

**In the Supreme Court of the United States**

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ALBERT W. FLORENCE,  
*Petitioner,*

*v.*

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

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**BRIEF FOR AMICUS CURIAE NATIONAL  
POLICE ACCOUNTABILITY PROJECT  
IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The National Police Accountability Project (“NPAP”) is a nonprofit organization founded by members of the National Lawyers Guild. Members of NPAP represent plaintiffs in police misconduct cases. NPAP has more than four hundred attorney members throughout the United States.

NPAP assists its members in fulfilling the duty this Court recognized in *Hudson v. Michigan*, 547 U.S. 586 (2006) to enforce constitutional rights through damage actions. To ensure that “civil liability is an effective deterrent,” *id.* at 598, NPAP often presents the views of victims of civil rights violations through amicus filings in cases raising issues that transcend the interests of the parties before the Court.

This case arises from petitioner’s arrest on a warrant issued for failure to pay a fine and presents broad questions about the circumstances under which a jail may conduct a suspicionless strip search of any person in custody on a minor offense. The question decided by the Court of Appeals was whether arrestees could be strip searched upon their admission to the general jail population. NPAP submits this brief to bring before the

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<sup>1</sup>The parties’ letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the amicus curiae states that no counsel for a party has written this brief in whole or in part and that no person or entity other than the amicus curiae, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief

Court the interests of detainees who are not entering the “general jail population for custodial housing.” *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc). These include persons arrested on minor charges and held in local police lock-ups pending an initial appearance before a judge, as well as those placed in special county jail holding cells awaiting an initial court appearance. Also included in this group of temporary detainees are persons who are in the process of posting bail, as well as persons awaiting court ordered release. An additional group of temporary detainees are persons whose release has been ordered but are strip searched upon returning to the jail before being released. All of these temporary detainees have an especial interest in avoiding intrusive, embarrassing, and gratuitous strip searches.

### STATEMENT

Petitioner was strip searched while being temporarily detained at a county jail awaiting an appearance before a judge, who would adjudicate petitioner’s claim that he had been mistakenly arrested for failure to have paid a fine.

On March 3, 2005, petitioner was a passenger in his motor vehicle when it was stopped by a police officer. (Pet.App. 3a.) The officer ran a computer check and learned that on May 5, 2003 an entry had been made in the “CJIS” database about a civil contempt warrant for petitioner, the owner of the vehicle. (Jt.App. 396a.) The officer determined that petitioner was the person sought in the warrant and placed him under arrest. (Pet.App. 51a.)

The warrant had been issued on April 25, 2003 because petitioner had failed to pay a fine. (Jt.App. 80a.)

Petitioner paid the fine in full on April 29, 2003. *Id.* The officer's computer check showed only that the warrant had been issued. (Jt.App. 396a.)

Pursuant to state procedure, the officer who arrested petitioner on the computer warrant should have taken him within 12 hours "before the nearest available committing judge authorized to admit to bail."<sup>2</sup> The officer instead brought petitioner to the Burlington Jail, where he completed a "hold over" form.<sup>3</sup> (Jt. App. 100a.)

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<sup>2</sup> New Jersey Rule of Court 3:3-3(b) provides as follows:

(b) Territorial Limits. The warrant may be executed and the summons served at any place within this State. An officer arresting a defendant in a county other than the one in which the warrant was issued shall take the defendant, without unnecessary delay, before the nearest available committing judge authorized to admit to bail in accordance with R. 3:26-2, who may admit to bail conditioned on the defendant's appearance before the court issuing the warrant. Nothing in this rule shall affect the provisions of N.J.S. 2A:156-1 to 2A:156-4 (Uniform Act on Intrastate Fresh Pursuit).

New Jersey Rule of Court 3:4-1(b) requires that this appearance occur "no later than 12 hours after arrest" because bail had not been set when the warrant was issued. The rule provides as follows:

(b) Arrest on Warrant. If bail was not set when an arrest warrant was issued, the person who is arrested on that warrant shall have bail set without unnecessary delay, and no later than 12 hours after arrest

<sup>3</sup> Warden Cole of the Burlington Jail explained at his deposition that a "hold over is an inmate that's put in our facility by a police officer." (Jt.App. 106a.)

