

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

**BRIEF OF ACADEMICS ON GANG BEHAVIOR
AS *AMICI CURIAE* ON BEHALF OF
PETITIONER**

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**IDENTITY OF *AMICI* AND
STATEMENT OF INTEREST¹**

Throughout this litigation, the jails have argued that they conduct suspicionless strip searches in part to try to prevent gang violence. That is, the jails claim that performing strip searches, even when there is no reason to suspect any given individual of belonging to a gang, allows the jails to identify members of gangs. *Amici* are all recognized scholars who have contributed to the academic understanding of gangs, tattoos, and prisons. They submit this brief in order to dispute the claims that the jails make about tattoos and gangs. *Amici*'s studies of gangs establish that strip searching detainees at jails does not meaningfully help to identify gang members.

The experts, in alphabetic order, are:

- Alex Alonso, who is a Ph.D. candidate in sociology at the University of Southern California in Los Angeles, California. He is curator of a nationally known website, streetgangs.com; has consulted on over 225 cases involving gangs; and has testified in state, federal, civil and military courts. He has

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, their counsel, or the printer made a monetary contribution to this brief's preparation. The parties have consented to the filing of all *amicus* briefs.

published articles in peer-reviewed journals, magazines, and edited volumes. He also produced the award-winning documentary on Los Angeles gangs entitled *Bastards of the Party* (2005) for HBO.

- Rosemarie Ashamalla, who received her Ph.D. in anthropology from the University of California, Los Angeles in 1999. She is the executive director of the non-profit Sunrise Community Outreach Center in Los Angeles, California, which offers low or no-cost tattoo removal to individuals transitioning away from life in gangs. Sunrise Outreach specializes in counseling former gang members, former detainees reentering society, and recovering drug addicts.
- David Brotherton, who is the chair and a professor of sociology at John Jay College of Criminal Justice in New York, New York. He has co-authored or co-edited five books on gangs, and he is presently finishing work on two manuscripts: one dealing with individuals deported to the Dominican Republic, and the other on transnational street gangs. He is an expert on gangs based in New York and on the East Coast, including the Almighty Latin King Queen Nation.
- John Hagedorn, who is a professor of criminology, law, and justice at the University of Illinois-Chicago. He has researched gangs for more than 25 years, beginning in Milwaukee, Wisconsin, and for the last 15 years in Chicago. He has written two books on gangs – *PEOPLE & FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY* (2d ed. 1997), and *A WORLD OF GANGS: ARMED*

YOUNG MEN AND GANGSTA CULTURE (Globalization and Community) (2009) – and edited two more. He has written dozens of book chapters and articles in peer reviewed journals, as well as many popular articles. In 1995, he was hired by the National Institute of Justice to train NIJ researchers in the techniques of gang research. He has consulted in approximately 50 gang-related court cases.

- Cheryl Maxson, who is an associate professor of criminology, law and society at the University of California, Irvine. Professor Maxson is co-author of STREET GANG PATTERNS AND POLICIES (2006) and RESPONDING TO TROUBLED YOUTH (1997), both published by the Oxford University Press. She is co-editor of THE EUROGANG PARADOX: GANGS AND YOUTH GROUPS IN THE U.S. AND EUROPE (2001) and THE MODERN GANG READER (1st ed. 1995; 2d ed. 2001; 3d ed. 2006). Her articles, chapters, and policy reports concern street gangs, youth violence, juvenile justice legislation, drug sales, community policing, and community treatment of juvenile offenders. She has served as the president of the Western Society of Criminology, where she was honored as a fellow. She also has served as executive counselor of the American Society of Criminology, and as the associate editor of its journal, Criminology.
- Jody Miller, who is a professor and associate dean at the School of Criminal Justice at the Rutgers University (Newark), in New Jersey. She earned a Ph.D. in sociology from the University of Southern California in 1996. Her research focuses on gender, crime, and victimization in the

contexts of urban communities, the commercial sex industry, sex tourism, and youth gangs. Among other awards, Professor Miller has been elected as the executive counselor of the American Society of Criminology for 2009, and she has received the University of Missouri-St. Louis Chancellor's Award for Excellence in Service in 2007.

