch a regime would place an additional burden on public school teachers," or, prison administrators, "who are already tasked with the difficult job of maintaining order and discipline." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002). Second, "a program of individualized suspicion might unfairly target members of unpopular groups." *Id.* Third, "[t]he fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use." *Id.*

Generally speaking, "[a] rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard's rationale. A speed limit is a rule; negligence is a standard." *MindGames, Inc. v. W. Pub. Co., Inc.*, 218 F.3d 652, 657 (7th Cir. 2000). Balancing tests and totality-of-the-circumstances tests, used to review the reasonableness of searches under the Fourth Amendment, also constitute standards, which, while allowing for "the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules," Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 58-59 (1992), are also "vague and open-ended[,] . . . invite the sometimes unpredictable exercise of judicial discretion, and are more costly to adjudicate." *MindGames*, 218 F.3d at 657. On the other hand, a rule like the blanket strip search policy at issue here, "once formulated, afford[s] decisionmakers less discretion than do standards." *Sullivan,* 106 Harv. L. Rev. at 57. "Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere." *Id.* at 58.

In the circumstances of this case, it is the view of *amicus curiae* DRI and those who favor rules that "rules require decisionmakers to act consistently, treating like cases alike." *Sullivan,* 106 Harv. L. Rev. at 62. As a result, "rules reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties' particular attractive or unattractive qualities into the decisionmaking calculus." *Id.* at 62. Wayne LaFave's observations on rules and standards as they relate to the Fourth Amendment, although addressing the law in general as it affects police officers in performance

of their duties, are equally applicable to correctional institution personnel required to determine whether there is reasonable suspicion to conduct a strip search on an individual entering the general population of a jail.

> Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.
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> The essential point . . . is that we must resist the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity lest we end up with a fourth amendment with all of the character and consistency of a Rorschach blot. . . . [I]t may well be that the rules governing search and seizure are more in need of greater clarity than greater sophistication. And thus, as between a complicated rule which in a theoretical sense produces the desired result 100% of the time, but which well-intentioned police could be expected to apply correctly in

> only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former. [Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines' and "Good Faith' (Fna)*, 43 U. Pitt. L. Rev. 307, 320-321 (1982) (internal citations and punctuation omitted).]

Amicus curiae DRI believes that the problems that will flow from after-the-fact case-by-case strip search decisions will be serious. Lawyers attempting to offer guidance will find it difficult to accurately predict the outcome of the after-the-fact analysis of juries and courts. Thus, their ability to counsel and train their clients is apt to be hampered by a lack of clear guidance.

B. This Court has approved the use of bright-line rules allowing searches without reasonable suspicion in several contexts where the individuals to be searched are determined by participation in an activity or membership in a class and where requiring reasonable suspicion is impractical and can result in abuse of discretion and unfairness.

As this Court has explained, "[U]nder our general Fourth Amendment approach' we 'examin[e] the totality of the circumstances" to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Samson v. California*, 547 U.S. 843, 848 (2006), quoting *United States v. Knights*, 534 U.S. 112, 118 (2001). Reasonableness "is determined by assessing, on the one hand, the degree to which it intrudes upon an

individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* Nevertheless, this Court has approved the use of bright-line rules allowing searches in situations where the government's interest in performing a search outweighs any intrusion on an individual's privacy. In these cases, individualized suspicion is not required; indeed, "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 624 (1989). Rather, the government is "entitled to search classes of individuals based on a balance struck for the class as a whole, regardless of whether there's reasonable suspicion-or any suspicion at all-as to any particular member." *Bull*, 595 F.3d at 983 (Kozinski, J., concurring). These classifications "trade the protection afforded by individualized suspicion for protection derived from the fact that the government treats all similarly situated people in precisely the same way." *Id.* Importantly, these cases also recognize *amicus curiae* DRI's concern that implementing a reasonable suspicion standard is often impractical and the discretion it affords subject to abuse.

1. Prisoners have, at most, a lesser expectation of privacy that, when coupled with the security needs of a prison, allow for searches without reasonable suspicion.

As discussed, this Court determined in *Bell* that visual body-cavity searches of all detainees who engaged in contact visits while housed at a federal correctional institution were constitutionally permissible without a showing of reasonable suspicion. *Bell*, 441 U.S. at

560. The Court observed that "simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations," a principle which "applies equally to pretrial detainees and convicted prisoners." *Id.* at 545-46. The Court recognized that, in a prison context, "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546. Thus, while assuming that "both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility" the Court concluded that the searches at issue in *Bell,* conducted without individualized suspicion, were reasonable under the Fourth Amendment.[3] *Id.* at 558 (footnote added).

