No. 13-108

In the Supreme Court of the United States

KRISTOPHER ALAN MATKIN, et al.,
Petitioners,

v.

JACQUELINE BARETT,
former Sheriff, Fulton County, Georgia,
Respondent.

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

BRIEF OF *AMICI CURIAE* FLORIDA JUSTICE INSTITUTE, INC., HUMAN RIGHTS DEFENSE CENTER, NATIONAL POLICE ACCOUNTABILITY PROJECT, AND SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF PETITION FOR CERTIORARI

LANCE WEBER
HUMAN RIGHTS DEFENSE CENTER
3878 Connecticut Street
St. Louis, MO 63116
(603) 903-3410

HOWARD A. FRIEDMAN
LAW OFFICES OF HOWARD FRIEDMAN, P.C.
90 Canal Street
5th Floor
Boston, MA 02114
(617) 742-4100

CHRISTOPHER A. WIMMER
Counsel of Record
EMERGENT LEGAL
25 Taylor Street
Suite 410
San Francisco, CA 94102
(415) 894-9284
cwimmer@emergentlegal.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

CORPORATE DISCLOSURE STATEMENT

Each of the Florida Justice Institute, Inc., Human Rights Defense Center, National Police Accountability Project, and Southern Center for Human Rights is a nonprofit organization that has no parent company and does not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULE

OTHER

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nonprofit public interest organizations dedicated to protecting the rights of individuals held in all types of detention facilities in the United States.

The **Florida Justice Institute, Inc.** (FJI) is a private, not-for-profit public interest law firm founded in 1978 by leaders of the private bar to, in part, improve conditions of confinement in jails and prisons. It is primarily funded by The Florida Bar Foundation. FJI has participated as *amicus curiae* in a variety of cases in both state and federal courts at the intermediate appellate and Supreme Court levels, and was class counsel in two strip search cases that successfully challenged the same issue as in the case at bar. *See Parilla v. Eslinger*, 2005 WL 3288760 (M.D. Fla. Dec. 5, 2005) (strip searches of persons without reasonable suspicion and before a judicial determination); *Haney v. Miami-Dade County*, 2004 WL 2203481 (S.D. Fla. Aug. 24, 2004) (same).

The **Human Rights Defense Center** ("HRDC") is a nonprofit charitable corporation headquartered in

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[1] Counsel for the *amici* provided counsel of record for Respondents timely written notice of the intent to file this brief under Supreme Court Rule 37.2(a). Respondents consented. Petitioners have given blanket consent to any *amicus* brief in support of or opposition to the Petition. Record of that request and those consents have been lodged with the Court. In addition, no counsel for any party authored any part of this brief, and no party or counsel to a party made a monetary contribution intended to fund the preparation or submission of the brief.

Florida that advocates on behalf of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing Prison Legal News, a monthly publication that covers criminal justice-related news and litigation nationwide, publishing and distributing self-help reference books for prisoners, and engaging in litigation in state and federal courts on issues concerning detainees.

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, and 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. NPAP has more than five hundred attorney members throughout the United States.

The **Southern Center for Human Rights** ("SCHR") is a nonprofit public interest organization founded in 1976 to provide legal representation to inmates challenging the conditions of their confinement in prisons and jails in the Southern United States, including those within the jurisdiction of the Court of Appeals for the Eleventh Circuit. It is headquartered in Fulton County, Georgia, the site of the detention facility at issue in this case.

SUMMARY OF ARGUMENT

Each year, millions of basically law-abiding individuals are arrested for offenses punishable by little or no incarceration. For many, the experience of detention will be primarily one of processing: They will be booked into the facility pending arraignment, and then, at their first court appearance, will be ordered released pending trial or released unconditionally because their charges have been dismissed. They will then be processed back out of the facility. In the decades leading up to this Court's decision two terms ago in *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S.Ct. 1510 (2012), most courts, state legislatures, and detention facilities had reached the conclusion that subjecting these individuals to the humiliation of a strip search violated the Fourth Amendment unless there was at least reasonable suspicion to believe they possessed contraband, or a court had reviewed their charges and ordered them held.

In *Florence*, this Court determined that the Constitution did not forbid the suspicionless strip search of minor offense detainees who need to be housed in the general population. It did not, however, determine that blanket strip searches were always permissible. To the contrary, it reaffirmed the need to conduct a balancing test taking into consideration the justifications for the search and the interests of the individual, and it expressly left open the possibility that strip searches might offend the Constitution where the individuals had not yet appeared before a neutral magistrate and did not need to be held in the facility's general population.