The Burlington County Jail accepted petitioner “as a holdover awaiting transportation to Essex County.” (Jt.App. 24a.) Petitioner, who was neither formally processed nor admitted to the Burlington Jail, was nonetheless strip searched while being “held over.” (Pet.App. 51a-52a.)

Petitioner remained at the Burlington Jail for six days awaiting the seventy mile trip to the Essex County Correctional Facility. (Pet.App. 52a.) Petitioner arrived at the Essex County facility at 11:39 p.m. on March 9, 2005. (Jt.App. 67a.) The Facility’s written policy requires that any detainee be “accompanied by a proper commitment document ... which shall include a bail.” (Pet.App. 146a.) Although petitioner had not received a bail hearing, the Facility accepted custody of petitioner and subjected him to a strip search in advance of appearing before a judge the next day. (Pet.App. 52a.) On March 10, 2005 at 1:41 p.m., a court clerk made a computer inquiry of the “Comprehensive Automated Probation System” and verified petitioner’s claim that he had paid the fine in full. (Jt.App. 80a.) A judge ordered petitioner’s release the same day. (Jt.App. 9a.)

Petitioner filed this action under 42 U.S.C. § 1983, alleging *inter alia* that he had been unlawfully strip searched. Petitioner sought to represent a class of “all arrestees charged with non-indictable offenses” who had been processed into the Burlington Jail and into the Essex County Correctional Facility. (Jt.App. 18a.) The district court found that petitioner was not a member of this proposed class because he had not been “formally processed into the Burlington Jail.” (Jt. App. 25a n.6.) The district court certified a class using its amended

class definition of all “arrestees who were processed, housed, or held over at Defendants’ jails.”(Jt.App. 43a.)

The district court concluded on cross-motions for summary judgment that “strip searches of nonindictable offenders performed without reasonable suspicion violates the Fourth Amendment.” (Pet.App. 84a.) The Third Circuit reversed on an interlocutory appeal taken pursuant to 28 U.S.C. § 1292(b).

The Third Circuit limited its review to “whether it is constitutional for jails to strip search arrestees upon their admission to the general population.” (Pet.App. 1a.) A divided panel of the Court of Appeals answered this question by balancing “the Jails’ security interests at the time of intake before arrestees enter the general population against the privacy interests of the inmates.” Pet.App. 28a.) The panel majority concluded “that the strip search procedures described by the District Court at BCJ and ECCF are reasonable.” *Id.* The court held that the same result applied to “people properly assigned to the Jails and entering the general population ... whether they be convicted inmates, indicted pretrial detainees, contemnors, material witnesses, or arrestees awaiting preliminary hearings before a magistrate.” (Pet.App. 22a n.7.)

### SUMMARY OF ARGUMENT

Petitioner was arrested on a warrant issued because he had failed to pay a fine. The warrant was neither quashed nor recalled after petitioner paid the fine; when petitioner was arrested on the warrant, he was “held over” at two jails before appearing before a judge, who quashed the warrant and ordered petitioner’s release.

It is patently unreasonable to strip search a “hold-over” arrested on a warrant for non-payment of a fine, who was not formally processed into the jail, and who should have been brought before a judge for a bond hearing within the next 12 hours under applicable state law.

There are many circumstances in which persons are temporarily detained at a jail without being appropriately processed into the general population. A person may have been arrested without a warrant, and held at a station house or a county jail holding cell pending presentment to a court for the filing of charges, a probable cause determination, or setting bail; or arrested on a warrant, and awaiting a court appearance, to show that the warrant had been erroneously issued, or that he (or she) is not the person sought in the warrant, or awaiting the setting of bond.

