

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**

**BRIEF IN OPPOSITION FOR ESSEX COUNTY
CORRECTIONAL FACILITY AND ESSEX
COUNTY SHERIFF'S DEPARTMENT**

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February 23, 2011

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Essex County Correctional Facility's alleged former practice of conducting visual searches of all arrestees, all of whom were housed in the general jail population regardless of the offense for which they were arrested, did not violate the Fourth Amendment.

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BRIEF IN OPPOSITION

The conflict in the circuits petitioner identifies is not worthy of review by this Court at this time or in this case for several reasons. Recent *en banc* decisions by the courts of appeals and ongoing *en banc* activity suggest that further percolation would be beneficial and that the conflict, which has existed for several years already, may disappear. The *en banc* Fifth Circuit recently heard oral argument on the question presented here and thus may soon overturn—as did the Eleventh and Ninth Circuits—its precedent in tension with the decision below. The remaining circuit cases on petitioner’s side of the ledger all are more than a decade old and thus do not address the emerging view in the circuits. Additionally, none of the cases that adopt petitioner’s view applies the correct standard of review, *viz.*, the highly deferential test set forth in *Turner v. Safely*, 482 U.S. 78 (1987). Had they done so, the outcomes likely would be far more consistent across the circuits. Moreover, last term, this Court denied a petition for certiorari presenting the same issue and alleged circuit split identified here. *Saulsberry v. Myers*, 130 S. Ct. 1735 (2010) (No. 09-451). The case for review is even weaker here given the *en banc* Fifth Circuit’s imminent decision, which would provide a more compelling case for this Court’s review if the Fifth Circuit does not reverse itself, and because this case is an exceedingly poor vehicle for review. In sum, the petition should be denied.

STATEMENT OF THE CASE

1. During a traffic stop in March 2005, a New Jersey state trooper arrested petitioner based on an outstanding bench warrant from Essex County, New

Jersey. App. 3a. After the arrest, petitioner was taken to the Burlington County Jail (BCJ). *Id.* As the courts below recognized, the parties dispute the thoroughness and intrusiveness of the BCJ search. *Id.* at 6a, 63a-65a. Petitioner alleges that during intake, BCJ personnel directed him to remove all his clothing and subjected him to a visual search (or “strip search”) during which he had to open his mouth, lift his tongue, and lift his genitals. *Id.* at 3a (noting petitioner’s assertion that BCJ conducted a “visual body-cavity search”). After the search, petitioner was held in BCJ’s general jail population for six days. *Id.* at 3a, 51a-52a.

The Essex County Sheriff’s Department then took custody of petitioner and transported him to the Essex County Correctional Facility (ECCF). App. 3a. ECCF, the largest jail in the State, is located in Newark. It houses, *inter alia*, prisoners sentenced in the county, inmates from other jurisdictions, including federal offenders and state-remanded prisoners, and detainees awaiting trial on a range of charges. There is no indication that the Sheriff’s Department or ECCF personnel knew whether and how petitioner had been searched at BCJ.

Petitioner alleges that, pursuant to then-existing ECCF policies, he was required to remove his clothes and was subjected to a visual search, including a visual body-cavity search, while he took a supervised shower. App. 3a-4a. Again, the nature of the search petitioner alleges he underwent is in dispute. *Id.* at 6a, 63a-65a. As the district court acknowledged, the parties disputed “whether the strip search[] even occurred” at ECCF and disagreed about the scope of any such search that occurred. *Id.* at 66a.

ECCF’s written policy in effect when petitioner was admitted provided that before all arriving prisoners

took a required shower and received jail-issued clothing, the inmates would be subject to “strip searches.” App. 140a-142a. The policy stated that the reception officer was, *inter alia*, to have the inmate empty and turnout his or her pockets and undress completely. *Id.* at 141a. The policy then instructed the officer to observe the “interior of the mouth,” the ears, nose, hair and scalp (requiring “the inmate run his/her fingers through his/her hair”), and the fingers, hands and arms. *Id.*; see *id.* at 142a (requiring the officer to physically search all clothing and shoes, and to open inmates’ wallets, letters and other items to search for contraband). Although the policy also stated that the officer was to “[i]nspect all body openings, the inner thighs, and the soles of the feet and between the toes,” a subsequent paragraph within the same section of the policy stated that “[b]ody cavity searches shall take place when legally authorized by a search warrant or consent that probable cause exists.” *Id.* at 142a; see *id.* at 142a-143a (requiring medical personnel to conduct body cavity searches, and imposing mandatory reporting requirements for any such searches).