Less than a year later, the Court of Appeals for the Eleventh Circuit rejected this Court's cautious approach in favor of a new blanket rule: All persons that a detention facility decides to pass through the general population may be subjected to a strip search. This rule has no exceptions, and depends entirely on executive discretion. Whenever jail staff elect to place a detainee into the general population—even before arraignment, and even after a release order—the detainee may be made to disrobe, shower, lift his or her genitals, squat and cough, and then turn around and spread his or her buttocks for jail staff. Pet. at 4-6.

The decision below results in completely unnecessary strip searches. Consider: A man is arrested for an unpaid traffic ticket. He is booked into the jail. Even though there are secure rooms where he could be held until arraigned, the jail's policy requires that he be placed into the general population, and so he is strip searched. He then makes his first court appearance, where a judge determines that the charges against him should be dismissed and that he should be freed. He is returned to the jail where, again, simply because it is the jail's policy, he is strip searched and placed back into the general population while the jail staff check for outstanding warrants and gather the detainee's property for release. This is not a hypothetical scenario (Pet. at 6-8), and it could occur hundreds of thousands of times a year (*see* pages 5-6 below).

The breadth and categorical nature of the Eleventh Circuit's rule demand this Court's prompt intervention. If the decision below is allowed to stand even for a short while, hundreds of thousands of ordinary

individuals who have not yet been arraigned or who have been ordered released may suffer needless humiliation.

ARGUMENT

I. The Court Should Intervene Now to Prevent Suspicionless Strip Searches of Individuals Who Have Not Yet Been Arraigned or Who Have Been Ordered Released

The Court should intervene now because the Eleventh Circuit's decision establishes that individuals can be strip searched even before they have seen a judge and even after they have been ordered released, despite the absence of any reason to believe they possess contraband. If that remarkable proposition is left undisturbed, hundreds of thousands of individuals every year could be subjected to unnecessary, degrading examinations of their naked bodies.

As the Petition describes in detail, the Eleventh Circuit held that the Fourth Amendment is never violated when a detainee is strip searched before entering the general population. No other factor matters. The nature of the offense; the duration of the detainee's likely stay; the facility's reason for placing the detainee in the general population; potential administrative or technological alternatives; and whether the detainee has not yet been arraigned or has been ordered released by a court are all irrelevant. Pet. at 18-20. In essence, detainees can be strip searched whenever the facility's administrators decide to place

them in the general population—without ever having to justify the search or the placement decision.

The effects of this new rule would fall most heavily on the many individuals who are likely to be held for only a short while, owing to the nature of the charges against them. According to the federal Department of Justice's Bureau of Justice Statistics ("BJS"), 4.7 million arrests are made annually for gambling, violations of the liquor laws, drunkenness, disorderly conduct, vagrancy, curfew and loitering law violations, vandalism, driving under the influence, and petty larceny. BJS, *Arrest in the United States, 1999-2010* (Oct. 2012), at 2 (Table 1). Another 450,000 arrests are made for traffic violations. BJS, *Contacts between Police and the Public, 2008* (Oct. 2011), at 9 (Table 12). In the Eleventh Circuit alone, this represents approximately 560,000 annual arrests[2] of individuals who will likely be released following their first court appearance.

The reach of the Eleventh Circuit's decision goes beyond the criminal law. In 2012 alone, U.S. Customs and Border Patrol agents arrested 364,000 individuals

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[2] As of the most recent census, the population of the United States was 308.7 million; the population of the states in the Eleventh Circuit (Alabama, Florida, and Georgia) was 33.3 million. U. S. Census Bureau, Population Distribution and Change: 2000 to 2010, at Table 1 (March 2011). Nationwide, approximately 1.7 percent of the population is arrested annually for the offenses described in the text (5.2 million arrests out of a population of 308.7 million). Assuming that arrest rates are relatively constant across states, this results in 560,000 arrests for these same offenses within the Eleventh Circuit.

on immigration charges. U.S. Customs and Border Protection, *Performance and Accountability Report, Fiscal Year 2012* (April 2013), at 6. While national figures for imprisonment on civil contempt charges are not available, it appears that tens of thousands of individuals are incarcerated annually for nonpayment of child support. Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 Cornell J. of L. and Pub. Policy 95, 116-18 (2008).

