IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY BULL, et al., Plaintiffs/Appellees, vs. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants/Appellants.	9th Circuit Case No. 06-15566 (Consolidated with Docket No. 05-17080) (U.S. District Court No. C 03-1840 CRB N.D. Cal. San Francisco)

DEFENDANTS'/APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC* (FRAP 35, 40)

On Appeal from the United States District Court
for the Northern District of California

The Honorable Charles R. Breyer

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INTRODUCTION AND REASONS FOR GRANTING REHEARING OR REHEARING *EN BANC*

Defendants-Appellants ("Defendants") petition for rehearing or rehearing *en banc* of the divided panel decision of August 22, 2008 affirming the district court's denial of qualified immunity to San Francisco Sheriff Michael Hennessey.

From April 2000 through December 2003, searches of the general jail population in San Francisco's urban jail system uncovered over 1,500 items of contraband. This contraband included shanks (home-made knives), lighters, needles, cocaine, methamphetamines, and heroin. The persons smuggling this contraband were not limited to those arrested on charges involving drugs, weapons, or violence. Instead, many were persons arrested for minor violations, such as shoplifting and traffic violations. These persons often hid the drugs or weapons on their body or inside their bodily orifices in an effort to evade confiscation.

Based on experience, San Francisco jail officials knew that new arrestees were the most likely smugglers of contraband into the general jail population. Those officials also knew that visual strip searches were effective at deterring and reducing contraband smuggling. Thus, San Francisco implemented a visual strip search policy. Under this policy, after determining that an arrestee was ineligible for citation release and after providing a reasonable opportunity to post bail, San Francisco visually strip searched those arrestees who were about to be transferred into the general jail population. As a result of these searches, San Francisco confiscated numerous items of contraband including drugs and weapons that it would not have discovered using other types of searches—such as a pat down search or a search using a metal detector. Indeed, the effectiveness of San Francisco's policy is starkly illustrated by the death of a jail inmate from a drug overdose soon after San Francisco halted its policy in response to the filing of this lawsuit.

Arrestees who were strip searched by San Francisco before January 2004 filed this class action under 42 U.S.C. § 1983, alleging that San Francisco's visual strip search policy violated the Fourth Amendment. In a divided opinion with a strong dissent, the panel majority held that, under Ninth Circuit precedents, San Francisco's visual strip search policy was unconstitutional under the Fourth Amendment and that the illegality of the policy was clearly established at the time. The panel held that strip searches of pretrial detainees are unconstitutional "in the absence of reasonable individualized suspicion." *Bull v. City and County of San Francisco*, 539 F.3d 1193, 1196, 1201 (9th Cir. 2008).

Although Judges Thomas and Ikuta affirmed the denial of qualified immunity, Judge Ikuta, compelled by Ninth Circuit precedents, concurred "with reluctance and grave concern." *Id.* at 1202. Because the panel's holding and Circuit precedents "contradict[ed]" the United States Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), and thereby placed lives at risk, she urged "a reconsideration of our case law." *Bull*, 539 F.3d at 1205. In dissent, Judge Tallman agreed that the majority's holding conflicted with *Bell* and placed lives at risk but concluded that San Francisco's policy "was reasonable under the Fourth Amendment and resulted in no constitutional violation." *Id.* at 1212. Thus, two judges on the panel—a majority—believed that San Francisco's strip search policy was constitutional notwithstanding Ninth Circuit case law.

San Francisco now petitions for rehearing or rehearing *en banc*. As explained below, this Court should grant this petition because the panel majority's decision contradicts the Supreme Court's decision in *Bell*—the seminal case regarding strip searches of pretrial detainees—and the rulings of this and other federal circuits.

First, the panel majority's decision strayed from *Bell*. In *Bell*, the Supreme Court held that a policy of strip searching inmates after contact visits without

individualized, reasonable suspicion was constitutional. After balancing "the need for the particular search against the invasion of personal rights that the search entails," the court concluded that prison administrators should be accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547. In its earlier precedents, this Court misconstrued *Bell's* balancing test and failed to accord the required deference to jail administrators when it suggested that arrestees transferred to the general population cannot be strip searched absent an individualized, reasonable suspicion that they have contraband. As Judges Tallman and Ikuta correctly observed: "[o]ur ship has sailed far from the course charted by the United States Supreme Court in *Bell*." *Bull*, 539 F.3d at 1205; *see also Id.* at 1203 ("Ninth Circuit precedent has wandered far from *Bell*, as the dissent points out"). Thus, this Court should grant rehearing or rehearing *en banc* and reconsider *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), and *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 714 (9th Cir. 1990).

Second, the panel majority's decision conflicts with a recent *en banc* decision from the Eleventh Circuit. In *Powell v. Barrett*, 2008 WL 4072800 (11th Cir. Sept. 4, 2008), the Eleventh Circuit, in an 11-1 decision, upheld a policy of "strip searching all arrestees" to be transferred into the general jail population "even without a reasonable suspicion to believe that they may be concealing contraband." Thus, the Eleventh Circuit has taken a position contrary to the position that the Ninth Circuit has taken here. And this Court should grant rehearing or rehearing *en banc* in order to address this intercircuit conflict.

Third, the panel majority should have distinguished Ninth Circuit case law based on the unique record in this case. Although prior Ninth Circuit cases have held that strip searches of individual pretrial detainees violate the Fourth

Amendment in the absence of individualized, reasonable suspicion, none of those cases had a well-documented record of contraband smuggling as in this case. Moreover, many of those cases involved detainees who were awaiting bail or citation release at the time of the search. Absent evidence of a serious smuggling problem, this Court concluded that the privacy concerns of detainees who would only spend a few hours in jail outweighed the security interests of the facility. The same is not true here. As Judge Tallman aptly observed, "[w]e have never before been presented with such a compelling record of dangerous smuggling activity." *Bull*, 539 F.3d at 1206. Balancing inmate privacy against the jail's security in light of this record as required by Ninth Circuit precedents compels a different conclusion—that San Francisco's strip search policy *is* constitutional. Finally, even if the panel majority properly held that San Francisco's policy violated the Fourth Amendment, it erred in holding that the unlawfulness of the policy was clearly established at the time. In light of the serious smuggling problem plaguing San Francisco's jails, a reasonable jail official could believe that it was lawful to strip search arrestees who were unavoidably about to be placed in the general jail population.

The panel majority's decision poses a real danger to detention facilities throughout the Ninth Circuit. Like San Francisco jails, these facilities face a serious contraband smuggling problem that threatens the lives of their inmates and employees. Visual strip searches offer an effective way for these facilities to combat this problem. If allowed to stand, this decision will substitute the Court's judgment for that of experienced jail administrators. And in so doing, the Court will expose jail inmates and employees throughout the Ninth Circuit to injury and, sadly, even death. As Judge Ikuta noted, “by disregarding the jail administrators’ urgent concerns about a serious contraband smuggling problem, I agree with the dissent that we are potentially putting lives in the San Francisco detention system

at risk." *Bull*, 539 F.3d at 1202. Rather than place lives at risk, this Court should grant rehearing or rehearing *en banc*.

STATEMENT OF FACTS

This is a class action challenging San Francisco's former strip search policy. Until January 2004, San Francisco visually strip searched pretrial detainees who (a) had been given a reasonable opportunity to post bail or cite out (citation and release) before the search, and (b) were about to be transferred to the general jail population.[1] San Francisco jail administrators implemented this policy in order to combat contraband smuggling in its urban jails.

The smuggling problem in San Francisco jails is grave. From April 2000 through December 2003, searches of the general jail population uncovered over 1,500 items—including shanks, knives, lighters, rock cocaine, cocaine powder, methamphetamines, hypodermic needles, marijuana, heroin, and ecstasy pills. (E.R. IV: 669).[2] When prisoners smuggle drugs and weapons on or inside their bodies, employees, visitors, and inmates are put in danger. Indeed, courts have recognized the inherent danger posed by such smuggling. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984) (taking judicial notice of the "perplexing" problem of contraband flowing into prisons). And the record here shows that nothing less than the lives of inmates and staff are at stake.

All new arrestees in San Francisco are brought to County Jail No. 9, San Francisco's intake and release facility. At the facility, arrestees are booked and processed, and a determination is made as to whether they will be released or housed in the general jail population. (E.R. IV: 847). Because County Jail No. 9

[1] Because of this class action, the Sheriff instituted new search policies in January 2004 that are still in effect. These new policies are not at issue here.

[2] "E.R." refers to Appellants' Excerpts of Record filed in the consolidated companion appeal, Docket No. 05-17080.

is a temporary detention facility and does not contain beds for extended stays, all arrestees who are classified for housing are transferred to another San Francisco jail within 24 hours. (E.R. IV: 857). County Jail No. 9 is thus the gateway into the San Francisco jail system for both people and contraband.

From their experience, San Francisco jail administrators knew that arrestees received for booking and transferred into the general jail population were the most likely smugglers of drugs and weapons into San Francisco jails. (E.R. IV: 644, 646). Thus, after giving arrestees a reasonable opportunity to post bail, persons who were not eligible for citation release and did not post bail were visually strip searched before entering the general jail population. (E.R. IV: 653, 849). These searches were visual only; they involved no touching, occurred in private, and were conducted by a deputy of the same gender as the arrestee. (E.R. IV: 653-55.) Arrestees were given as long as possible to post bail or cite out before being strip searched. (E.R. IV: 861, 863, 868). The purpose of these searches was to prevent contraband smuggling, for the safety of inmates and staff. (E.R. IV: 644, 852).

And these visual strip searches prevented a huge amount of contraband from entering the jails. The evidentiary record reveals that the strip searches uncovered numerous knives, scissors, syringes, cocaine, heroin, and other illegal drugs hidden in the rectums, vaginas, mouths, or ears of new arrestees.[3]

Arrestees who attempted to smuggle drugs and weapons into San Francisco jails were not limited to persons arrested on charges involving drugs, weapons or violence. Indeed, the record reveals that persons who were not arrested for crimes

[3] E.R. IV: 646, 667; E.R. III: 463, 464, 471-74, 476, 478, 480-81, 483-84, 486-87, 497-99, 502, 506, 517, 521-22, 525-26, 532, 534-35, 54-45, 547-48, 551, 553, 558, 560, 563, 565, 567, 571, 576-77, 579, 582-84, 586, 591, 595, 604, 607, 609, 611-14, 617, 621, 623, 627-30, 632-34, 636-37.

involving drugs, weapons, or violence secreted drugs and other dangerous contraband in their bodily orifices.[4]

Based on the experience of jail administrators, visual strip searches of new arrestees reduced the flow of contraband into the jails and decreased the risk of injury to inmates, staff, and visitors. (E.R. IV: 645-46). This too is borne out by the record. After San Francisco ended its strip search policy, an inmate died from an overdose of cocaine that was smuggled into the general jail population at the County Jail. (E.R. V: 1058-60).