Similarly, in *Samson v. California*, *supra*, this Court upheld the warrantless, suspicionless searches of prisoners released on parole. The Court explained that "parole is an established variation on imprisonment of convicted criminals. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Samson*, 547 U.S. at 850

3. In a later case that did not address strip searches, this Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984).

(internal citations and punctuation omitted.) In California, pursuant to Cal.Penal Code Ann. § 3067(a), inmates who opt for parole submit to suspicionless searches by a parole officer or other peace officer "at any time." *Id.* at 852. Thus, the petitioner in *Samson* "did not have an expectation of privacy that society would recognize as legitimate." *Id.* By contrast, this Court recognized that the state's interests in such searches "are substantial," in that "a State has an overwhelming interest in supervising parolees because parolees ... are more likely to commit future criminal offenses." *Id.* at 853. This interest thus warrants "privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Id.*

Importantly, this Court in *Samson* recognized the impracticality of a reasonable suspicion standard in the circumstances at issue there, agreeing with the California legislature's assessment that "given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders." *Samson*, 547 U.S. at 854. This Court further observed that "[i]mposing a reasonable suspicion requirement . . . would give parolees greater opportunity to anticipate searches and conceal criminality." *Id.*

2. The case against individualized suspicion here, is at least as strong as cases in which this Court repeatedly has rejected such a requirement.

a. Drug testing transportation employees and certain government employees without individualized suspicion is reasonable under the Fourth Amendment because the government has an interest in ensuring the safety of the public and implementing a reasonable suspicion standard is unworkable.

In *Skinner v. Ry. Labor Executives Ass'n*, *supra*, this Court upheld as constitutional Federal Railroad Administration (FRA) regulations "that mandate blood and urine tests of employees who are involved in certain train accidents," and that "authorize, railroads to administer breath and urine tests to employees who violate certain safety rules." 489 U.S. at 606, 613. Citing *Bell*, among others, this Court explained that it may make an exception to the warrant and probable cause requirements of the Fourth Amendment when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. *Id.* This Court recognized that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety," was similar to "its supervision of probationers or regulated industries, or its operation of a government office, school, or prison," all of which are situations that present "special needs beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 620 (citations and punctuation omitted). The Court found that the

expectations of privacy of the employees at issue "are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety." *Id.* at 627. Thus, drug testing railroad employees was such a situation where "the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion . . . ." *Id.* at 624.

Finally, the Court addressed the impracticality of requiring individualized suspicion of drug or alcohol use at the scene of an accident investigation. Such a policy "would seriously impede an employer's ability to obtain this information, despite its obvious importance." *Skinner*, 489 U.S. at 631. This Court recognized that "[o]btaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident." *Id.* Thus, "[i]t would be unrealistic, and inimical to the Government's goal of ensuring safety in rail transportation, to require a showing of individualized suspicion in these circumstances." *Id.* See also *Int'l Brotherhood of Teamsters v. Dep't of Transp.*, 932 F.2d 1292 (9th Cir. 1991) (Random, pre-employment, post-accident, and biennial drug testing does not violate truck drivers' fourth amendment right against unreasonable searches).

In *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), this Court upheld the United States Customs Service's policy of requiring drug testing for employees who sought transfer or promotion to certain positions where they would be engaged directly in drug interdiction or were otherwise required to carry firearms.

Id. at 668, 677. This Court noted that, "[u]nlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms." *Id.* at 672. The Court reiterated that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Id.* at 665. In fact, as is relevant in this case, "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Id.* at 667-68 (internal citations and punctuation omitted.) *Amicus curiae* DRI agrees that, in certain situations such as this case, "the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." *Id*. at 668.

Additionally, the privacy interest of prison inmates, at issue here and in *Bell*, is far lower than in *Skinner* or *Von Raab,* which involve individuals who simply decide to work for the government (*Von Raab*) or a government-regulated entity (*Skinner*). The privacy intrusion in such cases was acknowledged to be quite high, see *Skinner*, 489 U.S. at 617 (although the procedures at issue in did not require "a surgical intrusion," "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic,

pregnant, or diabetic"); *id.* (quoting *Von Raab* regarding the intrusion in watching someone urinate).

b. A bright-line rule of searching all members of the public crossing the border, boarding airplanes, and entering a government building is easier to administer than a reasonable suspicion standard and avoids abuse of discretion.

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court held that, consistent with the Fourth Amendment, "a vehicle may be stopped at a fixed [immigration] checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens." *Id.* at 545. Additionally, "the operation of a fixed checkpoint need not be authorized in advance by a judicial warrant." *Id.* In such a situation, a reasonable suspicion standard "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." *Id.* at 557. Furthermore, "such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly." *Id.* at 557.

In explaining its decision, this Court also addressed the proper level of discretion to be afforded to border patrol officers. In an earlier case, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court had rejected roving patrol stops near the Mexican border that were not based on reasonable suspicion because such

searches "would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." *Id.* at 882-83. On the other hand, fixed checkpoint stops

> both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review. *[Martinez-Fuerte*, 428 U.S. at 559.]

So, too, do the blanket strip searches in the case at bar avoid abuse of discretion and prevent correctional institution personnel from oppressing particular individuals or groups of people.