Under the Eleventh Circuit's blanket strip search rule, all of these individuals could be forced to squat, cough, and expose their genitals and anus to jail staff, even if they have not yet been arraigned and even if they have already been ordered released, and even if there is no indication they are attempting to smuggle contraband.

This would represent a sea change in detention practice. Before this Court's decision in *Florence*, there was a growing consensus among the states, federal circuit courts, and detention facilities that a blanket strip search of those accused of minor offenses was unconstitutional. This necessarily meant that these individuals also could not be strip searched before their charges had been reviewed, or after they had been ordered released. For example, the American Correctional Association's standards, recognized as "the national benchmark for the effective operation of correctional systems throughout the United States," ACA, Standards and Accreditation, https://www.aca.org/standards/faq.asp, reject the practice of suspicionless strip searches of individuals arrested for minor offenses. Instead, they direct that

"[a] strip search of an arrestee at intake shall only be conducted when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband." ACA Standard 4-ALDF-2C-03. *See also* ACA, Core Jail Standards § 1-CORE-2C-02 (1st ed. 2010) (smaller set of core standards developed with the support of the American Jail Association, National Sheriffs' Association, National Institute of Corrections, and the Federal Bureau of Prisons ("BOP"), providing the same).

Facilities across the nation seek to comply with these standards in order to be accredited by the ACA. *See*, *e.g.*, U.S. Dep't of Justice, Strategic Plan Fiscal Years 2000-2005 79 (2000) (the BOP "utilizes ACA to obtain an external assessment of its ability to meet the basics of corrections," and "continue[s] to prepare all activated facilities for accreditation with the American Correctional Association"); *see also* U.S. Dep't of Justice, Strategic Plan Fiscal Years 2007-2012 83 (2007). And detention facility practice before *Florence* reflected the ACA's standards. The BOP, for one, rejected strip searches of those arrested for misdemeanors or civil contempt absent reasonable suspicion or written consent of the detainee. U.S. Dep't of Justice, BOP, Program Statement No. 5140.38, Civil Contempt of Court Commitments § 11, at 5 (July 1, 2004), http://www.bop.gov/policy/progstat/5140_038.pdf; U.S. Dep't of Justice, BOP, Program Statement No. 7331.04, Pretrial Inmates § 9(b), at 6 (Jan. 31, 2003), http://www.bop.gov/policy/progstat/7331_004.pdf.

Numerous state legislatures had also limited strip searches of those arrested on misdemeanors or lesser

offenses to particular instances of reasonable suspicion or probable cause, or when a judge had reviewed the charges and ordered the individual held. *See*, *e.g.*, New Jersey Stat. 2A:161A-8 (conferring authority on Commissioner of the Department of Corrections to promulgate regulations regarding strip searches of detainees) & N.J.A.C. 10A:31-8.4 (requiring a warrant; probable cause; lawful confinement and reasonable suspicion; or an emergency before a person detained for a minor offense may be strip searched); Conn. Gen. Stat. 54-33l(a) (requiring reasonable suspicion before person arrested for misdemeanor or traffic violation may be strip searched); Tenn. Code. Ann. 40-7-119(b) (same); Mo. Stat. Ann.§ 544.193(2) (requiring probable cause for anything less than a felony); Iowa Code Ann. § 804.30 (requiring probable cause for violations or simple misdemeanors); 725 Ill. Comp. Stat. Ann. 5/103-1(c) (reasonable suspicion for traffic offenses or misdemeanors); Ohio Rev. Code § 2933.32(B)(2) (probable cause); Va. Code Ann. § 19.2-59.1 (reasonable suspicion for traffic offenses or misdemeanors, absent detention pursuant to court order); Colo. Rev. Stat. § 16-3-405(1) (reasonable suspicion before arraignment on traffic or petty offense); Cal. Penal Code § 4030(f) (reasonable suspicion for misdemeanors or infraction offenses); Fla. Stat. 901.211(2) (probable cause or court-ordered detention for traffic, regulatory, or misdemeanor offenses not involving drugs or violence); Mich. Comp. Laws 764.25a (reasonable suspicion or court-ordered detention); Wash. Rev. Code. § 10.79.130 (same); K.S.A. § 22-2521 (probable cause for nonviolent misdemeanors or lesser offenses).