ARGUMENT

I. THE COURT SHOULD GRANT REHEARING OR REHEARING EN BANC BECAUSE THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT AUTHORITY.

A. The Panel's Holding Contradicts the Supreme Court's Decision In *Bell.*

Although the panel affirmed the district court's order holding that San Francisco's strip search policy violated the Fourth Amendment, a majority—Judges Ikuta and Tallman—agreed that the panel's holding contradicted *Bell*. Indeed, Judge Ikuta, who reluctantly concurred, stated that "a reconsideration of our case law is urgently needed." *Bull*, 539 F.3d at 1205. This Court should heed Judges Ikuta and Tallman and grant rehearing or rehearing *en banc*.

In *Bell*, the Supreme Court held that a detention facility may limit a pretrial detainee's constitutional rights in order to maintain "institutional security" and preserve "internal order and discipline." 441 U.S. at 546.[5] In determining whether a facility's measures are constitutional, courts apply a fact-intensive balancing test:

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[4] E.R. III: 474, 478, 527, 532, 534, 577, 595, 601, 603, 609, 612-14; Y.E.R. III: 414-15, 416-19, 427-28, 435-38, 439-42, 443-47, 448-49, 450-53, 454-57, 464-68, 488-89, 490-91. "Y.E.R." refers to Appellants' Excerpts of Record in *Yourke v. City and County of San Francisco*, Docket No. 06-16450, which were judicially noticed.

[5] Federal case law makes it clear that there should be no distinction between pretrial detainees and convicted inmates. As the Supreme Court explained in *Bell*,

(continued on next page)

> The test of reasonableness under the Fourth Amendment ... requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Id*. at 559.

Under this test, "even when an institutional restriction infringes a specific constitutional guarantee ... the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Id*. at 546-47. Courts must accord "wide-ranging deference" to prison officials "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id*. at 547. Further, "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id*. at 548 (internal quotations omitted).

Applying these principles, the Supreme Court in *Bell* upheld the detention facility's policy of conducting a body-cavity search after a detainee had a contact visit with a person outside the facility. It did so even though only one search conducted by the facility had resulted in the discovery of contraband. *Id.* at 558. "Balancing the significant and legitimate security interests of the institution against the privacy interest of the inmates," the Court concluded that the strip search policy was reasonable under the Fourth Amendment. *Id.* at 560.

(footnote continued from previous page)
441 U.S. at 546 n.28, "there is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." *Id.* *See also Dufrin v. Spreen*, 712 F.2d 1084, 1087-88 (6th Cir. 1983) ("It is clear that prison officials need not distinguish between convicted inmates and pretrial detainees in reviewing their security practices").

Under *Bell*, San Francisco's strip search policy is constitutional. The smuggling of drugs and weapons into San Francisco jails is pervasive and poses a serious danger to jail inmates and employees. Based on their experience, jail administrators concluded that visual strip searches were effective in combating this smuggling problem and protecting inmates and staff. The subsequent death of an inmate due to a drug overdose after San Francisco halted its policy supports this conclusion. Balancing the "significant and legitimate security interests" of San Francisco jails against privacy concerns as required by *Bell*, this Court should have upheld the constitutionality of San Francisco's strip search policy. *Bell*, 441 U.S. at 560.

Both Judges Tallman and Ikuta agreed. As Judge Tallman explained:

> San Francisco has demonstrated beyond cavil that the smuggling of drugs, weapons, and other contraband into the general jail population is a common and pervasive problem that imposes a security risk endangering both jail inmates and jail employees. While acknowledging the existence of this evidence, the majority extends Ninth Circuit restrictions and adopts a per se rule requiring reasonable suspicion to strip search a pretrial detainee transferred into the general population for housing who does not otherwise meet the category of arrestees the majority approves for strip-searching. But the newly-minted rule runs contrary to Supreme Court precedent, impedes jail administration, and further endangers the safety of jail inmates and employees. *Bull*, 539 F.3d at 1206.

Similarly, Judge Ikuta stated:

> In considering whether the policy was reasonable, we must defer to the judgment of jail administrators. If we did so, and thereby followed the directive of the Supreme Court, we would be compelled to uphold the strip search policy as reasonable given the substantial evidence in the record illustrating the dire security needs facing the facility. *Id.* at 1203.

Only prior Ninth Circuit precedents—whose "balancing test bears little relation to *Bell*'s"—compelled Judge Ikuta to "reluctantly concur in the majority's determination that the strip search policy was unconstitutional." *Bull*, 539 F.3d at

1204-1205. Those precedents should be reconsidered not only because of *Bell* but to ensure the safety of jail inmates and employees.

B. The Panel's Decision Conflicts With Other Federal Circuit Authority.

Just weeks after the panel concluded that San Francisco's strip search policy violated the Fourth Amendment, the Eleventh Circuit reached the opposite conclusion. In an 11-1 *en banc* decision, the Eleventh Circuit upheld a policy of "strip searching all arrestees as part of the process of booking them into the general population of a detention facility, even without a reasonable suspicion to believe that they may be concealing contraband." *Powell*, 2008 WL 4072800, at *1. Relying on *Bell*, it reversed prior Eleventh Circuit precedents that had held—like the Ninth Circuit—that individualized reasonable suspicion was necessary. As the court explained, "[e]mployees, visitors, and (not least of all) the detained inmates themselves face a real threat of violence, and administrators must be concerned on a daily basis with the smuggling of contraband by inmates accused of misdemeanors as well as those accused of felonies." *Id.* at *13. "These reasons support the expert opinion of jail administrators that all of those who are to be detained in the general population of a detention facility should be strip searched when they enter or re-enter it." *Id.* Because the panel's decision conflicts with *Powell*, the Court should grant rehearing or rehearing *en banc*.

II. THE COURT SHOULD GRANT REHEARING OR REHEARING EN BANC BECAUSE SAN FRANCISCO'S STRIP SEARCH POLICY IS CONSTITUTIONAL UNDER NINTH CIRCUIT PRECEDENTS.

The record of drug and weapons smuggling in this case is unprecedented. As Judge Tallman aptly noted, this Court has "never before been presented with such a compelling record of dangerous smuggling activity." *Bull*, 539 F.3d at 1206. Even under Ninth Circuit precedents, this record constitutionally justifies San Francisco’s strip search policy.

Under prior Ninth Circuit cases, a strip search policy must be reasonably related to the penal institution's interest in maintaining security—which must be sufficiently documented. *See Kennedy*, 901 F.2d at 713 ("the enacted policy, if it is to be constitutional, must be 'reasonably related' to the penal institution's interest in maintaining security"); *Giles*, 746 F.2d at 618 (holding that strip search must bear some "discernible relationship to security needs")(citations and quotations omitted). And in those prior cases, this Court invalidated various strip search policies because they were not reasonably related to the institution's security interest.

But this Court has never considered "a record as fully developed and complete as that provided by San Francisco in support of its policy." *Bull*, 539 F.3d at 1207. In *Giles*, 746 F.2d at 617, "the incidence of smuggling activity at the" jail was "minimal." Similarly, in *Kennedy*, 901 F.2d at 713, jail officials provided no "documentation (or even assertion) that felony arrestees have attempted to smuggle contraband into the jail in greater frequency than misdemeanor arrestees."[6] Finally, the Court in *Thompson*, 885 F.2d 1438 makes no mention of any contraband smuggling in the record.[7]

By contrast, San Francisco has documented the serious smuggling problem in its jails and has demonstrated that a substantial risk of smuggling exists regardless of whether the detainee is arrested for crimes involving drugs, weapons,

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[6] The strip search in *Kennedy* was far more intrusive than the strip searches at issue here. In *Kennedy*, the detainee was "required to insert her fingers into her vagina and anus"—and a policewoman touched her—in order to "check whether she had concealed any drugs or contraband in these body cavities." 901 F.2d at 711. San Francisco's strip searches involve no physical penetration and no touching.

[7] Because San Francisco only searched arrestees who were going to be transferred into the general jail population, other Ninth Circuit decisions – which do not involve arrestees transferred to the general jail population – are inapposite. *See Ward v. County of San Diego*, 791 F.2d 1328, 1333 (9th Cir. 1985); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-872 (9th Cir. 1993).

or violence. Thus, San Francisco has established that its strip search policy is "reasonably related" to its interest in maintaining jail security.

According to the panel majority, San Francisco's failure to clearly document any smuggling by an arrestee who would qualify as a member of the class – i.e., a person who was not arrested on a charge involving drugs, weapons, or violence, who did not have a criminal history involving drugs, weapons, or violence, and whose behavior did not create an individualized suspicion warranting a search – establishes that its strip search policy was not reasonably related to security interests. But the panel majority ignores the practical realities of the smuggling problem. As Judge Tallman explained, "[i]nmates returning from a court appearance outside jail pose the same risk to the general jail population upon return as do new arrestees coming in from the outside." *Bull*, 539 F.3d at 1211. Moreover, as evidenced by the record, arrestees who were not arrested on charges involving drugs, weapons, or violence regularly attempted to smuggle drugs and weapons into San Francisco jails. Finally, "officials at a county jail . . . usually know very little about the new inmates they receive or the security risk they present at the time of their arrival." *Id.* at 1211 (internal quotations omitted). In light of these practical realities, the panel majority's parsing of the record is fallacious. By restricting San Francisco's options for dealing with its serious smuggling problem based on the vagaries of the class definitions used by plaintiffs, the majority not only jeopardizes jail security, but also the lives of jail inmates and employees.

Because he gave insufficient weight to the security risks, Judge Thomas quite amazingly, stated that “we cannot conclude that there is any reasonable relationship between the criteria triggering a search (classification for housing) and the interest in conducting the search (eliminating the introduction of contraband).” *Bull*, 539 F.3d at 1199. If the panel majority had conducted the "reasonable

relationship" inquiry that Ninth Circuit precedents require, it would have found San Francisco's strip search policy constitutional.

Finally, contrary to the panel majority's assertion, *Id*. at 1197, 1199, neither *Giles* nor *Thompson* adopted a per se rule requiring individualized reasonable suspicion for a strip search of a pretrial detainee transferred into the general jail population.[8] *Giles*, 746 F.2d at 618-9, held that placement in the general jail population was not enough to validate a strip search because "intermingling [was] both limited and avoidable." *Thompson*, 885 F.2d at 1447, held that the placement of an arrestee "into contact with the general jail population" "by itself cannot justify a strip search." By contrast, San Francisco did not strip search a pretrial detainee until intermingling with the general jail population was unavoidable. And San Francisco did not implement its strip search policy *solely* because detainees would be placed into contact with the general jail population. It implemented the policy also based on (1) the grave, well-documented smuggling problem (not present in *Giles* or *Thompson*) in San Francisco jails, which has caused injuries and death, and (2) the judgment of experienced jail administrators that arrestees transferred into the general jail population pose the greatest risk of smuggling contraband. These additional factors render San Francisco's policy constitutional under Ninth Circuit precedents.