In *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974), the court of appeals determined that an airport search of carry-on baggage, absent individualized suspicion is reasonable. In *Edwards*, a case decided years before the tragedy of September 11, 2001, the court recognized that "[w]hen the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness . . . ." *Id.* at 500, quoting *U.S. v. Bell*, 464 F.2d 667, 675 (2d. Cir. 1972) (Friendly, J., concurring), cert. denied 409 U.S. 991 (1972). The court also recognized the benefits of a bright-line rule requiring everyone to be searched because "[t]he search of carry-on baggage, applied to everyone, involves not the slightest stigma. . . ." that would result if individuals were searched based on reasonable suspicion. *Id.* (citation omitted.) See also *McMorris v. Alioto*, 567 F.2d 897, 900 (9th Cir. 1978) (A limited search conducted as a condition of entering a state courthouse is reasonable under the Fourth Amendment).

c. Drug searches for students participating in school activities do not require individualized suspicion because a school's interest in preventing drug use outweighs any privacy interest and targeted searches are impractical and subject to abuse.

In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), this Court upheld a policy of drug-testing all student athletes who participate in the district's athletic programs. *Id.* at 648. The Court reiterated that a search unsupported by probable cause can be constitutional, "when special needs, beyond the normal need for law

enforcement, make the warrant and probable-cause requirement impracticable." *Id.* at 653, quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). In the specific context of a school, the state's power over schoolchildren "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Id.* at 655. Thus, while children retain constitutional rights (as do prisoners), "the nature of those rights is what is appropriate for children in school." *Id.* at 655-56.

The Court found that public school children have a somewhat lesser expectation of privacy than members of the general population because they are routinely required to submit to various physical examinations and to be vaccinated against various diseases. *Vernonia Sch. Dist.*, 515 U.S. at 656-57. Moreover, citing the public locker rooms used by those engaged in sports, this Court observed that "[l]egitimate privacy expectations are even less with regard to student athletes." *Id.* at 657.

As is relevant to this case, *Vernonia* addressed the pitfalls of replacing the bright-line rule of testing all student athletes with a suspicion-based policy. Such a change would "transform[] the process into a badge of shame" and "brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students." *Id.* at 663. The Court also recognized *amicus curiae* DRI's concern here that a suspicion-based policy would "generate[] the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed." *Id.* at 663-64. Finally, the Court recognized that a suspicion-based policy would add to "the ever-expanding diversionary duties of schoolteachers the new function

of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Id.* at 663-64.

Relying on *Vernonia*, the Court in *Pottawatomie County, supra,* upheld as constitutional the school district's policy requiring all middle and high school students who participate in competitive extra curricular activities to submit to drug testing, without a showing of individualized suspicion. The respondents argued that "because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the athletes tested in *Vernonia*." 536 U.S. at 831. The Court disagreed, explaining that "[t]his distinction . . . was not essential to our decision in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority." *Id.* In addition, this Court noted that it "has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing." *Id.* at 835, citing *Von Raab* and *Skinner.* Finally, the Court noted that "*Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities." *Id.* at 838. This Court thus concluded that the drug testing of students who participate in extracurricular activities "effectively serves the School District's interest in protecting the safety and health of its students." *Id.*

As it did in *Vernonia*, this Court also addressed the dangers inherent in a suspicion-based policy, which, as discussed, apply equally to the circumstances of this case.

First, "[s]uch a regime would place an additional burden on public school teachers," or, prison administrators, "who are already tasked with the difficult job of maintaining order and discipline." *Id.* at 837. Second, "a program of individualized suspicion might unfairly target members of unpopular groups." *Id.* Third, "[t]he fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use." *Id.*

In addition to the concerns expressed in *Pottawatomie County,* implementation of more targeted policies involving strip searches in correctional institutions requires additional training that "takes time away from other tasks and necessarily uses resources in scarce supply." *Bull*, 595 F.3d at 976. Moreover, if a reasonable suspicion standard replaces a bright-line rule, "every strip search will become a potential federal case," *Id.* at 987 (Kozinski J., concurring), and it will be difficult for DRI members to counsel their local government clients on ways to effectively avoid this litigation. Because the resulting lawsuits will necessarily be based on a multiplicity of facts, they will be difficult to resolve at the motion stage, a disheartening prospect for the many local governments facing unprecedented financial problems.

As this Court has made clear, reasonable suspicion is not a requirement in a case such as this where individuals are defined as a class, that is, all arrestees admitted to a jail's general population, and where the government's need to maintain safety and order outweighs the incarcerated individual's diminished privacy interests. *Bell* specifically recognized that, in a correctional institution, "maintaining institutional security and preserving internal order and

discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell,* 441 U.S. at 546. The blanket strip search policy at issue in this case is intended to prevent the entry of weapons and contraband into correctional institutions, a serious and well documented problem. *Id*. at 599. Thus, a blanket strip search policy is reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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