The lower federal courts “have consistently recognized a distinction between detainees awaiting bail and those entering the jail population when evaluating the necessity of a strip search under constitutional standards.” *Archuleta v. Wagner*, 523 F.3d 1278, 1284 (10th Cir. 2008). The Ninth Circuit acknowledged this distinction in *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc), when it noted that “[t]he reasonableness of a search is determined by its context,” *id.* at 971, and limited its decision to arrestees “introduced into the general jail population for custodial housing.” *Id.* The Eleventh Circuit made the same distinction in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc), when it limited its decision to persons who “were strip searched solely because they were entering the general population of inmates at the

detention facility.” *Id.* at 1300. The Court should likewise acknowledge this important distinction.

Additionally, strip searches are often undertaken *after* people have been ordered released, e.g., when charges are dropped. These gratuitous strip searches take place even when arrestees have not yet been processed into the general population or have been but are now subject to immediate release.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court considered the reasonableness of a policy requiring the strip search of a pre-trial detainee returning from a contact visit. The Court upheld the strip search policy “as an alternative to close and constant monitoring of contact visits to avoid the obvious disruption of the confidentiality and intimacy these visits are intended to afford.” *Id.* at 559 n.40. The “alternative” in this case for a person arrested on a warrant for failure to have paid a fine is to comply with state law by promptly taking the person arrested on a warrant to a judge, who can quash the warrant or set bond.

## ARGUMENT

### I. Strip Searching a Person Arrested on a Warrant Issued for Failure to Pay a Fine Is Unreasonable

Petitioner was arrested on a warrant issued because he had failed to pay a fine. The warrant was neither quashed nor recalled after petitioner paid the fine; when petitioner was arrested on the warrant, he was “held over” at two jails before appearing before a judge, who quashed the warrant and ordered petitioner’s release. It was manifestly unreasonable to strip search a person “held over” at a jail on a warrant for non-

payment of a fine, rather than to comply with state law and promptly bring the arrestee before a judge.

The historical record does not provide “a sure indication of the kinds of body searches that Americans thought reasonable in 1789-91.”<sup>4</sup> The reasonableness of strip searching a person arrested on a warrant issued for failure to pay a fine, when that person is “held over” and not admitted to general population at a jail awaiting an appearance before a judge, therefore turns on “a balancing of the need for the particular search against the invasion of personal rights that the search entails.” *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

Any claim that jail security requires the strip search of all persons being “held over” should fail unless supported by the type of empirical evidence on which the Court relied in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 454-55 (1990). There, the data showed the effectiveness of sobriety checkpoints. *Id.* at 454-55. Here, the empirical evidence advanced to justify strip searching pre-trial detainees shows the lack of effectiveness of these intrusive searches.

The Seventh Circuit found in *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983), that there was no evidence to support the claim that contraband would be found on “women minor offenders entering the lockups for short periods while awaiting bail.” *Id.* at 1273. Today, after nearly 30 years of advances in body-search technology and deployment of magnetometers, body orifice security scanner (“BOSS”) chairs and full-body scanners, it is not surprising that there continues

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<sup>4</sup> William J. Cuddihy, *The Fourth Amendment Origins and Original Meaning* 769 (2009).

to be no empirical evidence to support strip searching persons arrested on minor charges. The careful analysis undertaken by the district judge in *Dodge v. County of Orange*, 282 F.Supp.2d 41 (S.D.N.Y. 2003), underscores the lack of utility in broad strip search practices.

*Dodge* involved strip searches at the Orange County Correctional Facility. The district court granted a preliminary injunction to bar enforcement of the jail's strip search policy in July of 2002. *Dodge v. County of Orange*, 209 F.R.D. 65, 79 (S.D.N.Y. 2002). The decree permitted the jail to strip search newly arrived detainees charged with misdemeanors "only when they had reason to believe the new arrival might be secreting contraband, based on (1) the nature of the crime charged; (2) the circumstances of the arrest; and (3) the particular characteristics of the arrestee." *Dodge*, 282 F.Supp.2d at 43.