III. THE COURT SHOULD GRANT REHEARING OR REHEARING EN BANC BECAUSE SAN FRANCISCO'S VIOLATION OF THE FOURTH AMENDMENT WAS NOT CLEARLY ESTABLISHED.

According to the panel majority, "it was clearly established in this Circuit that conducting strip searches of pre-arraignment arrestees based solely on the fact

[8] To the extent *Giles* and *Thompson* appear to hold otherwise, these pronouncements are dicta, as Judge Tallman rightfully observed. *Bull*, 539 F.3d at 1208 ("[N]either case [*Giles* or *Thompson*] addressed a record as persuasive as that presented by San Francisco, and both cases based their holdings on separate legal grounds, making their broad pronouncements dicta.")

that they were assigned for transfer to the general population was unconstitutional." *Bull*, 539 F.3d at 1199. It therefore concluded that no reasonable person could have believed that San Francisco's strip search policy was lawful at the time of its implementation. But the evidentiary record in this case distinguishes this case from every other case. Because the majority erred in denying qualified immunity, this Court should grant rehearing or rehearing en banc.

Qualified immunity ensures that officers, before they are held liable for constitutional violations, have "fair notice that [their] conduct was unlawful." *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The inquiry into whether conduct violates clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id*. at 198 (citation and quotations omitted).

As explained above, prior Ninth Circuit cases did not involve a well-documented record of contraband smuggling or inmates being searched only after failing to post bail or failing to be cited and released. Unlike the defendants in those cases, San Francisco did not search detainees awaiting bail or citation release and whose transfer to the general jail population was avoidable. And unlike those defendants, San Francisco has demonstrated a serious smuggling problem in its jails—involving all arrestees, and not just persons arrested for offenses involving drugs, violence, or weapons. This smuggling problem jeopardizes the lives of its jail inmates and employees. Balancing privacy concerns against the security interests in light of the unique record in this case, a reasonable jail official could believe that San Francisco's strip search policy was constitutional. Accordingly, this Court should grant rehearing or rehearing en banc.

IV. PERMITTING THE PANEL MAJORITY OPINION TO STAND WILL HAVE SERIOUS NEGATIVE REPERCUSSIONS FOR DETENTION FACILITIES THROUGHOUT THE NINTH CIRCUIT.

The San Francisco jails are not the only ones facing the troubling problem of contraband smuggling. For example, the County of San Mateo submitted an amicus brief explaining that San Mateo jails face a similar scourge. And there can be little doubt that this issue affects county jails and federal prisons throughout the Ninth Circuit. *See, e.g.*, *Johannes v. Alameda County Sheriff's Dep't.*, 2006 WL 2504400, at *4-6 (N.D. Cal. Aug. 29, 2006) (discussing the contraband problem in a large county jail and the usefulness of strip searches in combating the problem). Like San Francisco, the administrators of these jails and prisons believe that a visual strip search policy is the only way to effectively combat the problem. Preventing these administrators from implementing such a policy jeopardizes the safety of inmates and employees. As the dissent succinctly and powerfully stated, "When people are dying as a result of our errant jurisprudence, it is time to correct the course of our law." *Bull*, 539 F.3d at 1213.

V. CONCLUSION

Based on the foregoing, the Court grant rehearing or rehearing *en banc*.

DATED: October 3, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. Pursuant to Federal Rule of Appellate Procedure 35(b)(2), this Petition For Rehearing and Rehearing En Banc does not exceed 15 pages, excluding material not counted under Rule 32.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 3, 2008.

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APPELLATE CM/ECF SYSTEM CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2008I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the following party in this case is a registered CM/ECF user and that service will be accomplished by the appellate CM/ECF system.

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06-15566
(Consolidated with 05-17080)

IN THE UNITED STATES COURT OF APPEALS

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For the Northern District of California
No. C 03-1840
The Honorable Charles R. Breyer, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

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California State Sheriffs' Association

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

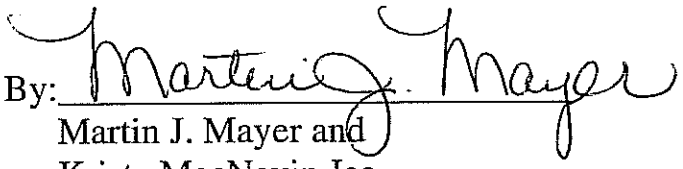
The California State Sheriff's Association ("CSSA") requests leave to file the attached Amicus Curiae Brief in support of Appellants' Petition for Rehearing and Rehearing En Banc ("Petition" or "Pet."), to assist this Court in resolving the important issues of law presented in this matter. CSSA represents each of the 58 Sheriffs in California. This Association is interested in this case because the issues presented have profound impact on the members of this Association as well as every jail employee and inmate under the command of the state's sheriffs.

The Applicant endeavors to provide this Court with a broad law enforcement perspective as to the issues in this matter, specifically the constitutionality of strip searching all inmates prior to their introduction into the general jail population and whether the Sheriff is entitled to qualified immunity with respect to a strip search policy.

Therefore, Applicant respectfully requests leave to file the attached Amicus Curiae brief addressing the above issues.

Dated: October 10, 2008

Respectfully submitted,
JONES & MAYER

By: 

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PROPOSED BRIEF OF AMICUS CURIAE

I. AUTHORITY TO FILE AND INTERESTS OF AMICUS

CSSA represents each of the 58 California Sheriffs. This Association is interested in this case because the issues presented have profound impact on the members of this Association as well as every jail employee and inmate under the command of the state's sheriffs. The decision of this Court in this matter will profoundly affect not only Appellants, but also the 57 other Sheriffs' Departments throughout the State of California, which also face varying degrees of drugs or weapons smuggling within their jail facilities. In fact, this Court's decision even impacts other jail facilities not represented by CSSA, such as the multiple municipal jails that house inmates on an on-going basis.

The undersigned serves as legal counsel to CSSA and has been given specific authority to make this Application.

II. STATEMENT OF FACTS

Amicus accepts the facts as set forth in the Petition, without restatement.

III. REHEARING EN BANC IS NECESSARY FOR UNIFORMITY OF DECISION AND TO SETTLE CRITICAL ISSUES OF LAW.

A rehearing en banc is appropriate when "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. Rules App.

Proced., Rule 35 (a). In particular, "a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. Rules App. Proced., Rule 35 (b)(1)(B).

As stated in the Petition, there are sufficient and appropriate grounds for this Court to grant rehearing or rehearing en banc. Appellants have specifically noted that this Court's decision conflicts with United States Supreme Court precedent, Bell v. Wolfish, 441 U.S. 520 (1979), as well as the recent decision of another Court of Appeal, Powell v. Barrett, 2008 U.S. App. LEXIS 18907 (11th Cir. 2008), and it involves critical issues of statewide importance to all Sheriffs.

A. Appellants' Strip Search Policy is Necessary, Justified and Constitutional.

The Court's opinion in this matter omits consideration of a very important aspect of the Sheriff's constitutional obligations. As the Court in Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989), noted, "jail officials have a constitutional obligation to provide inmates with adequate medical care and personal safety." Id. at 1447 (*citing* Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981)). The constitutional obligations of Sheriffs are not limited to the Fourth Amendment constitutional rights of an individual inmate with respect to

strip searches, or even the lesser administrative interests of penological efficiency and safety in running a jail facility, as to both inmates, employees and administration generally. An additional constitutional legal obligation exists as to a Sheriff's having to provide for the health and safety of his or her inmates. As the Thompson Court found, this obligation is of such paramount importance that "the County's interest of diagnosing severe medical problems to prevent transmission of serious disease among the general jail population is sufficiently compelling to preclude a finding that such searches [in the form of blood samples and x-rays] are unreasonable within the meaning of the Fourth Amendment." Id. It is hard to imagine that the forced "extraction of blood" or "forced submission to radioactive rays," which the Thompson Court found to be *more* intrusive than strip searches in certain respects, is constitutional in order to maintain the health and safety of inmates, but strip searches are not.

This conclusion is particularly troublesome when the specific strip search policy of Appellants and Appellants' specific justification for such policy are considered. As noted by Appellants, the strip searches at issue in this matter are "visual only; they involved no touching, occurred in private, and were conducted by a deputy of the same gender as the arrestee." (Pet., at p. 6). In addition, unlike other cases decided previously by this Court on the issue of strip searches, there is

a significant problem with contraband, including dangerous weapons, being smuggled into San Francisco County jails; jail administrators have specifically determined in their discretion that visual strip searches are an effective tool for combating such smuggling, even among those who were not arrested in connection with drugs, weapons or violence; and such searches have actually resulted in the confiscation of a significant number of contraband items. (Pet., at pp. 6-7). As Appellants aptly point out, the Supreme Court has held that "'in the *absence* of substantial evidence in the record to indicate that the officials have *exaggerated* their response to these considerations [prison administration and safeguarding institutional security], courts should ordinarily *defer* to their expert judgment in such matters.'" (Pet., at 8 (*citing* Bell, at 548) (emphasis added)).

The constitutional rights of an individual inmate cannot trump the constitutional rights of *all* inmates to safety and security in the jail setting, when they are put into the general jail population by the government. If this Court requires all Sheriffs to forego one of the only and best tools to discover dangerous contraband being smuggled into the general jail population, the Court is also requiring Sheriffs throughout the State to relinquish their duty to adequately and fully satisfy the constitutional obligation to insure the safety of all inmates. The practical reality of the Court's decision in this regard is all Sheriffs' Departments

will be subject to liability for the injury to or death of inmates that will result from the failure to find and deter contraband smuggled into the general jail populations, particularly since such efforts could have been easily thwarted by a reasonable visual strip search policy such as Appellants.

This Court must realize that the facts in Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984), are distinguishable from the set of circumstances faced by Appellants. As the dissent stated, in the opinion in the present matter and in construing Giles, "the Idaho county failed to *demonstrate* that its security interests *justified* the serious invasion of privacy created by its policy." Bull v. City and County of San Francisco, 539 F.3d 1193, 2008 U.S. App. LEXIS 18026, * 41 (9th Cir. 2008) (emphasis added) (*citing* Bell, at 617). The dissent further noted that "'[t]he record [in Giles] reveals that the incidence of smuggling activity at the Bonneville County Jail is *minimal*.'" Id. (emphasis added) (*quoting* Bell, at 617). This is in direct contrast to the detailed and specific evidence submitted by Appellants that smuggling of contraband into the jail system in the County of San Francisco is a "pervasive" problem. (Pet., at 9).

The Supreme Court's standard of deference set out in Bell, is not a call for this Court to require that jail administrators such as Appellants utilize the least restrictive method of combating the serious health and safety issues facing its

inmates and guards. This Court's opinion in this matter essentially analyzes Appellants' strip search policy under this type of rubric. Rather than truly deferring to Appellants' determination of how to address a demonstratably grave epidemic, this Court has required that Appellants show that their policy is in response to a particular problem associated with the particular class in this matter. However, the Supreme Court in Bell did not require this and the Eleventh Circuit in Powell specifically noted the absence of such a requirement. Powell v. Barrett, 2008 U.S. App. LEXIS 18907, *20-21 (11th Cir. 2008) ("[T]he Supreme Court was not ready to concede that lesser alternative analysis has any place in the Fourth Amendment area.") (*quoting* Bell, at 559 n.40 ("[T]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.") (internal quotations and citations omitted) (alteration in original)).