- Susan Phillips, who is an assistant professor at Pitzer College in Claremont, California. She received a Ph.D. in anthropology in 1998 from the University of California, Los Angeles. She has conducted field research on gangs in African American and Latino neighborhoods since 1990, and has written about gang tattoos and tattoo removal. Her first book, *WALLBANGIN: GRAFFITI AND GANGS IN L.A.* (1999), published by the University of Chicago Press, dealt extensively with gang symbols. Her second book on gangs, *OPERATION FLY TRAP: GANGS, DRUGS, AND THE LAW* (2012), will also be published by the University of Chicago Press. She was named a Soros Justice Media Fellow in 2008.
- T.W. Ward, who is an associate professor of anthropology at the University of Southern California in Los Angeles, California. He has conducted gang research since 1993, mainly with Central American gang members in the United States and El Salvador. His upcoming book on the Mara Salvatrucha gang, *GANGSTERS WITHOUT BORDERS* (2012), will be published by the Oxford University Press.

As experts on gangs, *amici* seek to ensure that this Court has at its disposal empirical evidence

related to gangs and tattoos. *Amici* collectively have decades of knowledge on gangs. They have conducted in-depth research on various types of gangs nationally and internationally. This includes close field-studies of gangs and gang members, statistical analyses, and study of the role of tattoos and tattoo removals in gang populations.

Many of the *amici* have previously served as gang experts for state, federal, and immigration courts, for both the government and defendants. They have studied several of the most prominent gangs in the United States, including Bloods, Crips, Mara Salvatrucha, 18th Street, the Almighty Latin King Queen Nation, and other national and regional gangs.

Amici hope to contribute to this Court's understanding of gangs generally and the role of tattoos in specific.²

SUMMARY OF ARGUMENT

The *amici* assert that placing tattoos on skin beneath a person's underpants is not a widespread gang practice. Therefore, the performance of suspicionless strip searches at jails will not help to

² *Amici* note that much of their knowledge of gang behavior, and specifically the role of tattoos, comes from their own field experience and study. Some published works deal with these topics, and are noted in this brief. Equally important, though, are the research and observations of *amici* themselves, which do not necessarily have published sources.

identify gang members. Gang members use tattoos to communicate their gang membership. Therefore, they usually locate tattoos on visible skin, as well as on some bodily regions that, while hidden by clothing, can be easily exposed. Male gang members do not tend to place tattoos on skin hidden by underpants. Women who have interacted with gang members, or who are active gang members themselves, sometimes do place tattoos in private areas. But rather than indicating gang membership, these tattoos signify individual sexual relationships with male gang members, some of whom have abused the women.

If a gang member were to place a gang-related tattoo on skin hidden by underpants, gang tattoos would also likely be evident on other parts of the body, and therefore would not require a strip search to identify. Further, gang tattoos by themselves are not a reliable proxy of active gang membership. Many individuals who receive gang-related tattoos as young people later leave their gangs. Relying on older tattoos to identify gang members could be misleading and harmful.

There is almost no support for the claim that gang members hide gang identity in a below-the-belt region. Indeed, gang members tattoo their private areas so rarely that a jail official who sees a tattoo only on a detainee's intimate parts might question whether the mark is a contra-indicator to gang membership. *Amici* agree it is important for jails to identify gang members to preserve order and to protect jail employees and other detainees. There are several methods of making such identifications, including conducting inspections for prominently displayed tattoos. But using suspicionless strip

searches to examine the private bodily areas of all detainees simply does not advance the goal of identifying gang members.