Petitioner claims that while naked he was “directed to open his mouth,” required to “lift his genitals,” and to “squat and cough” with his back facing an officer. App. 4a, 52a; *id.* at 65a-66a. ECCF personnel testified that the former policy did not permit inmates to be searched upon admission in the manner petitioner alleged, and testified further that, notwithstanding the written policy, they did not conduct strip searches upon admission as a matter of course.¹

¹ See, e.g., Joint Appendix at 342-343, *Florence*, Nos. 09-3603 *et al.* (filed 3d Cir. Nov. 25, 2009) (hereafter “CA3 App.”) (testifying that upon admission, an officer would see inmates naked

It is undisputed that petitioner joined the general jail population and remained in that population until the next day when charges against him were dismissed. App. 4a. It also is undisputed that the ECCF “strip search” policy in force at the time of petitioner’s admission was discontinued in April 2005 for reasons unrelated to petitioner’s suit. See Pet. 6; App. 5a n.2 (contrasting ECCF’s written policies over time); *id.* at 57a-58a (same); see also Supplemental Appendix at 40, *Florence*, Nos. 09-3603 *et al.* (filed 3d Cir. Jan. 14, 2010) (reproducing April 21, 2005 policy); App. 145a-166a (June 2008 revision).

2. Petitioner brought suit under 42 U.S.C. § 1983 against BCJ, ECCF and various related individuals and municipal entities claiming that the alleged searches violated the Fourth Amendment.² Although

while showering from several feet away, but inmates “are not checked” for contraband); *id.* at 343 (officer on duty at time of petitioner’s admission had never conducted or authorized a strip search); *id.* at 348 (officers did not search hands, feet and mouth of detainees upon admission); *id.* at 350-351 (officers were not authorized to visually search anal cavity or to command the inmate to squat and cough); *id.* at 354 (testimony from officer, who regularly worked intake at the time of petitioner’s admission, that he has not conducted a strip search since 1996); *id.* at 360 (body cavity searches, including requiring “a squat and cough,” were not done at intake as a matter of course); *id.* at 391 (a request that the inmate “squat and cough” would have required medical assistance). *See also id.* at 345, 352, 354 (officers would have needed to complete paperwork were petitioner searched in the manner he described).

² Petitioner also brought a host of federal civil rights claims not relevant to this appeal. See CA3 App. 120-121 (§ 1983 claims for unlawful arrest and false imprisonment); *id.* at 125-126 (discrimination claims pursuant to 42 U.S.C. §§ 1985, 1986); *id.* at 126 (unreasonable detention in violation of the Fourth Amendment). These claims are still pending and thus this case is interlocutory.

petitioner argues that the strip searches to which he was allegedly subjected violate New Jersey statutes and regulations, see Pet. 4-5, 28-29, he did not, however, pursue any state law remedies. The district court granted petitioner's motion for certification of a class of arrestees who were required "to strip naked before [BCJ or ECCF] officers ... without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs, or weapons." App. 4a, 49a; see also *id.* at 5a n.1 (noting that petitioner did not seek certification of his claim that he underwent a "visual body cavity search").

On cross-motions for summary judgment, the district court recognized "there were facts in dispute" concerning the details of BCJ's and ECCF's alleged strip search policies and the extent of the searches to which petitioner was subjected. App. 6a. Nonetheless, the district court concluded that "[w]hatever the case may be," the searches "rose to the level of a strip search' under the Fourth Amendment." *Id.*; see *id.* at 65a-66a. The court granted the plaintiff-class's motion for summary judgment, holding that "blanket strip searches of non-indictable offenders, performed without reasonable suspicion ... are unconstitutional." *Id.* at 7a (alteration omitted).