As the Powell Court recognized, "[t]he policy the Court upheld [in Bell] required that searches be conducted on every inmate after each contact visit, even *without* the slightest cause to suspect that the inmate was concealing contraband." Powell v. Barrett, 2008 U.S. App. LEXIS 18907, *20 (11th Cir. 2008) (emphasis added). This holding permits jail administrators to do what is necessary to satisfy their constitutional obligation to protect health and safety of *all* prisoners, as well

as protecting to rights of inmates to be subject only to *reasonable* strip searches, i.e. those searches that are conducted in a reasonable *manner* given the particular demonstrated need of the jail facility.

Even the District Court in Bell had found certain strip searches valid without any finding of cause to search a particular individual. The District Court found unconstitutional only those searches of genital and anal areas; "full body visual strip searches, which did not require the inmates to take any action to more fully expose their anal or genital areas to inspection, [were permitted] to continue without any showing of cause." Id. (*citing* United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 48 (S.D.N.Y. 1977); Bell at 558). And the Second Circuit's affirmation of the District Court's decision prohibited, without probable cause, *only* "forcing inmates to assume postures or take other actions that would more fully expose their anal and genital areas to visual inspection"; it did not prohibit strip searches entirely, or require reasonable suspicion as to particular individuals.

In addition, the justification for the strip searches was but *one* factor that the Supreme Court indicated should be evaluated in determining the reasonableness of a policy. Bell at 559. The other factors referenced in Bell related to the *manner* in which the search was conducted. All of these factors here weigh in favor of this Court finding the strip search policy of Appellants to be reasonable and

constitutional under the circumstances. As noted above, the justification for Appellants' policy is based on specific evidence of pervasive smuggling problems. Moreover, Bell did not require that the justification be specifically tailored to any specific class of persons or propensity to smuggle contraband. In addition, the searches are conducted in private and are minimally intrusive.

In fact, the Eleventh Circuit's analysis in Powell goes even further and would not seem to require any evidence of particular need, based on Bell. The Court generally states as follows:

> The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. It finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities. The Supreme Court **made no distinction in *Bell* between detainees based on whether they had been charged with misdemeanors or felonies or even with no crime at all.** Instead, the policy that the Court treated categorically, and upheld categorically, was one under which all "[i]nmates at all Bureau of Prison facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." *Bell*, 441 U.S. at 558, 99 S. Ct. at 1884. It was a **blanket policy applicable to all.**
>
> Among the "[i]nmates at all Bureau of Prison facilities, including the MCC," were detainees facing only lesser charges, people incarcerated for contempt of court, and witnesses in protective custody who had not been accused of doing anything wrong. See id. at 524 & n.3, 558, 99 S. Ct. at 1866 & n. 3, 1884.

Powell v. Barrett, 2008 U.S. App. LEXIS 18907, *23-24 (11th Cir. 2008). The

facility at issue in Bell was not "some special sort of seething cauldron of criminality," yet the Supreme Court permitted strip searches as a reasonable means to address the identified penological interests. Powell, at *33 n.3. As noted in the Petition and by the Court in Powell, there is a significant risk of contraband smuggling even among those for whom there might not otherwise be reasonable suspicion, particularly due to the influence of gangs. Powell, at *34-36 (*citing*, e.g. Johannes v. Alameda County Sheriff's Dep't, 2006 U.S. Dist. LEXIS 63378, 2006 WL 2504400, at *4-6 (N.D. Cal. 2006); Dodge v. County of Orange, 282 F. Supp. 2d 41, 46-49 (S.D.N.Y. 2003)).

Given the precise holding in Bell and its particular facts, this Court is requested to reconsider its position in this matter, taking into account the opinion and rationale in Powell, as well as the specific facts and evidence in this case. Specifically, this Court is respectfully requested to rehear this matter en banc and to determine that the strip search policy of Appellants is necessary, reasonable and constitutional. Appellants cannot be expected to satisfy their constitutional obligation to *all* inmates when this Court has effectively taken away the only and most effective method for maintaining the safety of its jail facilities. This is a matter of statewide importance and critical to the daily operations of Amicus and its members, all of the Sheriffs throughout the State of California. This issue is of

such magnitude that it is at least deserving of this Court's reconsideration en banc as well as this Court's specific evaluation of the Eleventh Circuit's recent opinion on the very same issue as are presented in this matter.

B. The Sheriff Is Entitled to Qualified Immunity.

This Court has concluded that it was clearly established in the Ninth Circuit that blanket pre-arraignment strip searches were unconstitutional. Bull, 539 F.3d 1193, 2008 U.S. App. LEXIS 18026, *18 (2008). This Court has indicated that its precedent, including the opinions in Giles and Thompson required reasonable individualized suspicion for strip searches to be conducted. However, this issue was not really settled and, until this Court's current opinion, was subject to the interpretation of multiple court decisions, involving vastly different types of searches and inmates, as well as varying degrees of evidence to support penological policies.

In Giles there was no evidence that the strip search performed on the inmate was related to any documented security risk. In fact the Giles Court indicated that the county had "*not demonstrated* that its security interests warrant the serious invasion of privacy inflicted by its policy. The *record* reveals that the incidence of smuggling activity at the Bonneville County Jail is *minimal*." Giles, at 617 (emphasis added). It was entirely reasonable to interpret this case to stand for the

proposition that a blanket, per se policy of strip searching might be permissible and constitutional where there *was* a demonstratable and serious risk. In particular, the Giles Court pointed out that only eleven instances of concealment had occurred in an eighteen-month period, with only one of significance, a weapon. Id. In contrast, Appellants here have demonstrated the significant need and the success of such a strip search policy, namely 1,500 items confiscated during more than three-year period. Indeed, they have even shown the effects of *not* having such a strip search policy, namely the death of an inmate from an overdose. (Pet. at 5-6).

In Thompson, the Court generally stated that reasonable suspicion of a particular individual was required for strip searches, but also went on to find that the taking of a blood sample and an x-ray, which were found to be *more* intrusive in certain respects than a strip search, were justified solely by "the County's interest of diagnosing severe medical problems to prevent transmission of serious disease among the general jail population." Thompson, at 1447. In fact, the Thompson Court specifically recognized the constitutional obligation of jail officials to provide for the "personal safety" of inmates. Id. (*citing Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981)). Therefore, the magnitude of the penological interests of a jail facility and the significance of the justification for a

blanket strip search policy could reasonably be seen as constitutional, since the balance would tip in favor of jail administration and the constitutional rights of all inmates to safety and security while in custody.

Based on these authorities, it cannot be said to be beyond a reasonable officer's belief that he or she can balance the rights of *all* inmates to safety with the rights of individual inmates in being reasonably searched. An officer must satisfy *both* requirements and is not unreasonable in not being able to fully satisfy both where they are clearly conflicting.

Moreover, Thompson cannot reasonably be said to be support for the proposition that individuals held on minor offenses cannot be subject to a blanket rule of strip searches; Thompson was not arrested for a minor offense, but grand theft auto, which the Court found to be an offense sufficiently associated with violence to justify reasonable suspicion. Id. at 1447. In addition, it is not clear whether the search policy in this matter is of the same type as in Thompson, which involved a body cavity search. Id. at 1446 n.5.

Similarly, Ward v. County of San Diego, 791 F.2d 1329 (9th Cir. 1986), involved a strip search, pursuant to a blanket policy, which was done prior to a determination of the arrestee's eligibility for an own recognizance release and which involved a body cavity search. It is not clear that they same type of policy

is at issue here and that there would not be a reasonable basis for finding that differences in policies would justify a different analysis of constitutionality.

Finally, qualified immunity should normally be afforded where there is any reasonable basis for disagreeing about the meaning and scope of precedent, as here. In Brewster v. Board of Educ., 149 F.3d 971, 977 (9th Cir., 1998), the Ninth Circuit pointed out that the "Supreme Court has made clear that qualified immunity provides a protection to government officers that is quite far-reaching. Indeed, it safeguards 'all but the plainly incompetent or those who knowingly violate the law. . . . If officers of reasonable competence *could disagree* on the issue whether a chosen course of action is constitutional, immunity should be recognized.'" Id. (emphasis added) (*quoting* Malley v. Briggs, 475 U.S. 335, 341 (1986); Knox v. Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir. 1997) ('The test allows ample room for reasonable error on the part of the [government official].')).

Applied in the context of the facts and circumstances presented to Appellants, there was a reasonable basis for concluding that there was sufficient justification for a blanket policy of strip searches, where there may not have been in other factual scenarios in prior court opinions. Brewster, at 977 (qualified immunity defense requires consideration "not [of] a general constitutional

guarantee . . . but its application in a particular context") (*quoting* Todd v. United States, 849 F.2d 365, 370 (9th Cir. 1988) & *citing* Kelley v. Borg, 60 F.3d 664, 667 (9th Cir. 1995) ("Broad rights must be particularized before they are subjected to the clearly established test.")). See also, Auriemma v. Rice, 910 F.2d 1449, 1455 (7th Cir. 1990) ("test for [qualified] immunity is whether the law is clear in relation to the specific facts confronting the public official when he acted"). Where reasonable minds can differ and, even where reasonable officers could err, qualified immunity should still apply.

Moreover, if the policy is deemed constitutionally deficient, the fact that the Sheriff's Department and the City and County of San Francisco are already parties makes the Sheriff in his official capacity a superfluous defendant. Monell v. Department of Social Services of New York, 436 U.S. 658, 690 n.55 (1978) ("official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent"); Kentucky v. Graham, 473 U.S. 159, 165 & 167 n.14 (1985) ("there is no longer a need to bring official capacity actions against local government officials").

IV. CONCLUSION.

For all of the foregoing reasons, Amicus Curiae, the California State Sheriffs' Association, on behalf of its members – all 58 Sheriffs in the State of

California, respectfully request that this Court grant Appellants' Petition and rehear this important matter en banc.

Furthermore, Amicus Curiae request that this Court find that Appellants' policy of strip searching all inmates before introduction into the general jail population is reasonable and thus constitutional, and/or that the Sheriff is entitled to qualified immunity in implementing such policy.

Dated: October 10, 2008

Respectfully submitted,
JONES & MAYER

By: Martin J. Mayer

Martin J. Mayer and
Krista MacNevin Jee,
Attorneys for Amicus Curiae,
California State Sheriffs' Association

STATE OF CALIFORNIA)

COUNTY OF ORANGE) ss.

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Boulevard, Fullerton, California. On **October 10, 2008**, I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

on the parties or attorneys for parties in this action who are identified on the attached service list, using the following means of service. (If more than one means of service is checked, the means of service used for each party is indicated on the attached service list).