ARGUMENT³

I. The jails claim that suspicionless strip searches help to identify gang members entering jails.

The jails have repeatedly argued during this litigation that they must strip search all detainees in order to identify gang members. And the Third Circuit relied on this argument at least in part in sanctioning the jails' practices.

For instance, in their argument to the Third Circuit, the jails made clear that identifying gang members was one of their three primary goals in conducting strip searches. See *Florence v. Bd. of Chosen Freeholders of the Cty. of Burlington*, (3d Cir. 2010), Pet. App. 1a, 18a (stating that jails justify strip searches on the basis that they are helpful to

³ For the purposes of this brief, *amici* define strip-searching as the observation of a nude body, with or without a cavity search. *Amici* limit their conclusions to the context of jail, where arrestees are generally not convicted felons, and where some arrestees—as in the case here—are not indicted on criminal charges. Thus, *amici's* argument only addresses the jails' assertion that they strip search arrestees in order to discover gang-related tattoos.

“eliminating weapons and drugs from the jail environment, serving to mitigate gang violence and preventing disease.”) (quoting filings from jails).

In their briefs opposing *certiorari* in this case, the jails continued to rely on the identification of gang members to justify suspicionless strip searches. The Burlington Respondents wrote that “the summary judgment record documented . . . the increasing need to identify gang members upon their entry into the institution.” Burlington Respondents’ Cert. Op. at 18-19. They continued that “the Burlington County jail and its officers have been subjected to litigation about whether they adequately protected against gangs.” *Id.* at 20, n.9. The Burlington Respondents claimed that using techniques other than strip searches to identify gang members would allow jail personnel to exercise too much subjectivity, and so might raise Equal Protection concerns. *Id.* at 23. And they conclude by asserting that gang identification is a sufficient “risk factor” to justify strip searches of detainees. *Id.* at 24. The opposition to *certiorari* by the Essex Respondents also points to gang violence to justify strip searches. See Essex Respondents’ Cert. Op. at 6-7, 15.

The Third Circuit also partially relied on the identification of gang members as a reason to justify suspicionless strip searches. It wrote that its conclusion relied only on excluding contraband, rather than identifying gang members *per se*. *Florence*, Pet. App. 28a n.9. But under the guise of security, the Third Circuit still claimed that the jails needed to use strip searches to identify gang members, because “gang members would be likely to

exploit an exception from security procedures for minor offenders.” *Id.* at 24a.

As is discussed below, *amici* dispute that suspicionless strip searches help to identify gang members entering jails.

II. Gang members display tattoos prominently, not in private bodily areas that strip searches examine.

Contrary to the jails’ claims, strip searches do not meaningfully help to identify gang members. This is because gang members usually do not tattoo areas covered by underpants, and when they do gang members usually display other tattoos in areas that are visible without conducting strip searches. Gang members use their tattoos largely as a form of communication, to quickly and easily convey their affiliation to others. Such public proclamations of gang affiliation provide a basis for determining whether another person is a potential friend or foe.⁴

Gang tattoos, also known among academics as “signifiers,” range from numbers, letters, and figures to generic symbols of gang life. They also include general jailhouse or religious iconography. As one

⁴ See, e.g., Margo Demello, *The Convict Body: Tattooing Among Male American Prisoners*, 9 ANTHROPOLOGY TODAY 10 (1993); William Riley, *Interpreting Gang Tattoos*, CORRECTIONS TODAY 46 (Apr. 2006); Bill Valentine, GANGS AND THEIR TATTOOS: IDENTIFYING GANGBANGERS ON THE STREET AND IN PRISON vii (2000).

retired law enforcement officer has written, “[o]f all the identifiers used to verify gang membership, tattoos are one of the most pervasive and reliable. Not only are they relatively permanent, but they convey a wealth of information about the wearer.” Valentine, *GANGS AND THEIR TATTOOS*, *supra*, at vii. See also William Riley, *Interpreting Gang Tattoos*, *CORRECTIONS TODAY* 46, 46 (Apr. 2006) (“Tattoos are part of a process of nonverbal communication used by gang members. Without the need to verbally communicate, a gang member, as well as observant nongang members, can identify a fellow gang member or rival”) (statement of former corrections officer).