The weight of authority in the federal circuit courts was to the same effect. *See*, *e.g.*, *Roberts v. Rhode*

Island, 239 F.3d 107, 112-113 (1st Cir. 2001) (blanket strip search of minor offenders committed to state prisons held unconstitutional); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (strip search of misdemeanor arrestee was unconstitutional absent reasonable suspicion that person was concealing contraband); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (strip search of woman arrested on DWI charge who would not be introduced into general population was unconstitutional); *Stewart v. Lubbock Cty. Tex.*, 767 F.2d 153, 156-157 (5th Cir. 1985) (strip search of minor offenders awaiting bond held unconstitutional absent reasonable suspicion); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) (strip search of person arrested for nonviolent minor offense or traffic violation held unreasonable absent individualized reasonable suspicion); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (same, misdemeanor arrests); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985) (same); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984) (strip search of man arrested for traffic violations, despite introduction into general population, was unconstitutional where there were no circumstances suggesting contraband). *But see Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 621 F.3d 296, 311 (3d Cir. 2010), *aff'd*, 132 S. Ct. 1510 (2012); *Bull v. City and County of San Francisco*, 595 F.3d 964, 975 (9th Cir. 2010) (en banc); *Powell v. Barrett*, 541 F.3d 1298, 1307 (11th Cir. 2008) (en banc) (case below).

These statutes, policies, and judicial decisions were well-founded. Those who are arrested on minor charges do not generally remain within a detention facility for long. Constitutional standards and state

statutes require that they be promptly seen by a judge following arrest, and a very likely result of their arraignment is release, whether on bail, on their own recognizance, or without condition because their charges have been dismissed. There is, accordingly, little need to house such individuals in the general population along with those being held pending trial or while serving sentence. Unless something about such temporary detainees' behavior suggests that they are attempting to introduce drugs, weapons, or other contraband into the facility, there can be little justification for strip searching them.

Florence eliminated the constitutional grounding of those strip search bans and limitations for individuals who need to be housed in the general population. *See Florence* at 1520-21. However, as the Petition explains (Pet. at 14-18), this Court expressly qualified the limits of its ruling by leaving open the possibility that strip searches might be unconstitutional if performed before arraignment or where the detainee could be held outside the general population. *See Florence* at 1522-23. Strip searches of those who have been ordered released ought to give this Court even greater pause, as these individuals "are no longer prisoners in the eyes of the law." *Barnes v. District of Columbia*, 793 F. Supp. 2d 260, 289-90 (D.D.C. 2011).

The Eleventh Circuit decision ignores the Court's careful demarcation of its ruling, and answers the questions this Court left open in favor of blanket strip searches of all detainees entering the general population in all circumstances, leaving nothing but executive discretion between individuals arrested for minor offenses, immigration offenses, or civil contempt

and the humiliation of a strip search—even if they have not yet been arraigned, and even if they have been ordered released. That executive discretion is not to be trusted as a bulwark against arbitrary and unreasonable searches. As the Petition describes, individuals have been strip searched following arrests for such trivialities as honking a car horn when it was not an emergency, trespassing at an antiwar demonstration, driving while a license was inaccessible, making an illegal left turn, attending an outdoor party without a permit, failing to disperse from a political protest, driving with a suspended license, falsely reporting an incident, refusing to sign a summons for a leash law violation, failing to license a dog, failing to appear in court for five-dollar parking violations, driving with a noisy muffler, failing to use a turn signal, and riding a bicycle without an audible bell. Pet at 32-33 n.6.

The Eleventh Circuit's extreme deference to prison staff and misreading of this Court's precedents to the detriment of detainees are reminiscent of that Circuit's earlier decision in *Hope v. Pelzer*, 240 F.3d 975 (11th Cir. 2001). There, the Circuit granted qualified immunity to prison guards who cuffed a shirtless inmate to a hitching post for seven hours, offered him water once or twice, and never permitted him to use the bathroom. *Id*. at 976. The Circuit concluded that, because the facts of *Hope* were not "materially similar" to those of its own prior cases finding use of the hitching post unconstitutional, the defendants were immune from suit. *Id*. at 981. This Court granted *certiorari* and reversed. *Hope v. Pelzer*, 536 U.S. 730 (2002). The Eleventh Circuit had applied the wrong standard for qualified immunity, despite "clear"

precedent from this Court rejecting the Circuit's approach. *See id*. at 741 ("Our opinion in [*United States v.*] *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be 'fundamentally similar.'"). The Circuit had also ignored "clearly established" authority from this Court, its own prior cases, a state regulation, and a federal Department of Justice report indicating that use of the hitching post was "a clear violation of the Eighth Amendment." *Id*. at 741-42.