___ **BY EXPRESS MAIL.** I placed __ the original or __ a true copy of the foregoing document in a sealed envelope individually addressed to each of the parties on the attached service list, and caused such envelope or package to be deposited in the.

x **BY OVERNIGHT EXPRESS.** I placed __ the original or x a true copy of the foregoing documents in a sealed envelope or package designated by Overnight Express with delivery fees paid or provided for, individually addressed to each of the parties on the attached service list, and caused such envelope or package to be delivered to an authorized courier or driver authorized by Overnight Express to receive documents.

___ **(State)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

X **(Federal)** I declare that I am employed in the office of a member of the bar of this court, at whose direction the service was made.

Executed on October 10, 2008 at Fullerton, California 92835.

Debbie Menicucci

DEBBIE MENICUCCI

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Case No. 05-17080
(Consolidated with Case No. 06-15566)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY BULL, et al.,

Plaintiffs/Appelles,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants/Appellants.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANTS/APPELLANTS PETITION FOR REHEARING AND REHEARING EN BANC

On Appeal from the United States District Court
for the Northern District of California
(U.S. District Court No. C 03-1840 CRB)
The Honorable Charles R. Breyer

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Amici Curiae, California State Association of Counties ("CSAC") and League of California Cities ("League"), respectfully move this Court, pursuant to Federal Rule of Appellate Procedure 29, for leave to file the brief submitted with this motion in support of Defendants and Appellants City and County of San Francisco, et al.

I. INTEREST OF AMICI CURIAE

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of California Cities ("League") is an association of 480 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State.

The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

The issue of violence and drug use in this State's jails and prisons is one of critical importance to CSAC and the League. Local law enforcement is on the front line for dealing with arrestees. Pretrial detainees begin their process through the criminal justice system in our jails. Though Amici Curiae are not aware of any comprehensive study involving county jails and other local detention centers, the State prison system illustrates the serious problem of inmates obtaining contraband while incarcerated in the general population. In the latest data available, covering 2006, there were 14,490 incidents in our State prisons, which is a rate of 9.2 incidents per 100 inmates.[1] This is the highest incident rate in more than twenty years. Of these reported incidents, 1,869 involved assault with a weapon, 1,238 involved possession of a weapon, and 1,005 involved a controlled substance. This averages to more than 11 incidents per day in our State's prisons involving contraband. The dangers facing our local jail personnel, as well as our residents both visiting and incarcerated in our jails, is apparent from these facts.

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[1] The statistics in this paragraph are found in: *California Prisoners and Parolees*, California Department of Corrections and Rehabilitation, p. 34 (2006) [available at: http:www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf].

III. Conclusion

Amici Curiae respectfully move that this Court grant leave to file the Brief of Amici Curiae submitted with this motion.

DATED: October 15, 2008

Respectfully submitted,

CALIFORNIA STATE ASSOCIATION OF COUNTIES,
and LEAGUE OF CALIFORNIA CITIES

By _____
JENNIFER B. HENNING, SBN 193915
Litigation Counsel
California State Association of Counties

Further, the general liability exposure of cities and counties, particularly of our various police departments and law enforcement agencies, will be significantly affected by this Court's ruling regarding the Fourth Amendment constitutionality of blanket strip search policies in detention facilities. As such, Amici Curiae have a significant interest in the decision of this Court with regard to a possible en banc hearing.

II. Amici Curiae's Brief

Amici Curiae desire to file this brief in order to articulate and clarify the issues and law surrounding this Court's deliberations and the potential burden it presents to the law enforcement operations of cities and counties. Amici's counsel is familiar with the briefs filed in this case and has reviewed the Petition for Rehearing and Rehearing En Banc. The amicus brief enclosed herewith does repeat these arguments, but instead refers this Court to some cases not otherwise cited by the Petitioner and provides the Court with the public policy concerns that are of particular interest to CSAC's and the League's member cities and counties.

Case No. 05-17080
(Consolidated with Case No. 06-15566)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY BULL, et al.,

Plaintiffs/Appelles,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants/Appellants.

BRIEF OF AMICI CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF THE PETITION FOR PANEL REHEARING AND REHEARING EN BANC SUBMITTED BY THE CITY AND COUNTY OF SAN FRANCISCO

On Appeal from the United States District Court
for the Northern District of California
(U.S. District Court No. C 03-1840 CRB)
The Honorable Charles R. Breyer

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I. INTRODUCTION

The issue of violence and drug use in this State's jails and prisons is one of critical importance to Amici Curiae California State Association of Counties ("CSAC") and the League of California Cities ("League").[1] Local law enforcement is on the front line in dealing with arrestees. Pretrial detainees begin their journey through the criminal justice system in our jails. Though Amici Curiae are not aware of any comprehensive study involving county jails and other local detention centers, the State prison system illustrates the serious problem of inmates obtaining contraband while incarcerated in the general population. In the latest data available, covering 2006, there were 14,490 incidents in our State prisons, which is a rate of 9.2 incidents per 100 inmates.[2] This is the highest incident rate in more than twenty years. Of these reported incidents, 1,869 involved assault with a weapon, 1,238 involved possession of a weapon, and 1,005 involved a controlled substance. This averages to more than 11 incidents per day in our State's prisons involving contraband.

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[1] The interests of amici curiae are set forth the motion for leave to file this brief.

[2] The statistics in this paragraph are found in: *California Prisoners and Parolees*, California Department of Corrections and Rehabilitation, p. 34 (2006) [available at: http:www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf.

The dangers facing our local jail personnel, as well as our residents both visiting and incarcerated in our jails, is apparent from these facts. To address the documented problem in its jails, the City and County of San Francisco adopted a policy that intruded as minimally as possible. Detainees were subject to visual searches only when they were to be moved into the general population. The searches involved no touching, occurred in private, and were conducted by officers of the same gender.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), the United States Supreme Court held that visual strip searches can be conducted without individualized, reasonable suspicion. Since then, this Court has reviewed on several occasions Fourth Amendment challenges to a variety of strip policies, creating a string of cases in which the Court has attempted to distinguish *Bell* based on a variety of factors. The result is binding precedent that led the panel in this case to conclude that a strip search similar in every critical aspect to the one upheld by the Supreme Court in *Bell* is unconstitutional.

Judge Ikuta, in her concurring opinion, felt compelled by Circuit precedent to reach this result, but urged reconsideration of the Ninth Circuit case law. (*Bull v. City and County of San Francisco*, 539 F.3d 1193, 1202 (2008).) An en banc Eleventh Circuit recently undertook a similar exercise.

It revisited its case law on this subject and concluded "a policy or practice of strip searching [arrestees] as part of the booking process" does not violate the Fourth Amendment, "provided that the searches are no more intrusive on privacy interests than those upheld in the *Bell* case." (*Powell v. Barrett*, 2008 U.S.App.LEXIS 18907 (11th Cir. Sept. 4, 2008).)[3]

Amici CSAC and the League urge this Court to undertake a similar review. Rehearing is necessary for two reasons. First, the panel's holding takes this Court further away from the Supreme Court's ruling in *Bell* that blanket strip searches can be conducted on less than probable cause. Second, the panel's decision is squarely at odds with the Eleventh Circuit's recent holding that a policy or practice of searching all arrestees as part of the process of booking them into the general population of a detention facility is constitutionally permissible. (*Id.*)

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[3] In *Powell v. Barrett*, the Eleventh Circuit upheld a policy of the Fulton County, Georgia jail that required a visual strip search of inmates entering or re-entering the general population at that facility. (*Powell, supra*, 2008 U.S.App.LEXIS 18907 at *2-3.) Unlike the policy at issue in this case, the Fulton County policy required inmates to be searched in a group setting. (*Id.* at *5.) By comparison, San Francisco's policy of private searches is even less intrusive than the policy upheld by the Eleventh Circuit in *Powell*.

II. ARGUMENT

A. United States Supreme Court Precedent Dictates That Arrestees Can Be Subjected To Strip Searches Before Entering the General Population Without Reasonable Suspicion

Between 1974 and 1977, the United States Supreme Court decided three important cases brought by prisoners raising constitutional claims challenging prison regulations or policies. In *Procunier v. Martinez*, 416 U.S. 396 (1974), the Court described the principles that frame an analysis of prisoners' constitutional claims. First, the regulation or practice in question must further "one or more of the substantial governmental interest of security, order, and rehabilitation." (*Id.* at 413.) Second, the limitation of the constitutional freedom "must be no greater than is necessary or essential to the protection of the particular governmental interest involved." (*Id.* at 413-14.) The decision was followed by *Pell v. Procunier*, 417 U.S. 817 (1974) and *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), which built upon *Martinez* in holding that that examination of prisoners' constitutional claims must occur with wide-ranging deference to prison administrators and authorities. (*Jones, supra,* 417 U.S. at 126-28.) Taken together, these decisions establish that a jail regulation or policy need only further the security interests of the jail to the

extent necessary, and that the judgment of jail administrators should be accorded great deference.

1. The Supreme Court Upheld A Policy Strikingly Similar To The Policy At Issue Here

In 1979, the Supreme Court decided the seminal case of *Bell v. Wolfish*, 441 U.S. 520 (1979). *Bell* specifically addressed "the constitutional rights of pretrial detainees – those persons who have been charged with a crime but who have not yet been tried on the charge."[4] (*Id.* at 523.) Among the complaints brought by the plaintiffs was the institution's practice of conducting visual body-cavity searches after contact visits. (*Id.* at 527.)

The Court followed the holdings in *Martinez*, *Pell* and *Jones* and upheld the constitutionality of visual body-cavity searches very similar to the searches involved in the present case. The Court noted that "[c]orrections officials testified that visual cavity searches were necessary not only to discovery but also to deter the smuggling of weapons, drugs, and other contraband into the institution." (*Id.* at 558.) The Court went on to use standard Fourth Amendment analysis and applied a balancing test in

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[4] The facility at issue in *Bell* included, in addition to pretrial detainees, "inmates . . . who are serving generally relatively short sentences in a service capacity, . . . witnesses in protective custody, and persons incarcerated for contempt." (*Bell*, 441 U.S. at 524.) The policy applied to all of these categories of person. (*Id.*)

which it considered the "scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." (*Id.* at 559.) This "balancing test" examination resulted in the Court's conclusion that blanket strip searches can be conducted on less than probable cause. (*Bell*, 441 U.S. at 560.)

2. A "Balancing Test" Analysis Under *Bell v. Wolfish*

Jail detainees may constitutionally be subject to visual strip searches without individualized, reasonable suspicion. (*Bell v. Wolfish*, *supra*; *Arruda v Fair*, 710 F.2d 886 (1st Cir. 1983)(upholding the constitutionality of subjecting inmates to strip search after they receive visitors); *Goff v. Nix*, 803 F.2d 358 (8th Cir. 1986)(same).) The common thread and security concern in cases that have upheld such searches is a detainee's physical access to and contact with the "outside world." Such contact presents the opportunity for contraband to be introduced into the general jail population where it may result in physical harm to the detainees or jail personnel. Likewise, any pretrial detainee who has just been arrested and booked has been brought into the jail from the "outside world" and, presumably, has been under no supervision prior to arrest and detainment.