The district court reasoned that *Bell v. Wolfish*, 441 U.S. 520 (1979), required respondents to demonstrate individualized reasonable suspicion to conduct a strip search of any "non-indictable" inmate upon admission. App. 84a-87a; see generally *id.* at 53a n.3 (discussing "non-indictable" category of offenses under N.J. Stat. Ann. § 2C:1-4(b)). In *Bell*, this Court held that a policy requiring *all* inmates detained at a federal short-term holding facility to undergo strip searches, including visual body cavity inspection,

after custodial visits did not violate the Fourth Amendment. 441 U.S. at 560.

In holding the policies unconstitutional, the district court brushed aside the institutions' showings that subjecting newly admitted inmates to strip searches is justified by significant security interests. See App. 84a-86a. Notwithstanding petitioner's representation to this Court that "respondents[] bald[ly] assert[ed]" that strip searches of all inmates upon intake serve important governmental interests, Pet. 28, respondents were the *only* parties who submitted evidence on this subject.

Specifically, the Essex respondents presented evidence from Dr. George M. Camp, an expert on correctional practices who testified in the district court proceedings that gave rise to *Bell*, see CA3 App. 315-316, and whose studies have been credited by this Court. See *Turner v. Safley*, 482 U.S. 78, 92-93 (1987) (citing G. Camp & C. Camp, U.S. Dep't of Justice, *Prison Gangs: Their Extent, Nature and Impact on Prisons* 64-65 (1985)). Dr. Camp opined that conducting strip searches of new arrivals is "an essential function in protecting the security and institutional integrity of a jail." CA3 App. 320. He explained that inmates arrested for misdemeanors "can be more dangerous and ... more likely to bring in contraband" if it is known that such inmates will not undergo strip searches upon admission. *Id.* at 316; see *id.* at 317 ("interaction and mingling between misdemeanants and felons" make it imperative that the former category of prisoners also be searched). Dr. Camp also noted that if arrestees know that certain categories of offenders will not be searched, "[t]hese weak links [will be] discovered by the inmate population and exploited to the detriment of both prisoners and staff." *Id.* at 318. See also App. 85a-

86a (noting BCJ's evidence regarding importance of visual searches to prevent contraband, to discover gang membership, and to prevent disease).

After the district court entered summary judgment for petitioner and the plaintiff-class, BCJ and ECCF successfully moved the court pursuant to 28 U.S.C. § 1292(b), to certify for interlocutory appeal whether “a blanket policy of strip searching all inmates upon admission to a county correctional facility” violates the Fourth Amendment. App. 40a; see also *id.* at 40a n.4, 7a (district court's reframing of the question to focus on “non-indictable arrestees”).

3. On appeal, the Third Circuit reversed. Applying *Bell*'s balancing test, see App. 17a-28a, the court of appeals found that, even as described by petitioner, “the scope, manner, and place of the searches are similar to or less intrusive than those in *Bell*.” *Id.* at 20a; see *id.* at 19a (the alleged searches were comparable to those upheld by the district court in *Bell*). Therefore, the court turned to the jails' justifications for strip searching newly admitted prisoners, including those arrested for non-indictable offenses. *Id.* at 20a.

Recognizing that the facilities had an undeniable interest in preventing smuggling of contraband, the court below rejected the argument that “jails have little interest in strip searching arrestees charged with non-indictable offenses.” App. 21a. It concluded that petitioner's argument was irreconcilable with *Bell*, which “explicitly rejected any distinction in security risk” between detainees and convicted inmates. *Id.* at 21a-22a. Next, the court rebuffed petitioner's argument that “individualized suspicion” was required “for each inmate searched.” *Id.* at 22a; see *id.* at 22a n.8. It found that contention contrary to *Bell* in which this Court upheld a policy of strip

searches as a whole without considering the circumstances of particular inmates. *Id.* at 22a-23a. The Third Circuit then rejected the claim that non-indictable offenders present a lower risk of smuggling contraband. *Id.* at 23a. The court found support in *Block v. Rutherford*, 468 U.S. 576 (1984), in which this Court upheld a blanket ban on contact visits with pretrial detainees, recognizing that “low security risk detainees” would “take advantage of any gap in security.” App. 24a. Finally, the Third Circuit grounded its disposition in this Court’s “repeated[] ... emphasi[s] that courts must defer to the policy judgments of prison administrators.” *Id.* at 26a (collecting cases, including *Bell*); see *id.* at 27a-28a (discussing jails’ justifications for the policies).