Significantly, gang members in part use their tattoos so that others can spot their affiliation from a distance. This form of identification occurs when individuals encounter each other in neighborhoods, or in jails and prisons. Because of the importance of communicating quickly and from a distance, most gang members tattoo in places that are either quite visible, or easily revealed. As a result, “the tattoos themselves are usually on extremely public areas of the body where they can be easily read by others.” Demello, 9 *ANTHROPOLOGY TODAY* at 10. See also Herbert C. Covey, *STREET GANGS THROUGHOUT THE WORLD* 141 (2010) (gang members use tattoos to “cover much of their upper bodies, including their faces”).

Gang members commonly place tattoos in prominent or easily displayed areas of their bodies, including: scalp, face, hands, neck (front, sides, back), earlobes, chest, back, stomach, small of back, arms, and legs (including sometimes calves and shins). It is

uncommon for gang tattoos to appear in more obscured areas, such palms, feet, knees, or beneath underpants. Tattoos in such areas are difficult for others to notice, and so do not effectively serve to communicate gang identity.

Gang members usually tattoo gang names, initials, and insignia on several locations on the body. And despite the ability of large tattoos to communicate affiliation at a distance, gang tattoos can vary in size, complexity, and visibility. Smaller initials and numbers often appear on members' hands or faces; medium-sized images are frequent on necks and arms; larger images commonly appear on chests or backs. Gang references may also be incorporated into larger-scale designs, such as on the back, chest, or as "sleeves" on the arms. "Often one's level of gang identity can be gauged by the amount and type of tattoo. Some might only place a small dot (•) or cross (†) on their hand, between the thumb and forefinger, while others, especially the committed veterans, might cover large parts of the body with a very elaborate art form." James Diego Vigil, *BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA* 115 (1988).

None of the literature on gang tattoos that *amici* have surveyed refers to gang tattoos on skin beneath underpants. There are rare instances of people placing gang-related tattoos in private regions, but the practice is not common. Even if gang-related tattoos exist on skin beneath underpants, in almost all cases these would merely supplement tattoos visible on more accessible parts of the body.

Outside of gangs, some individuals do indeed place tattoos on skin hidden by underpants, including their genitalia. Genital piercings may also be found among certain individuals. But, as is discussed above, this conduct is very rare among gang members. Indeed, gang members tattoo their private areas so rarely that a jail official who sees a tattoo only on a detainee's intimate parts might question whether the mark is a contra-indicator to street gang membership.

Amici understand and agree that jails need to identify gang-affiliated individuals for security reasons. This is true in New Jersey, where relatively high numbers of gang members cycle through the jail system. *Amici* also agree that tattoos help to identify gang members. According to one correctional officer:

When corrections and law enforcement personnel learn to read tattoos and their meanings, that knowledge can be used to identify gang members in correctional facilities. Once gang members are appropriately identified, facility managers have more information to house offenders appropriately, diminishing the violence levels that occur with gang activity.

Riley, CORRECTIONS TODAY, *supra*, at 53. But tattoos must be used in tandem with other methods used for gang validation. As noted criminologists G. David Curry & Scott Decker have written, “[a] tattoo is perhaps the most severe outward indication of membership, but there are others.” David Curry & Scott H. Decker, CONFRONTING GANGS: CRIME AND COMMUNITY 7 (2d ed. 1998). These include correspondence, photos, court records, known

associates, admission of membership by the detainee, and information gleaned from informants.

Further, in *amici's* experience, courts usually require the existence of at least three indicators to confirm that a witness or defendant is a member of a gang. Even if jail authorities were to use only tattoos for gang identification as a proxy for gang membership during initial screening of detainees, the ready visibility of the overwhelming majority of gang tattoos means that jails can effectively screen for tattoos without strip searching every detainee.