In *Bell,* it was noted that it would be extremely hard for a detainee to conceal contraband or weapons because the visits took place under observation. (*Bell*, 441 U.S. at 504 (J. Stevens, dissenting).) Yet the strip searches were constitutional. The potential for a new arrestee to have obtained and secreted illicit contraband is immeasurably greater than that of an incarcerated prisoner. (*See Bell v. Wolfish*, 441 U.S. at 546, n. 28 ("Indeed, it may be that in certain circumstances [pretrial detainees] present a greater risk to jail security and order"); *Block v. Rutherford*, 468 U.S. 576, 587 (1984)("It is not unreasonable to assume . . . that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates").)

Obviously, every pretrial detainee does not require a strip search because many are never booked into the general population. However, a detainee who will be introduced into the general jail population is a unique problem, as numerous courts have recognized. (*See Dufrin v. Spreen*, 712 F.2d 1084, 1087 (6th Cir. 1983)(strip search upheld where a pretrial detainee would ultimately come into contact with the general jail population); *Dobrowolskyj v. Jefferson County, Kentucky*, 823 F.2d 955 (1987)(upholding a strip search where detainee was not strip searched until his movement into the general population of the jail was imminent).

Compare Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981)(strip search unconstitutional where, *inter alia*, "[a]t no time would [the plaintiff] or similar detainees be intermingled with the general jail population"); *Swain v. Spinney*, 117 F.3d 1, 8 (1st Cir. 1997)("There was no risk that [the detainee] would come into contact with other prisoners, or be able to smuggle contraband or weapons into a secure environment"); *Savard v. Rhode Island*, 338 F.3d 23, 29 (1st Cir. 2003)("There are important differences between detaining an arrestee in virtual isolation and introducing an arrestee into the general population of a maximum security prison.").)

B. Strip Searches Of Pre-Trial Detainees Before Entering The General Population Are Consistent With The Balancing Test Established In *Bell*.

1. There Is A Valid, Rational Connection Between The Disputed Policy And The Legitimate Governmental Interest Of Preventing Introduction Of Contraband Into The General Population.

Prison administrators are responsible for maintaining internal order and discipline, and for securing the safety, security and, to the extent possible given realistic constraints, the rehabilitation of the inmates committed to it. It cannot be disputed that a detention facility has a legitimate penological interest in preventing the introduction of weapons, drugs, money, and other contraband into the general inmate population.

Such paraphernalia can present a danger to inmates, guards, staff and visitors, can result in discipline problems, and can inhibit the rehabilitation of detainees (particularly with regard to drug use). The use of strip search is both exceptionally effective and directly related to the goal of keeping the general jail population free from dangerous and/or disruptive paraphernalia.

2. There Are No Alternative Means Of Exercising The Right To Privacy That Is Implicated By The Disputed Policy.

A policy such as the one at issue in this case is designed to be as unobtrusive as possible. It is only visual. There is no touching. It is conducted in private by an officer of the same gender. The point of a strip search is to search the subject's private areas for contraband and illicit material; any alternative to this invasion would render the policy pointless.[5] The intrusion of an individual inmate, though highly personal, is substantially outweighed by the institutional interest in protecting its staff, guards, visitors, and the prison population at large.

The policy at issue here goes no farther than is necessary to accomplish its stated goals. There is no evidence in the record that the need for the policy has been exaggerated by corrections officials. And as

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[5] "Where an arrestee is wearing blue jeans or another heavy material, even the most thorough patdown search will not necessarily turn up small items such as several hits of LSD on postage stamps, a small rock of crack cocaine, or a razor blade." (*Kraushaar v. Flanigan*, 45 F.3d 1040, 1046 (7th Cir. 1995).

established above, the judgment of such officials demands judicial deference.

3. The Panel's Interpretation Of Detainee's Right to Privacy Would Have A Significant Negative Impact On The Facility's Guards, Staff, Visitors, and Other Inmates, And On The Allocation Of Prison Resources Generally.

As noted above, the latest statistics available from the State prison system show that incidents involving contraband are shockingly common and on the rise. This situation is a real and dangerous reality in our local jails as well. As the dissent noted, the record in this case is "replete with incidents of jail officials finding contraband during strip searches," including those arrested for minor offenses. (*Bull, supra,* 539 F.3d at 1206.) An amicus brief was also filed by San Mateo County detailing its similar experience with the problem of smuggling contraband. It is a significant issue that jail administrators must address.

The purpose of the strip search policy is to prevent the introduction of weapons, drugs, money and other illicit material into the general jail population. By virtue of this goal, and the nature of the strip search itself, the only possible accommodation would be to limit strip searches to suspicious cases. This would defeat the goal of the policy. It is clear, and readily acknowledged by the Supreme Court, that "inmate attempts to

secrete [contraband] into the [detention facilities] by concealing them in body cavities are [well] documented." (*Bell*, 441 U.S. at 559.)

Alternative methods of search and detention, such as metal detectors, are inherently incapable of revealing the myriad of objects and materials that a visual search would turn up.[6] Not all weapons are made of metal. Certainly paper money, drugs, stamps, cigarettes, and a host of other materials could pass through such a device undetected. Ultraviolet and infrared detection devices are similarly unreliable. Further, said devices are costly, and requiring their purchase would further strain the resources of an already under-funded operation.

III. CONCLUSION

The panel's decision has moved the Ninth Circuit beyond the United States Supreme Court's rulings on the issue of pretrial detainee strip searches. It directly conflicts with case law of another circuit. And it dangerously underestimates the seriousness of the problems faced by local jails in booking pretrial detainees into the general population. As such,

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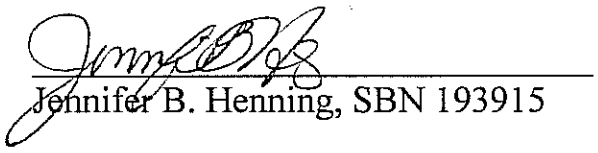
[6] It should be noted, however, that "[g]overnmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional." *Bell*, 441 U.S. at 542, n. 25.

Amici Curiae urge this Court to grant San Francisco's petition and affirm the city's strip search policy.

Dated: October 15, 2008

Respectfully Submitted,



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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY BULL, ET AL., Plaintiffs - Appellees, vs. CITY AND COUNT OF SAN FRANCISCO, ET AL., Defendants - Appellants.	9th Circuit Case No. 06-15566 Consolidated with Docket No. 05-17080 U.S. Dist. Ct, N.D. CA, San Francisco, Case No. No. CV-03-01840-CRB/EMC

PLAINTIFFS'/APPELLEES' RESPONSE TO DEFENDANTS'/APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC* (FRAP 35, 40)

On Appeal from the United States District Court
for the Northern District of California
The Honorable Charles R. Breyer

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INTRODUCTION

Defendants-Appellants ("Defendants") seek Rehearing and Rehearing *En Banc* of the panel decision upholding the lower Court's order that Defendants' policy to strip search all pre-arraignment detainees classified for housing at the San Francisco jail violated the Fourth Amendment.[1]

Defendants once again take the position they previously asserted that the problem of smuggling at the San Francisco jail – which is pervasive – justifies the strip search at issue here, which involves a limited, innocuous subset of the tens of thousands of arrestees who were booked and processed at the San Francisco jail during the relevant period. However, as the panel's majority decision succinctly stated:

> The fact that San Francisco had documented a significant problem of contraband smuggling does not muddy the clarity of the law. The evidence defendants produced . . . shows only that contraband smuggling was a significant problem in the San Francisco jails; it does not demonstrate that persons eligible for inclusion in the class in this case contributed significantly, *or even at all*, to that problem. *Bull v. City and County of San Francisco*, 539 F. 3d 1193, 1201. [emphasis added].

The evidence, in other words, simply does not support, and even contradicts, Defendants' assertion that members of the class here were engaged in illicit smuggling.

Defendants' claim that their strip search of the Plaintiff class was lawful because "many persons arrested for minor violations, such as shoplifting and traffic violations…often hid drugs or weapons on their body [sic] or inside their bodily orifices in an effort to evade confiscation," is misleading. (Defendants' Petition, p.1.) It implies, incorrectly, that the District Court and Ninth Circuit panel decisions have prohibited the jail from strip searching persons arrested for minor violations. Yet, it is

[1] Orders of U.S. District Court Judge, Charles R. Breyer, September 22, 2005, and February 23, 2006 – consolidated on appeal.

well established, and Plaintiffs have never disputed, that the jail is entitled to strip search minor offense arrestees for a number of reasons. The arrest charge is only one factor in determining whether an arrestee can and should be strip searched; prior arrest history, parole/probation status, as well as "appearance and conduct" (including gang affiliation) are all important factors in making this determination, and provide a lawful basis for a strip search. *Kennedy* 901F.2d at 716. Contrary to the concern expressed by the panel dissenter, the Defendants have never taken the position that they "know very little about the arrestee" and are therefore unable to determine whether an arrestee should be strip searched under the reasonable suspicion standard. (539 F.3d at 1211.)

Given the importance of the factual record in this case, it is especially egregious that Defendants have withheld information concerning the prior arrest history and other information relevant to the strip search of arrestees charged with minor offenses in the past, possibly leading the dissenter on the panel to believe that the instances cited were class members. (591 F.3d at 1210-1211.) The fact remains that – setting aside the instances where Defendants have willfully concealed the relevant documentation concerning the security justification for the strip search – *every single citation to the record* by Defendants demonstrates the falsity of their central claim that it was reasonable and necessary to strip search this class.[2] Defendants argue that the

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[2] Defendants' citations to the evidence to substantiate its claim of smuggling by the class before the Court are contained in two footnotes of their petition. (fn 3 and 4.) The citations are based on various jail records which sometimes show the arrest charge or otherwise indicate the reasons for the search; in some instances, as noted above, Defendants have not seen fit to release information about the arrestee or the circumstances of the strip search, even though such records are, of course, available to them. As to these incomplete records, there is no way to know why or when the person was strip searched, and therefore their relevance to this case is impossible to determine.

The first group of citations supposedly supports the claim that strip searches have uncovered various items of contraband – knives, scissors, syringes, cocaine, heroin. (Defendants' Petition, p.6, fn. 3.) As demonstrated in Plaintiffs' Statement of Facts, *infra*,

unfortunate death of an inmate due to a drug overdose somehow supports their policy, yet there's no evidence that this inmate obtained drugs because a new arrestee was not strip searched or that a strip search of persons in this class would have prevented this death.