The decision below merits review for analogous reasons. In purported reliance on *Florence*, the Eleventh Circuit conferred unlimited authority on prison staff to conduct strip searches of anyone introduced into the general population, even if there is no reason to believe the person possesses contraband, and even if there is no reason for introduction into the general population because the detainee has not yet been arraigned or has been ordered released. The Circuit thus ignored this Court's careful limitation of its prior decision, with drastic consequences for the hundreds of thousands of individuals detained annually in that Circuit.

II. There Are Feasible Alternatives to Blanket Strip Searches, But the Eleventh Circuit Rule Makes Them Irrelevant

The Court should also intervene now and reverse the Eleventh Circuit's decision because it discourages the development and use of simple administrative and

technological alternatives to strip searches by making their availability irrelevant.

Under this Court's precedents in *Bell v. Wolfish* and *Florence*, the reasonableness of strip searches "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. 520, 559 (1979). *See also Florence*, 132 S. Ct. at 1516 ("[t]he need for a particular search must be balanced against the resulting invasion of personal rights"). As both the Chief Justice and Justice Alito identified in *Florence*, the need for a search may depend on the existence of alternatives. *See* 132 S. Ct. at 1523 (in upholding strip search of detainee, finding it "important" that "there was apparently no alternative . . . to holding him in the general jail population") (Roberts, C.J.); *id*. at 1524 (for pre-arraignment detainees "who could be held in available facilities apart from the general population[,]" a strip search "may not be reasonable, particularly if an alternative procedure is feasible") (Alito, J.). The Eleventh Circuit's blanket strip search rule eliminates the role of alternatives in the Fourth Amendment analysis, and so removes the incentive to use existing alternatives or develop additional ones.

This elimination of incentives to use effective, less intrusive alternatives to strip searches is even more troubling since feasible administrative and technological alternatives already exist. The lynchpin of the Eleventh Circuit rule is admission to the general population. *See Powell v. Sheriff, Fulton Cnty. Georgia*, 511 F. App'x 957, 964 (11th Cir. 2013) ("At the end of the day, each Plaintiff here—whether after a first appearance hearing at the Jail or after court

returns—was actually placed in the general Jail population and the challenged strip searches occurred due to their entering for the first time or reentering the general Jail population; thus, we conclude Plaintiffs have not shown a violation of their constitutional rights under the Fourth Amendment."). Yet there are numerous administrative alternatives to ensure that those who do not need to enter the general population are kept out of it, and so are not subjected to unnecessary strip searches. For example, where individuals have been ordered released by a court, there is no reason that jail administrators could not complete the release paperwork and check for any outstanding warrants at the courthouse, rather than returning detainees to the jail and placing them into the general population solely in order to process them. Both Los Angeles and the District of Columbia have adopted this approach. *See* L.A. County Sheriff's Dep't, 17th Semiannual Report 75-76 (Nov. 2003), http://file.lacounty.gov/lac/mbobb17.pdf.; *Bynum v. District of Columbia*, 384 F. Supp. 2d 342, 344 (D.D.C. 2005). As another example, for those minor offense detainees not yet arraigned by a neutral magistrate—who thus may be ordered released on bond or on their own recognizance—there is no reason why administrators could not keep them outside of the general population until they have made their first court appearance. The facility at issue in the Petition has sometimes done just that. Pet. at 7.

There are also alternative search techniques that would permit the discovery of contraband without strip searches. Pat-downs and passes will find anything hidden under the clothing, but not in a body cavity. *See* U.S. Dep't of Justice, National Institute of

Corrections, *Jails and the Constitution: An Overview*, at 35 (2d ed. Sept. 2007) (reviewing litigation over strip searches, and concluding that "jail officials could not show that any significant amount of contraband, undetectable in a pat search, entered the jail via persons arrested for minor offenses such as unpaid parking tickets"). Body orifice scanner ("BOSS") chairs can be used to identify metal objects hidden in body cavities. And more effective technologies are on the near horizon. The National Institute of Justice has funded the development of devices that use electric field tomography (akin to an MRI) to detect not only metallic objects, but also drugs, money, chemicals, or any other foreign object inside a body cavity—without forcing an individual to disrobe, take submissive postures, and endure close visual inspection, and without the apparent health risks of backscatter machines. *See*, *e.g.*, Ariel Whitworth, NIJ Update, Detecting Contraband: Current and Emerging Technologies and Limitations, Corrections Today, at 105 (Oct. 2010); *see also* http://www.nij.gov/topics/technology/detection-surveillance/contraband-detection/person.htm.