The Third Circuit remanded the case to the district court, App. 28a, where petitioner continues to litigate his other federal civil rights claims, see Docket, No. 1:05-cv-03619 (D.N.J.); *supra* at 4 n.2.

REASONS FOR DENYING THE PETITION

I. THE CONFLICT IN THE CIRCUITS PETITIONER IDENTIFIES DOES NOT NECESSITATE REVIEW.

Respondents acknowledge that there are divisions in the courts of appeals regarding whether a policy requiring strip searches of all inmates, including those arrested for non-indictable offenses or misdemeanors, upon admission to a correctional facility violates the Fourth Amendment. But it strains credulity to claim that the circuits are “*irreconcilably* divided” on this issue. Pet. 13 (emphasis added, capitalization omitted).

1. Recent developments show that the circuits are capable of resolving any meaningful conflict

concerning the question presented. Consistent with the decision below, two courts sitting *en banc* recently overturned their former circuit precedents holding that strip searches of inmates (including those arrested for misdemeanors) upon admission violate the Fourth Amendment. *Bull v. City & Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010) (*en banc*); *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (*en banc*).

Moreover, as petitioner acknowledges (at 15 n.1), the Fifth Circuit granted rehearing *en banc* to reconsider its longstanding precedents supporting petitioner's interpretation of the Fourth Amendment. *Jimenez v. Wood Cnty., Tex.*, 621 F.3d 372 (5th Cir.), *reh'g en banc granted*, 626 F.3d 870 (5th Cir. 2010). The *en banc* court heard oral argument on January 19, 2011. See Docket, *Jimenez*, No. 09-40892 (5th Cir.). That case squarely presents the question whether a county jail violated the Fourth Amendment rights of plaintiff, who was arrested for a misdemeanor, by strip searching him upon admission pursuant to jail policy. See *Jimenez*, 621 F.3d at 374 ("The parties agree ... it was the department's policy to perform strip searches on all detainees entering the jail who were arrested for a felony, Class A misdemeanor, or Class B misdemeanor."); compare *infra* § III (discussing vehicle problems here). The Fifth Circuit's *en banc* review of this issue, like the prior *en banc* reviews of the Eleventh and the Ninth Circuits, suggests that any conflict in the circuits can be resolved without this Court's intervention.

2. If the *en banc* Fifth Circuit were to stem the emerging tide, perhaps the case for review would be stronger, but this Court's intervention certainly would be premature here. Indeed, just last Term, this Court denied *certiorari* in a case presenting the same issue now raised here. *Saulsberry v. Myers*, 130

S. Ct. 1735 (2010) (No. 09-451). After the Eleventh Circuit issued its *en banc* decision in *Powell*, a panel of the Tenth Circuit adhered to binding circuit precedent holding that strip searches of misdemeanor arrestees on admission violate the Fourth Amendment. *Myers v. James*, 344 F. App'x 457, 459-60 (10th Cir. 2009), *cert. denied sub nom.* 130 S. Ct. 1735 (2010). Not only was that petition's first question presented materially indistinguishable from the question posed here, see Pet. at i, *Saulsberry*, No. 09-451, 2009 WL 3341925 (filed Oct. 14, 2009), but the petitioner identified the same conflict in the circuits, *id.* at 10-19, and argued at length that the Ninth Circuit's *en banc* decision in *Bull* exacerbated the need for review. Supp'l Br. for Pet'rs at 1-7, *Saulsberry*, No. 09-451, 2010 WL 638461 (filed Feb. 19, 2010). Having denied *certiorari* in *Saulsberry*, nothing warrants a different result here. On the contrary, given the Fifth Circuit's ongoing *en banc* review, there is a stronger case for allowing these issues to continue to percolate.

3. Additionally, the circuit cases petitioner cites as favoring his view themselves indicate that further development in the circuits would be fruitful. See Pet. 14-15 n.1. All, aside from *Jimenez*, are at least a decade old. *Id.* Therefore, none engages with *Powell*, *Bull* or the decision here. More significantly, none applies the deferential standard of review set forth in *Turner v. Safley*, namely "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89 (citing, *inter alia*, *Bell*).