This is why the panel decision concluded that "Defendants' claim that they have documented instances of eligible class members engaging in smuggling contraband is not credible and is not supported by the record." (539 F.3d at 1198.) And this is why, as the panel further found, "we cannot conclude there is any reasonable relationship between the criteria triggering a search (classification for housing) and the interest in conducting the search (eliminating the introduction of contraband.)" (539 F.3d at 1199.)

Notwithstanding their failure to present a security justification for the strip search of the limited class of arrestees whose Fourth Amendment rights are at issue here, Defendants assert three different bases for their attack on the panel decision. First, they assert that *Bell v. Wolfish*, 441 U.S. 520 (1979) mandates absolute, unconditional deference to the judgment of jail officials, and requires this Court to reverse and repudiate twenty five years of precedent holding that jail officials must show a reasonable *factual* relationship between the strip search policy and the security problem it is supposed to address. (Defendants' Petition, p.2-3; 8-9.)

Yet in *Bell*, the Supreme Court made crystal clear that courts should defer to jail administrators only when there is an "absence of substantial *evidence* in the record" to indicate that the officials have "exaggerated" their response to "the problems that arise

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every documented instance involved persons who were *lawfully* strip searched precisely because there was a security justification to do so.

The second group of citations supposedly substantiates the assertion that "persons not arrested for crimes involving drugs, weapons, and violence secreted drugs and other dangerous contraband in their bodily orifices." Again, all the documented instances cited involve *lawful* strip searches, since of course there are security reasons to strip search arrestees which are based on factors other than the nature of the arrest charges, and which are not contested here. (Defendants' Petition, p.7, fn. 4.)

in the day-to-day operation of a corrections facility." (441 U.S. at p.548.) This case presents the very situation discussed by *Bell* in which jail administrators "exaggerated" their response to the problem of contraband smuggling at the jail by sweeping within their blanket strip search policy a clearly defined, innocuous class which demonstrably does not engage in such illicit and dangerous activity.

Therefore, the blanket strip search policy at issue here is not "constitutional" just because *Bell* found it appropriate to defer to jail administrators in that case, which presented different circumstances relating to the security need for the strip search. In other words, the strip search policy in that case did not represent an "exaggerated" response to a security threat, while here it does, rendering deference unwarranted.

Second, Defendants attack the panel decision by arguing that *Powell v. Barrett*, 541 F3d 1298 (11th Cir 2008) throws new light on Ninth Circuit precedent, revealing that this Court of Appeals has been wrong all along in deciding such cases as *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984); *Ward v. County of San Diego*, 791 F.2d 1329 (9th Cir. 1986); *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989); and *Kennedy v. Los Angeles Police Department*, 901 F.2d 702 (9th Cir. 1990). There is a short, but dispositive, answer to this contention. *Powell* did not, as here, involve the visual inspection of each arrestee's *body cavity*, the type of strip search that has consistently given the Courts, as *Bell* itself said, "instinctively the most pause" and which has been widely viewed inside and outside of this circuit as "dehumanizing and humiliating." (*Bell*, 441 U.S. at 558; *Kennedy*, 901 F.2d at 711.)

Instead, in *Powell*, arrestees were required to shower together in groups of up to thirty inmates and then, while standing in a line or singly, "show [their] front and back sides while naked" to a guard. 541 F.3d at 1300. The intrusion upon individual privacy in *Powell* was minimal, and perhaps it is for this reason that the Court found it self-evident that deference to the jail administration was appropriate under *Bell*. In any case, the privacy interests at stake in *Powell* are not those at issue here, and there is no

need for this Court to grant rehearing or rehearing en banc "to address this intercircuit conflict." (Defendants' Petition, p. 3.)

In addition, any decision by this Court would not alter the arguable existence of an inter-circuit conflict since every other circuit to address the issue, aside from the Eleventh Circuit, has concluded that post-arrest placement in the general population is a relevant *factor* in the Fourth Amendment calculus, but, standing alone, is inadequate to justify a routine strip search policy. (*Compare, e.g., Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (general population a factor); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) (same); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989) (same); *Hill v. Bogans*, 735 F.2d 391, 394-95 (10th Cir. 1984) (same) *with Powell v. Barrett*, 541 F3d 1298 (11th Cir 2008) (general population a per se justification for strip search).)

Finally, Defendants' third attack on the panel decision is that the security justification in San Francisco is distinguishable from *Giles, Kennedy, Thompson, Ward*, and all the District Court decisions that have followed these cases. With regard to this *factual* contention, it is puzzling that the Defendants do not accurately present the facts before both the District Court and the Court of Appeals, or disclose consistent and complete documentation of the circumstances surrounding the strip searches advanced as justification for the blanket policy.

Contrary to Defendants' attacks on this Court's opinion, there is a compelling record based on hundreds of thousands of strip searches over a period of many years that shows the class before this Court *is not involved in illicit smuggling*. Given this key fact, there is no reason to lump Plaintiffs with the class of arrestees who do present a security risk. Rather, it is reasonable to look at the members of this class individually. The respect we show to individuals' bodily privacy under our Constitution requires no less. Indeed, the standard Defendants must meet to lawfully strip search such individuals is so minimal – any articulable reason to search is arguably enough under

the "reasonable suspicion" standard – the jail is fully protected. Defendants have never made the claim that it is *not* feasible to ferret out contraband by strip searching this class on a case-by-case basis.

STATEMENT OF THE CASE

On August 22, 2008, a panel of the 9th Circuit Court of Appeals filed its decision upholding the decision of District Court Judge Charles R. Breyer that the policy of the City and County of San Francisco and its Sheriff Michael Hennessey to strip search all pre-arraignment detainees classified for housing, violated the Fourth Amendment's prohibition against unreasonable searches with respect to the class certified in the case, which included only a limited subset of the arrestee population – those "who were arrested for an offense not involving drugs, weapons, violence, or a violation of parole or probation; who did not have a criminal history involving drugs, weapons, or violence; and whose behavior did not create individualized suspicion warranting the search." (539 F.3d at 1198.)

The panel's opinion, authored by Judge Thomas, was joined by Judge Ikuta who filed a concurring opinion; Judge Tallman dissented. The panel followed a long line of 9th Circuit precedent which outlawed the pre-arraignment blanket strip search of arrestees unless there is "some reasonable relationship between the criteria used to identify the specific individuals eligible for a strip search and the interest in preventing the introduction of contraband", or, in other words, that the strip search policy "'bear some discernible relationship to security needs.'" (539 F.3d at 1197-1198, [internal quote omitted].)

Defendants petitioned for rehearing and rehearing en banc and the Court directed Plaintiffs to file their answer to that petition by November 20, 2008.

Lest the twin towers of rationality and stare decisis which underpin our rule of law crumble, Defendants' arguments must fail.

STATEMENT OF FACTS

A. The Class Before the Court

The class of arrestees before the Court in this case consists of those alleged minor offenders who were brought to the San Francisco jail on charges *not* involving drugs, weapons, or violence, who had no criminal history of such offenses, who were *not* on parole or searchable probation, and who also were *not* reasonably suspected of concealing or seeking to smuggle contraband that could only be discovered by a strip and visual body cavity search, but who were nonetheless strip searched. (E.R. V: 1063-1064, [Summary Judgment Memorandum and Order, pp.3:17-4:5]; Plaintiffs' E.R. 28-37 [Amended Order]).) This strip search invariably involved inspection of the naked body and rectal and vaginal cavities, requiring the arrestees to squat, spread their cheeks and, if female, their labia, and to cough while under observation. (E.R. I: p.115 [Jail Policy E-03, p.3].)

B. The Jail's Strip Search Policies

As Defendants state, arrestees in San Francisco were initially brought to County Jail 9 which was used as an intake facility to hold arrestees before releasing or housing them. (Defendants' Petition, p.5.) When first brought to the holding area of County Jail 9, and booked, all arrestees were searched, "either a 'pat search' performed in conjunction with a hand held metal detector, and/or a strip search." (E.R. I: p.14 [Policy].) Numerous categories of arrestees were strip searched at the time of booking without regard to whether they were later classified for housing – including those arrested on charges involving drugs, weapons or violence; those with a criminal history of such charges; those who were parolees or probationers; those who were individually suspected of concealing contraband; as well as others not in the class before the Court. (E.R. I: 115 [Policy E-03 II A, p.2]; E.R. I: 93-94, 106-109 [Arata Depo, 1:20-42;

43:763:1-65:9.) This booking search was not challenged by Plaintiffs.

Arrestees who did not fall into these categories were not strip searched at the time of booking. But, if they were not released from the intake facility, or if they did not or could not make bail in the time allowed, they were subjected to a strip search when they were "assigned a custody level by Classification and scheduled for custodial housing." (E.R. I: p.115 [Policy II.A.10].) Arrestees were "classified" and strip searched even if they were to be immediately transported directly to Court and never housed at the jail. This strip search occurred before the arrestees were interviewed for release on their own recognizance. (E.R. I: 193, 181 [Humphrey Depo 94:9-18; 66:5-21].) Indeed, an arrestee could not be considered for release on his or her own recognizance without bail ("O.R.") until "stripped in." (E.R. I: 181-182 [Humphrey Depo 66:15-67:1].)

In fact, "classification" of arrestees could be, and was, routinely *advanced* in time so that it occurred immediately after booking, if the arrestee declined to "consent" to a strip search when initially received at the jail, under a policy in effect until February 2003. (E.R. I: 138-139 [McConnell Depo 36:13-23; 38:18-39:4]; E.R. I: 200-203, 206 [Oaks Depo 31:1-12; Depo Ex 46; 30:18-24; 31:7-14; 47:1-6]; E.R. II: 220-221 [Quock Depo 16:1-22; 17:12-25]; E.R. I: 155-157 [Hawkins Depo 14:21-16:15]; E.R. I: 123 [Dyer Depo, Ex. 15].)

The body cavity inspection and strip search of arrestees in Plaintiff class solely because they had been unable to make bail or otherwise gain release (and were therefore "classified" for housing) is the sole search challenged herein.

C. The Classification Process

If they were to be housed at the jail before arraignment, arrestees were "classified", that is, assigned a bunk in an appropriate area other than County Jail 9. "Classification" was done in order to segregate arrestees who were housed separately in accordance with their level of criminal sophistication, criminal history, criminal

charges, past incarceration behavior, vulnerability, gang affiliation, and other relevant factors such as age and sex. (E.R. I: p.89-92 [Arata Depo 36:18-39:17; 60:18-65:9].)

Defendants claim that the arrestees in the class were, once classified, housed in the "general population" of the jail. But there is no evidence that there *is* a "general population" within the San Francisco jail in which arrestees in the class were indiscriminately mingled once they were housed, given the classification process. Significantly, while searches of *unspecified* areas of the jail found contraband *within* the jail between 2000 and 2003, there is no evidence that arrestees in the Plaintiff class were ever housed in the areas where those items of contraband were found. (Defendants' Petition, pp.6-7.)