III. Women's intimate tattoos usually mark sexual relationships, and can signal coercion and abuse rather than active gang affiliation.

While the above discussion applies to both men and to women, women who have had interactions with male gang members sometimes do have tattoos on the small of the back, on the buttocks, or in the "bikini area." See, *e.g.*, Wendy L. DeBoer, *THERE GOES THE NEIGHBORHOOD: TATTOO REMOVAL, STIGMATIZATION, AND THE CONTEXT OF CULTURE* 94 (unpublished dissertation, University of Southern California) (2004). It is important to emphasize, however, that these tattoos do not normally reference gang membership. Rather, tattoos on women's intimate areas usually relate to specific, sexualized, male-female relationships. In short, male gang members use tattoos to literally place their marks on women. While women may be members of gangs, the existence of tattoos in women's private areas does not help to establish such membership. Rather, women gang members may also have more prominent

tattoos, like those discussed above; conducting strip searches does not facilitate finding those more visible gang-related tattoos.⁵

Academic literature on gangs contains very little discussion of tattoos on women, and almost none on tattoos in women's private areas. But, in *amici's* research experience, the majority of women's intimate tattoos are not gang signs. Rather, they are generic, sexualized designs; or the names of men who ask, encourage, or demand that women tattoo their names on sexual areas. Tattooing men's names in both hidden and more visible regions is common among women in gang contexts. According to one expert, "the women's acquisition of men's names carried the additional significance of men's 'owning' the women who named them and women's 'belonging' to these men." DeBoer, *THERE GOES THE NEIGHBORHOOD*, *supra*, at 161. But rather than indicating active membership in gangs, women's intimate tattoos can signify current or former abuse and control by men.

⁵ On women, even prominent gang tattoos on visible body parts may not indicate active gang membership. As one authority has written, "[w]omen I interviewed who did not consider themselves to be gang members acquired many of the same tattoos that gang members did." DeBoer, *THERE GOES THE NEIGHBORHOOD*, *supra*, at 137. One woman "was tattooed with a gang name while she was passed out." *Id.* at 93. The *amici* have heard many accounts in which abuse and tattooing overlap.

For example, one woman's male abuser tattooed his name onto her pubic region, using a homemade tattoo gun. She bore the name "Babar" in her genital region for many years before having the tattoo removed. Another woman had the name "Spaceride" tattooed on her lower back. This region of her body would have been at least partially covered by underpants, and so would be revealed in a strip search. But the revealed tattoo would not indicate that the woman belonged to a gang. This is because the term "Spaceride" combined the nickname of the woman's abusive ex-boyfriend, Spacey, with a slang term with sexual overtones. Another example is a woman who covered *exposed* parts of her body with tattoos linked to a prison gang. But this woman had no gang-related tattoos in her underpants region. She did have a tattoo on her lower back, in an area that might have been hidden by her underpants, stating "Scotty's Ride." This has the same general formulation – a male sexual partner's name combined with a slang term with sexual overtones – as in the previous example. If this woman were sent to a jail, her prominent gang tattoos would identify her as a potentially active gang member, and a strip search would add no additional information.

Nor do *amici* anticipate that a gang tattoo—if it did exist on a woman's body beneath her underpants—would serve as a reliable proxy of her own gang membership. Rather, if such a gang-related tattoo were to appear on a woman's intimate areas, it would more likely evidence the sort of male abuse or control discussed above.

In short, with regard to women, tattoos located beneath underpants do not stand for what the jails

claim. Because on women there is no clear empirical link between gangs and intimate tattoos, there is no reason to conduct strip searches of women to expose them.

IV. Male gang members rarely place tattoos on their genitalia or skin covered by their underpants.

In their research, *amici* have encountered very few examples of male gang members who have tattooed their genital or private regions. In the few instances in which *amici* have heard of such tattoos, the marks were either not linked to gangs, or supplemented other more clearly gang-related tattoos that the individuals wore on more prominent body parts.