Although the majority of those circuit cases pre-date *Turner*, the rest simply ignore it. They do so despite this Court's admonition that "[w]e made quite

clear that the standard of review we adopted in *Turner* applies to *all circumstances* in which the needs of prison administration implicate constitutional rights.” *Washington v. Harper*, 494 U.S. 210, 224 (1990) (emphasis added). Although the court below and the Eleventh Circuit declined to reach *Turner*’s application to the searches at issue, App. 18a n.5; *Powell*, 541 F.3d at 1302-03, the Ninth Circuit correctly held that *Turner* controlled and concluded that the searches were constitutional under the “reasonable relationship” test. *Bull*, 595 F.3d at 973-74; see also *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (inmate’s Fourth Amendment claims regarding strip searches failed under *Turner*).³ Had the circuit court decisions upon which petitioner relies applied the *Turner* test, the outcomes also might have been different.

4. Finally, several of the cases upon which petitioner relies do not squarely address the issue presented here and are so fact-bound that it is not clear that those circuits would depart from the

³ Consistent with *Washington v. Harper*, many appeals courts—including those that previously adopted the individualized suspicion rule for which petitioner advocates—have applied the *Turner* standard to Fourth Amendment claims, including those involving strip searches. See, e.g., *Oliver v. Scott*, 276 F.3d 736, 745-46 (5th Cir. 2002) (applying *Turner* and upholding strip search policy against Fourth Amendment challenge); *Hayes v. Marriott*, 70 F.3d 1144, 1146-48 (10th Cir. 1995) (applying *Turner* to strip searches alleged to violate Fourth Amendment); *Covino v. Patrissi*, 967 F.2d 73, 77-79 (2d Cir. 1992) (upholding under *Turner* a visual body cavity search alleged to violate the Fourth Amendment); *Cornwell v. Dahlberg*, 963 F.2d 912, 916-17 (6th Cir. 1992) (applying *Turner* and finding that Fourth Amendment claim regarding strip searches conducted outdoors in front of guards of the opposite sex presented triable issues of fact).

decision below were these facts presented. See Pet. 14-15 n.1. For instance, in *Mary Beth G. v. City of Chicago*, the policy found to violate the Fourth Amendment subjected *only women* arrested for misdemeanors to a “strip search and a visual inspection of their body cavities” upon admission. 723 F.2d 1263, 1266 (7th Cir. 1983). Men arrested for the same offenses could be strip searched “only if [officers] had reason to believe that the detainee was concealing weapons or contraband.” *Id.* at 1268. *Mary Beth G.* therefore does not address the question posed here, whether the Fourth Amendment is violated when *all* inmates are subjected to search as a matter of policy.

Similarly, in *Jones v. Edwards*, the court did not address the constitutionality of a *policy* of strip searches upon admission at all. 770 F.2d 739 (8th Cir. 1985). Rather, the court held, based on the peculiar facts of the case, that the strip search of a misdemeanor arrestee at the time of admission violated the Fourth Amendment. The court concluded that the search in question failed *Bell’s* first prong (the need for the search) because “[o]fficers were with [the arrestee] every moment after they read him the warrant; they watched him dress and go to the bathroom, thereby eliminating any chance that he might have secreted a weapon on his person.” *Id.* at 741; see *id.* at 740-41 (rejecting defendants’ argument that the search was justified by the arrestee’s “loud and abusive” and “increasingly profane” conduct).

For all these reasons, this Court should allow lower courts the fullest opportunity to resolve similar Fourth Amendment claims if they are squarely presented and under the correct standard of review set forth in *Turner*.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

Contrary to petitioner's contention, there is no conflict between the decision below and this Court's Fourth Amendment decisions. See Pet. 16-30. Petitioner's effort to conjure a divide between the rule the court below adopted and this Court's cases is nothing more than a re-characterization of the above-discussed circuit cases that nominally side with his view of the Fourth Amendment.