Once classified and/or housed, arrestees in the class had to be taken before a magistrate for arraignment "without unnecessary delay" under California law, and, in any event, could not be detained for more than two days, excluding Sundays and holidays.[3]

D. The Smuggling Problem and the Security Justification for the Strip Search of the Class before the Court

While Defendants presented evidence of smuggling at the San Francisco jail, there is not a single shred of evidence which shows that an arrestee within the class before the Court *ever* tried to smuggle *anything* through the intake facility of the San Francisco jail at the time of the pre-arraignment classification strip search, or, indeed, at any other time or in any other area of the jail. Nor was there any evidence that the "reasonable suspicion" standard for strip searching an individual minor offense arrestee before arraignment was inadequate to protect jail security. Neither was there any evidence that the innocuous arrestees in the class were "intermingled" indiscriminately with other arrestees when placed in the "general population".

Indeed, the Defendants' Statement of Facts demonstrates that there is no security

[3] The period could be extended by one day only if Court was not in session until the following day. (Cal. Penal Code § 825.)

justification for the classification strip search of class members.[4] (See, Defendants' Petition, p.6 fn. 3.)

The instances of discovery of contraband cited by Defendants to show that arrestees do secrete contraband is misleading because:

1. This evidence does not show a security justification for the strip search of arrestees in the class certified in this case. The arrestees searched in connection with these discoveries were ineligible to join the class and/or the strip search was lawful [E.R. III: 463; 474; 478; 506; 522; 534; 577; 595; 607; 612-614; 617; 621; 632; 633; 634; 636; 637];

2. The discoveries did not involve a visual body cavity search or the inspection of the naked body [E.R. III 464; 525; 583];

3. In many instances Defendants have suppressed the documentation relating to the reason for the strip search (such as the arrest charge or criminal history) or the eligibility of the arrestee for membership in the class; without this relevant documentation, there is no way to know if the discovery of contraband has any bearing on the security justification for the strip search at issue here, and in fact it can be presumed that the missing evidence is unfavorable to Defendants under well established evidentiary presumptions. [E.R. III: 474; 476; 480; 483; 484-5; 486; 487; 497; 498; 499; 502; 517; 521; 525; 526; 532; 535; 544; 545; 547; 548; 551; 553; 558; 560; 563; 565; 567; 571; 576; 579; 582; 584; 586; 591; 604; 609];

4. The discoveries occurred after the discontinuance of the policy challenged here [E.R. III: 611; 612-614; 617; 623; 627; 628; 629; 630].

Defendants also claim that persons "not arrested for crimes involving drugs, violence or weapons have secreted drugs and other dangerous items in their bodily orifices". (Petition, p.7.) The instances of discovery of contraband cited by Defendants in support of this proposition are similarly irrelevant or unsupportive of this conclusion

[4] The evidence has been exhaustively analyzed in Plaintiffs' Opening Briefs in the course of the appeal and also in Plaintiffs' Opposition to Defendants' Request for Judicial Notice. Due to space limitations, the analysis here presents only the barest outline of the lack of evidentiary support for the strip search policy at issue here. The *Yorke* record did nothing to strengthen Defendants' case.

because:

1. This evidence does not show a security justification for the strip search of arrestees in the class certified in this case: the arrestees searched were ineligible to join the class and/or the strip search was lawful [E.R. III:474; 478; 534; 577; 595; YER 416-19; 435-38; 443-47 (booking search) 448-49 (booking search); 454-57; 464-68; 488-89; 490-91];

2. The discoveries did not involve a visual body cavity search or the inspection of the naked body [E.R. III 601-603; YER 439-42];

3. In many instances, the Defendants have suppressed the documentation of the reason for the strip search or the eligibility of the arrestee for membership in the class, which is, of course, readily available to Defendants since they are in possession of arrest and criminal records; as noted above, it can be presumed that the missing evidence is unfavorable to Defendants [E.R. III:532; 609; YER 414-15; 427-28; 439-42; 450-53];

4. The discoveries involved a strip search incident to "safety cell" placement on the basis of combative behavior or some other type of search which is not at issue here. [E.R.III: 527; 612-615].

Finally, with regard to the contention that jail administrators knew that new arrestees were the "most likely smugglers" of contraband, nowhere in the record does any San Francisco jail official opine that the members of *this class* posed a threat to jail security at the time they were classified or at any other time, and in the absence of any objective support for such an opinion, it is entitled to no weight.

ARGUMENT

A. *BELL V. WOLFISH* DOES NOT REQUIRE JUDICIAL DEFERENCE TO JAIL OFFICIALS' JUDGMENT WHEN THEY, AS HERE, EXAGGERATE THEIR RESPONSE TO SECURITY CONSIDERATIONS

Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed. 2d. 447 (l979) is a seminal case because it set forth the operative principles for analyzing the constitutionality of jail strip searches under the Fourth Amendment, articulating a

"balancing test" which requires the Court to balance "the need for the particular search against the invasion of personal rights that the search entails." Under the circumstances presented there, the Court upheld a policy of strip searching inmates of the jail after contact visits that were afforded to inmates as a privilege or benefit.

The Court had no occasion to distinguish between classes of inmates, since the Plaintiffs apparently argued the validity of the strip search as an "all-or-nothing" proposition. As this circuit observed in *Kennedy*, "the majority was not focusing on the individual basis for each search; the majority's constitutional inquiry instead centered around the soundness of the policy as a whole." (901 F.2d 702.) The consideration of whether a strip search policy could be applied constitutionally to particular categories of jail inmates arose, of necessity, when individual Plaintiffs, as in this case, began to challenge strip search policies applied to them in particular. In applying *Bell's* balancing test to determine whether particular categories of arrestees can be lawfully strip searched under a challenged policy, this circuit has not strayed from the principles enunciated in *Bell*, but has simply applied them to the facts before it.

In *Bell*, the factors weighed by the Court on the scale, in favor of upholding the strip search policy, included the fact that many of the inmates would be held for months pending trial, were charged with serious offenses, could not qualify for bail under the liberal pretrial release policy, presented an escape risk, had contact visits planned in advance, were not closely supervised, and thus presented a perfect opportunity to obtain contraband. (*Bell*, 441 U.S at 447, fn28; 559-560.*)* Deference was deemed due to federal jail administrators because, given the afore mentioned circumstances, there was a reasonable relationship between the strip search and the security objective. (*Bell*, 441 U.S. at 561.)

Here, the converse is true. Unlike the inmates in *Bell*, here the members of the class before the Court have <u>not</u> been charged with any criminal offenses or appeared in Court for determination of whether they should be released on bail or O.R; they have

only been arrested, on the basis an "educated guess", as the *Kennedy* Court observed, by police officers. (901 F.2d at 714.) Unlike the inmates in *Bell*, a population that included those charged with serious and violent offenses, here the Plaintiff class had been arrested for minor, non-violent, non-drug or weapon related charges, were not on parole or probation, and had no criminal history of such offenses. In contract to the inmates in *Bell*, the members of the class here could be detained for only a few days pending their arraignment, and have never smuggled anything into the jail. There is also no evidence that they were "intermingled" with the general jail population once classified. And unlike contact visits which justified the search in *Bell*, the arrests which brought the class members to the jail in this case were unplanned events.

In sum, as both the District Court and the panel majority found, the evidence failed to show that "persons eligible for inclusion in the class in this case contributed significantly, *or even at all*, " to the problem of smuggling at the jail, Defendants have simply "exaggerated their response" to the risk posed by this class and, by so doing, destroyed the deference otherwise due them.

B. THE ELEVENTH CIRCUIT'S DECISION IN *POWELL V. BARRETT* IS NEITHER CONTROLLING NOR PERSUASIVE AND FAILS TO FOLLOW *BELL V. WOLFISH'S* ANALYTICAL APPROACH OF BALANCING SECURITY NEEDS AND PRIVACY INTERESTS

In *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008), as previously mentioned, the Court ruled on Defendants' motion to dismiss and held that a "shower-search" of new arrestees did not violate the Fourth Amendment. To reach this decision the Court engaged in no balancing test as required by *Bell* – apparently finding that the need for the inspection of new arrestees was self-evident. Since there was no record before the Court, we cannot know the purpose of the shower inspection, its security justification, the information that was available to the jail about arrestees, the length of time they were to be housed, or anything else other than that they were booked, inspected after

showering, and then placed in the general population for the first time.

It is clear, however, that the "shower-search" did not involve the visual body cavity inspection which Defendants conducted here, and which Courts have uniformly found so dehumanizing. Therefore this case does not create an inter-circuit conflict and does not weigh in favor of granting Defendants' Petition.

The fundamental reasoning of the *Powell* Court appears to be that the fact that a new arrestee was automatically put in the jail was a per se justification for a strip search. However, this Court has ruled to the contrary several times, aside from this case. *See e.g.*, *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989) ("Although Thompson… was placed into contact with the general jail population, such a factor by itself cannot justify a strip search"); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) (fact that arrestee may ultimately be intermingled with general jail population does not, by itself, justify strip search as such intermingling is "both limited and avoidable"; factors to be considered in determining whether reasonable suspicion exists to warrant a strip search include "the nature of the offense, an arrestee's appearance and conduct, and the prior arrest record"); *Way v. County of Ventura*, 2006 WL 1028835, 4, 5 (9th Cir. 2006) ("We cannot see how the charge of being under the influence of a drug necessarily poses a threat of concealing (and thereby using or trafficking) additional drugs in jail during the limited time between booking and bail, or booking and placement in the general population"; "as there is no evidence that security concerns require strip searching all arrestees on all drug offenses before placement in the general jail population, and none that all persons arrested for being under the influence of a drug are likely to have concealed more drugs in a bodily

cavity, the Sheriff Department's blanket policy cannot be a proxy for reasonable suspicion"). There is no need to revisit this well established law in this circuit.

C. THIS CASE CANNOT BE DISTINGUISHED FROM PREVIOUS CASES INVALIDATING SIMILAR STRIP SEARCH POLICIES

Defendants argue that the contraband smuggling problem faced by the San Francisco jail is particularly acute such that all previous cases invalidating the strip search of arrestees similar to the members of this class are distinguishable. But as demonstrated by the Plaintiffs' Statement of Facts, rebutting each and every instance that the Defendants rely upon to make their case, and as the panel majority opinion found, this case is *not* distinguishable from other cases on the crucial issue of whether there is a security justification for applying the jail's policy of strip searching arrestees who were classified for housing to the *members of this class.*

CONCLUSION

For all of the reasons stated, the petition to grant rehearing or rehearing *en banc* should be denied.

DATED: November 19, 2008 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. Pursuant to Federal Rule of Appellate Procedure 35(b)(2), this Answer to Petition For Rehearing and Rehearing En Banc does not exceed 15 pages, excluding material not counted under Rule 32.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 19, 2008.

DATED: November 19, 2008 Respectfully submitted,

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APPELLATE CM/ECF SYSTEM CERTIFICATE OF SERVICE

I, Kari L. Kalista, CCLS, declare:

I hereby certify that on November 20, 2008 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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