Significantly, most of the instances of this conduct that *amici* have encountered were located among the population of convicted prisoners in California. California has a much more significant gang presence than does New Jersey. And convicted prisoners likely have a higher percentage of gang members than detainees in jails who have not been convicted. Given that *amici* see so little tattooing below the belt in California's gang-heavy prisoner population, it seems *less* likely still that the jails in New Jersey in this case will encounter such tattoos.

Thus, there is very little evidence to support the jails' assertion that gang members tattoo below the belt in order to hide gang identity. In the academic experience of *amici*, the opposite is true. Conversations between *amici* and gang-related and jailhouse tattoo artists, gang members, tattoo removal participants, and law enforcement

personnel, including gang specialists, all indicate that gang tattooing below the belt is extremely uncommon.

There are several reasons for this. As is discussed above, gang tattoos serve to communicate gang affiliation, and hidden tattoos by definition cannot advertise membership. In addition, gang cultures often emphasize hypermasculinity and homophobia. These characteristics likely prevent males from obtaining tattoos in private regions. That is, gang members may associate certain intimate bodily locations, such as the buttocks or bikini line, with females, and might view placing tattoos there as feminine and therefore inappropriate for men. Further, a male receiving a tattoo on his intimate body parts might require another man to touch the intimate areas. The homophobic culture of male gangs would likely prevent such conduct.

Simply put, for a gang member “[t]o *outwardly* mark his or her body with the gang’s symbol is viewed as a privilege.” Louis Kontos & David Brotherton, *ENCYCLOPEDIA OF GANGS* 75 (2008) (emphasis added). Hidden tattoos have no such effect.

V. Because many people leave gangs, tattoos by themselves do not reliably indicate active gang membership.

Having a gang tattoo, regardless of placement, does not necessarily constitute active gang membership. This is because many people have who received gang-related tattoos subsequently leave gangs. See, e.g., DeBoer, *THERE GOES THE NEIGHBORHOOD*, *supra*, at 78; J. Korman, *Removal of*

Gang-Related Tattoos, 162 W. J. OF MED. 541 (1995). However, it is very difficult for former gang members to remove their tattoos immediately when they leave their gangs, and most remain unable to do so. *Amici* have learned of a sixty-year old woman who removed tattoos she got when she was fifteen. One man received tattoo removal treatment in his seventies for gang signs tattooed during his teen years. The many people who remove tattoos years after receiving them indicate that a given gang tattoo may be a relic. Indeed, despite the growth of the tattoo removal industry, the majority of people who would like to remove gang tattoos are unable to do so. "Tattoo removal can cost several thousand dollars, and often former gang members cannot afford it." Korman, 162 W. J. OF MED. at 541. Therefore, uncovering a gang tattoo during a routine search could be misleading. Worse, placing a former gang member with active gang members solely on the basis of tattoo could lead to violence. As is stated above, additional measures besides tattoo identification are necessary to determine active gang membership.

* * * * *

In the experience of *amici*, suspicionless strip searches are not necessary or even helpful to identify gang members within the context of a jail. The rarity of gang tattoos beneath underpants, the ease with which gang tattoos are found on visible parts of the body, and the need to combine tattoo identification with other validation methods all indicate that strip searches do not help to identify gang members detained in jails. Male gang members generally do not tattoo on skin hidden by underpants. And when they do, other gang tattoos are usually present in

more visually accessible locations. Women who have interacted with gangs and who place tattoos in intimate areas generally have tattoos that do not signify active gang membership. Rather, they stem from relationships or sexual liaisons with male gang members, and can result from coercion or abuse. Searching for such private tattoos on women do not aid in gang identification. In addition, finding a gang tattoo is not by itself necessarily a reliable way to determine active membership in a street gang. Therefore, there is little if any basis for the jails to use suspicionless strip searches to identify gang members.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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