Petitioner faults the court below for failing to adopt a rule that there must be "individualized suspicion" unique to a particular inmate arrested for a non-indictable offense. Pet. 18, 19, 20, 22, 32; see also *id.* 14-15 n.1, 16 (same argument based on circuit decisions adopting this rule). But petitioner cannot locate such a requirement in *Bell* or any other decision of this Court involving searches of inmates. As the court below correctly recognized, "*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." App. 22a; see *id.* at 22a n.8; *accord Bull*, 595 F.3d at 974, 978; *id.* at 983 (Kozinski, J., concurring) (collecting cases); *Powell*, 541 F.3d at 1307.⁴ Indeed, in affirming a policy requiring random drug testing of

⁴ Instead, petitioner suggests (at 18-19) that such a requirement is dictated by *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009) (strip searches of school children, not inmates), *Chandler v. Miller*, 520 U.S. 305 (1997) (drug testing of political candidates), *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989) (drug and alcohol testing of railway workers involved in train accidents and who violate safety rules), and the seminal decision in *Terry v. Ohio*, 392 U.S. 1 (1968).

all athletes without requiring any particularized suspicion, this Court confirmed that “*Bell v. Wolfish* [citation] displays no stronger preference for individualized suspicion than we do today.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664 n.3 (1995). The decision below does not conflict with this Court’s Fourth Amendment case law. It was consistent with and dictated by *Bell*, to say nothing of *Turner*.

III. THIS CASE IS AN EXTRAORDINARILY POOR VEHICLE FOR REVIEW.

While petitioner’s claims that there are conflicts that require this Court’s immediate intervention are strained, his assertions that this case is “the ideal vehicle” in which to address the question presented are just wrong. Pet. 13, 31. The posture of this appeal, the facts concerning the searches to which petitioner alleges he was subjected, the respondents’ changes to their policies, and the legal approach of the court below all would complicate this Court’s review.

1. Petitioner seeks review of an interlocutory decision in which the Third Circuit resolved just one of his many civil rights claims. See *supra* at 4 n.2 (noting other claims); *id.* at 7 (Third Circuit reviewed a certified question). After entering summary judgment on the Fourth Amendment claims implicated here, the Third Circuit remanded for further proceedings, which remain ongoing in the district court. *Id.* at 8. This posture alone is reason enough to deny review. See, e.g., *Bhd. of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893). After a final judgment, this Court could review the Fourth Amendment issues presented here should subsequent developments in the circuits so

warrant. See, e.g., *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam); *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964) (per curiam).

2. This case inherently is fact-bound because any alleged strip search of petitioner at ECCF is unique among the circuit cases petitioner identifies. Specifically, ECCF personnel searched petitioner *after* he had been housed at BCJ for six days. App. 3a. While at BCJ, he was in contact with a range of offenders and had special opportunities to obtain and hide contraband. See *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003) (“Drug smuggling and drug use in prison are intractable problems.”); *Bell*, 441 U.S. at 559 (“[a] detention facility is a unique place fraught with serious security dangers” and smuggling of contraband is “all too common”); see also App. 20a (recognizing the dangers of New Jersey jails related to gang activity); CA3 App. 211-212, 225 (gang activity in Burlington County).

None of the cases petitioner relies upon as evidence of a circuit split involves a search following transfer from one correctional facility to another. Compare *Jackson v. Herrington*, 393 F. App'x 348, 355 (6th Cir. 2010) (per curiam) (policy of strip searching all inmates upon transfer from one correctional facility to another did not violate the Fourth Amendment), *cert. denied*, No. 10-7711, 2011 WL 589095 (Feb. 22, 2011). Therefore, the analysis of the reasonableness of ECCF's alleged search that petitioner asserts is required (e.g., Pet. 13, 18-19) would not be susceptible to broad application. See generally *Pearson v. Callahan*, 129 S. Ct. 808, 819 (2009) (endorsing First Circuit's acknowledgement that “the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent

on the facts”); *California v. Carney*, 471 U.S. 386, 396 (1985) (Stevens, J., dissenting) (Fourth Amendment cases “burden[] the argument docket” and “present[] fact-bound errors of minimal significance”); *Bull*, 595 F.3d at 996 (Thomas, J., dissenting) (suggesting that “the Fourth Amendment reasonableness inquiry is factbound” by definition).

3. Aside from the post-transfer nature of the alleged ECCF search, the district court and the Third Circuit recognized that factual disputes exist about the respondents’ policies and how such policies were applied to petitioner.⁵ Despite the seemingly one-size-fits-all question presented, see Pet. i, and that the cross-motions for summary judgment were filed after certification of a class that pursued “only ... strip search claims” but not claims that class-members “w[ere] subjected to a visual body cavity search,” App. 5a n.1, petitioner now seeks to inject petitioner-specific and fact-heavy claims into the case. See Pet. 20-21 & n.5 (arguing that petitioner was subjected to a specially intrusive search and suggesting that he was subjected to visual body cavity searches while in view of other inmates).