The Eleventh Circuit rule makes the availability of these and any other administrative and technological alternatives constitutionally irrelevant, eliminating any legal incentive to take advantage of the alternatives that already exist or to develop additional ones, and entrenching the continued use of degrading, traumatic, and unnecessary strip searches. This Court's intervention is warranted to reestablish the importance of these alternatives in the Fourth Amendment balancing analysis.

III. Limiting Strip Searches Before Arraignment and After Release to Instances of Individualized Reasonable Suspicion Strikes the Appropriate Balance Between Institutional Security and Individual Privacy

Finally, this Court should grant *certiorari* in order to establish that, before arraignment and after release, the Fourth Amendment requires that strip searches be supported by individualized reasonable suspicion. This standard, which is the same applied to strip searches of prison visitors, strikes the appropriate balance between institutional security and individual privacy.

By the mid-1990s, "[i]n a long and unbroken series of decisions by our sister circuits stretching back to the early 1980s, it had become well established . . . that strip searches of prison visitors were unconstitutional in the absence of reasonable suspicion that the visitor was carrying contraband." *Burgess v. Lowery*, 201 F.3d 942, 945 (7th Cir. 2000). *See also Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996) ("In determining the level of individualized suspicion against which to test the constitutionality of prison-visitor strip searches with a view to striking the proper balance between respecting the legitimate privacy expectations of prison visitors and the need to maintain prison security, courts have converged upon one common benchmark: the standard of 'reasonable suspicion.'"); *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995) (need for reasonable suspicion was "clearly established" by 1990); *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997) (same); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982); *Thorne v. Jones*, 765 F.2d 1270, 1277 (5th Cir. 1985).

The rationale for requiring individualized reasonable suspicion for strip searches of visitors is that, while their expectations of privacy are "diminished" when they enter a prison owing to the "exigencies of prison security," visitors remain "free citizens" who are separated from inmates by the "'harsh facts of criminal conviction and incarceration.'" *Blackburn v. Snow*, 771 F.2d 556, 563 (1st Cir. 1985)(quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985)). The same rationale applies to those who have not yet been arraigned, or who have been ordered released, and so need not be introduced into the general population. Before arraignment, detention is only for the purpose of ensuring that "the suspect will [not] escape or commit further crimes while the police submit their evidence to a magistrate." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). After a release order, detention is only for the purpose of conducting administrative procedures incident to that release, such as checking for warrants and confirming the detainee's identity. *See*, *e.g.*, *Brass v. County of L.A.*, 328 F.3d 1192, 1199-1200 (9th Cir. 2003); *Lewis v. O'Grady*, 853 F.2d 1366, 1370 (7th Cir. 1988). In both situations, the "harsh facts of criminal conviction and incarceration," *T.L.O.*, 469 U.S. at 338, separate the individual who has not yet been arraigned or who has been ordered released from the inmate held pending trial on order of a neutral magistrate or following conviction by a jury. The results of the Fourth Amendment balancing test should reflect the different purposes of detention, and the heightened liberty interests of detainees, during these periods.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of *certiorari* and reverse the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

CHRISTOPHER A. WIMMER
Counsel of Record
EMERGENT LEGAL
25 Taylor Street, Suite 410
San Francisco, CA 94102
(415) 894-9284
cwimmer@emergentlegal.com

HOWARD A. FRIEDMAN
LAW OFFICES OF HOWARD FRIEDMAN, P.C.
90 Canal Street, 5th Floor
Boston, MA 02114
(617) 742-4100

LANCE WEBER
HUMAN RIGHTS DEFENSE CENTER
3878 Connecticut Street
St. Louis, MO 63116
(603) 903-3410

Counsel for Amici Curiae
Florida Justice Institute, Inc.,
Human Rights Defense Center,
National Police Accountability Project,
and Southern Center for Human Rights