The district court evaluated the impact of the injunction when it considered a request to bar strip searches of new arrivals who were charged with felonies. 282 F.Supp.2d at 43. The court found that of the 23,000 persons admitted from January of 1999 to February 28, 2003, "the County encountered three incidents of drugs recovered from an inmate's anal cavity and two incidents of drugs falling from an inmate's underwear during the course of a strip search." *Id.* at 69. The court also found that "there may have been reasonable suspicion to strip search four of these five detainees, based upon either the nature of the offense or the characteristics of the detainee. *Id.* at 70.

The district court in *Dodge* concluded that "the data belies [defendants'] contention [that more contraband has been smuggled into the facility as a result of the

preliminary injunction].” *Id.* at 87. *Dodge* makes plain that respondents cannot support their policy with empirical data.

Similar data was presented in *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001). There, records produced by the Nassau County Jail showed that contraband had been found in only 16 of the 75,000 strip searches of new admittees conducted over a five year period, and that nearly all of these 16 pieces of contraband would have been detected in a pat-down or a search of shoes and outer-clothing. Moreover, in the three instances in which contraband was found beneath the undergarments, there was reasonable suspicion to justify a strip search.<sup>5</sup>

More recently, in a case involving a very large jail in Cook County, Illinois, the district court found that the jail officials were unable to show that persons entering the jail on minor charges “routinely possessed contraband.” *Young v. County of Cook*, 616 F.Supp.2d 834, 847 (N.D.Ill. 2009).

Cases arising from strip searches of persons in custody on minor offenses consistently demonstrate the unreasonableness of these intrusiveness searches. It is

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<sup>5</sup> *Shain v. Ellison*, 2d Cir., No. 00-7071, Appendix A343-493; Supplemental Appendix SA7-43. Only three strip searches yielded weapons or contraband from the detainee’s body or a body cavity. *Shain*, Appendix A354-72, A391-97, A398-413. Contraband found in the other 13 strip searches was located in the shoes or clothing of the detainee, and would have been found by a “pat down” or “clothing” search only. In the three cases in which the contraband was found on the body or in a body cavity, there was a drug or felony history that would have justified a strip search on individualized reasonable suspicion. *Shain*, supra, Appendix A343-493.

impossible to defend as reasonable the strip search of a young woman arrested for being underage in a tavern. *Doe v. Calumet City*, 754 F.Supp. 1211, 1213-14 (N.D.Ill. 1990). It is equally difficult to explain the need to strip search a woman “arrested for violating a municipal ordinance that prohibits peddling sausages without a license.” *Ford v. Suffolk County*, 154 F.Supp.2d 131, 136 (D.Mass. 2001).

A plausible showing of reasonableness cannot be made to justify the strip search of a women “detained for the nonpayment of parking fines in the amount of \$75.” *Roderique v. Kovac*, 1987 WL 17058 \*4 (D.N.J. 1987). The same is true for the strip search of a woman who failed to appear in traffic court because the judge had given her the wrong appearance date. *Masters v. Crouch*, 872 F.2d 1248, 1250 (6th Cir. 1989). Or the strip search of a man arrested on a withdrawn warrant for failure to pay a traffic fine. *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984).

The decision of the Third Circuit, if allowed to stand, would authorize each of these unreasonable searches, as well as the strip search of Mrs. Atwater following her arrest for a seat belt violation. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). The Court should reject this dilution of the Fourth Amendment and reverse.

## II. The Court Should Recognize the Differences between Temporary Detainees and Those Properly Assigned to the General Jail Population

There are many circumstances in which persons are temporarily detained at a jail and not processed into the general population. For example, many jails, like those in Orange and Nassau County, New York, do not admit new jail entrants to general population for 72 hours or more for medical screening or other reasons.<sup>6</sup> Thus, without exception, the lower federal courts recognize a “distinction between detainees awaiting bail and those entering the jail population when evaluating the necessity of a strip search under constitutional standards.”<sup>7</sup> *Archuleta v. Wagner*, 523 F.3d 1278, 1284 (10th Cir. 2008). There is no legitimate reason to strip search a person who is about to be released.