Assuming *arguendo* that (i) petitioner retained Fourth Amendment rights while incarcerated,⁶ and

⁵ See, e.g., App. 5a-6a (“the District court concluded that ... there were facts in dispute—such as whether non-indictable male arrestees at BCJ were required to lift their genitals during the search”); *id.* at 64a-65a; *id.* at 66a (“Essex apparently seeks to raise a question of fact as to whether the strip searches even occurred.”); *supra* at 2-4 & n.1.

⁶ See *Bell*, 441 U.S. at 558 (assuming without deciding that the Fourth Amendment applied to searches of inmates); App. 19a (same, but “noting that that under *Hudson v. Palmer*, 468 U.S. 517 (1984), “prisoners do not have a Fourth Amendment right to privacy in their cells”).

(ii) the *Bell* balancing test, not *Turner*, controls here, but see *supra* at 10-11, these unsettled fact issues are significant and potentially outcome determinative. As petitioner acknowledges, under *Bell*, “the scope of the particular intrusion, the manner in which it is conducted ... and the place in which it is conducted” are essential to the Fourth Amendment analysis. Pet. 9 (quoting *Bell*, 441 U.S. at 559); see *id.* at 31 (acknowledging the relevance of “[t]he underlying facts, including the scope and *application* of the jails’ policies and practices”) (emphasis added). Accordingly, any argument that the specific facts of the searches at issue do not make this a poor vehicle is specious given petitioner’s own theory of the case. Compare *supra* at 9 (discussing *Jimenez* (5th Cir.), in which “[t]he parties *agree*” about the policies at issue) (emphasis added).

Indeed, depending on the resolution of the disputed facts underlying the alleged search at ECCF, it appears that at least one circuit whose rule petitioner characterizes as conflicting with the decision below also would reject his Fourth Amendment claim. Second Circuit law seemingly would foreclose his claim if—as ECCF personnel testified was consistent with their practice, see *supra* at 2-3 & n.1; App. 66a—officers merely saw petitioner’s “genitals during a clothing exchange” in which he was not “subjected to [a] visual ... body cavity search” or “asked to manipulate his body in any way or to assume any particular position.” *Kelsey v. Cnty. of Schoharie*, 567 F.3d 54, 63 (2d Cir. 2009); *id.* at 64-65; see also *Stanley v. Henson*, 337 F.3d 961, 965-67 (7th Cir. 2003) (clothing exchange during which inmate stripped and exposed her breasts to officer before receiving jail-issued clothing did not violate Fourth Amendment).

4. ECCF's policy today and the alleged requirements of New Jersey law diminish the importance of review. Petitioner admits (at 29) that ECCF's current policy does not permit "strip searching" all inmates upon intake, but instead specifies that "[n]ewly admitted inmates may be subjected to a strip search or body cavity search only in accordance with the conditions set forth in N.J.A.C. 10A:31-8." App. 152a; see also *id.* at 126a (current BCJ policy also requires "reasonable suspicion" to strip search non-indictable arrestees) (capitalization omitted). Moreover, although petitioner declined to plead any claims under New Jersey law, he argues that the New Jersey statute cited in ECCF's current policy categorically prohibits strip searches of non-indictable arrestees absent "at least reasonable suspicion that the individual possesses contraband." Pet. 4; *accord id.* at 29. Thus, because the type of searches alleged to violate the Fourth Amendment here are unlikely to recur at ECCF and because plaintiffs can seek relief under state law for any future violations of the assertedly more protective New Jersey laws governing searches, this case would not be an efficient use of this Court's limited resources.

5. Finally, the court below found that the searches at issue here were constitutional under *Bell* without addressing the more rigorous *Turner* analysis. A case subjecting a similar strip search policy to the *Turner* test would permit more meaningful review and more useful guidance for lower courts. See *supra* at 10-11.

For these many reasons, this case is far from an "ideal vehicle" for reviewing the question presented.

CONCLUSION

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

Respectfully submitted,

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February 23, 2011

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