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<sup>6</sup> *Dodge v. Orange County*, 282 F. Supp. 2d 41, 54 (S.D.N.Y. 2003) (usually three to five days but up to seven days before admission to general population); *Shain v. Ellison*, 2d Cir., No. 00-7071, Appendix A317-19, A339 (pursuant to the Jail’s health quarantine policy, new admittees to the Jail are not released into the general Jail population for 72 hours).

<sup>7</sup> The Ninth Circuit recognized this distinction in *Bull v. City and County of San Francisco*, 595 F.2d 964 (9th Cir. 2010) (en banc), when it noted that “[t]he reasonableness of a search is determined by its context,” *id.* at 971, and limited its decision to arrestees “introduced into the general jail population for custodial housing.” *Id.* The Eleventh Circuit acknowledged the same distinction in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc), when it made plain that its decision was limited to persons who “were strip searched solely because they were entering the general population of inmates at the detention facility.” *Id.* at 1300.

Most persons arrested on warrants for failure to have a paid a fine are released at or before their initial court appearance. The arrestee may post bond. *Roderique v. Kovac*, 1987 WL 17058 \*4 (D.N.J. 1987). The judge may determine, as in this case, that the fine had been paid. Or, as in *Patton v. Przybylski*, 822 F.2d 697, 698 (7th Cir. 1987), the judge may find that the arrestee is not the person sought in the warrant. Alternatively, the judge may find that the detention “was in error,” as in *Calvin v. Sheriff of Will County*, 2004 WL 1125922, \*1 (N.D.Ill. 2004), *opinion granting summary judgment*, 405 F.Supp.2d 933 (N.D.Ill. 2005). These temporary detainees should not have to undergo the indignity of a strip search.

Nor should persons be strip searched after appearing in court and securing an order of release, as in *Young v. City of Little Rock*, 249 F.3d 730 (8th Cir. 2001). “[T]here is no necessity whatever to strip search a person who was wholly innocent of any charge.” *Id.* at 736. There is also no need to strip search a person about to be released on bond. *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981). Nor is there any basis to strip search a person who is about to be released because charges have been dismissed or because he (or she) has been sentenced to time considered served, *Lopez v. Youngblood*, 609 F. Supp. 2d 1125, 1131 (E.D. Cal. 2009). The district court in *Gary v. Sheahan*, 1999 WL 1021040 (N.D.Ill. 1999) recognized this rule when it prohibited “strip searching female inmate court returnees who have been judicially discharged.” 1999 WL 1021040 at \*3.

Many strip search policies appear to be based on the type of over-inclusive rationale the Court rejected in *Bell v. Wolfish*, 441 U.S. 520 (1979) when it evaluated

“loading a detainee with chains and shackles and throwing him in a dungeon ... [to] ensure his presence at trial and preserve the security of the institution.” *Id.* at 539 n.20. For example, one of the subclasses in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc) consisted of persons who had posted bond or had been ordered released at their initial appearance. These persons had not been strip searched after arrest or before appearing in court but each member of this subclass was strip searched while awaiting release. The jail sought to justify strip searches because it held these former detainees in custody while searching for “other detention orders, warrants, and holds.” *Powell v. Barrett*, 496 F.3d 1288, 1313 (11th Cir. 2007) (panel opinion).

The Court should not approve the strip search of persons entitled to release merely because a jail is hoping that something will turn up in its search for “detention orders, warrants, and holds.” This is precisely the type of investigative detention the Court condemned in *Davis v. Mississippi*, 394 U.S. 721 (1969), and is fairly described as the “hallmark of a police state.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 550 (1985) (Stewart, J., dissenting).

The Court should reject any argument that it is not practical to make distinctions between temporary detainees and those properly assigned to a jail’s general population. The Constitution recognizes higher values than “speed and efficiency,” *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), and “[w]ith the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.” *Arizona v. Evans*, 514 U.S. 1, 17-18 (1995) (O’Connor, J., concurring).

**CONCLUSION**

It is therefore respectfully submitted that the Court should reverse the judgment of the court of appeals.

June, 2011

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