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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 10-945, Florence v. The Board of Chosen Freeholders of the County of Burlington.

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Mr. Chief Justice, may it please the Court:

We ask this Court to hold that a jail may strip search an arrestee in cases of reasonable suspicion. That is the rule that was applied throughout almost the entire country in the three decades after Bell v. Wolfish, without either administrative difficulty or any apparent increase in smuggling. We're here today, of course, because both the Burlington Jail and the Essex County Jail require every arrestee to stand 2 feet in front of a correctional officer and strip naked.

JUSTICE GINSBURG: Do you apply the reasonable suspicion rule to all arrestees? I thought you were making a distinction between felons and less serious offenders.

1 MR. GOLDSTEIN: We do apply it to all
2 arrestees. The Respondents and the U.S. Bureau of
3 Prisons do draw a line at major versus minor offenders.
4 I think they do that because they think that people who
5 commit more serious crimes might be inclined to greater
6 criminality. But our rule is one of reasonable
7 suspicion. Our question presented draws a line at minor
8 offenders because this class definition is only people
9 who were arrested for minor offenses.

10 JUSTICE KENNEDY: Is the reasonable
11 suspicion test more easily met if it's a felon detained
12 for a serious felony?

13 MR. GOLDSTEIN: It is in the view of the
14 courts that have considered this question, absolutely.
15 In our view --

16 JUSTICE KENNEDY: In your -- in your view?

17 MR. GOLDSTEIN: Yes. Yes, and, in fact --

18 JUSTICE KENNEDY: Well, then you are going
19 on a case-by-case basis based on the offense.

20 MR. GOLDSTEIN: The category -- there is a
21 categorical rule, and that is -- that was adopted by
22 these Respondents, by the Bureau of Prisons, and four
23 court of appeals, that says if you were arrested for a
24 more serious offense, categorically there exists
25 reasonable suspicion.

1 Our case-by-case rule, it's true, applies
2 with respect to minor offenders. And, again, that's the
3 class that was defined here.

4 JUSTICE ALITO: Well, how would this work
5 with respect to individuals who have been arrested for
6 serious offenses? Let's say someone has been arrested
7 for -- for assault. Say it's a case of domestic
8 violence, assault. Would that be enough to justify a
9 search?

10 MR. GOLDSTEIN: I think you will have to
11 ask -- I know you want me to answer the question. Let
12 me just be very clear. This is their rule. The
13 Respondents draw the major/minor offense line. The
14 Respondents apply a reasonable suspicion standard. Now,
15 in my view --

16 JUSTICE ALITO: No, I understand. You say
17 that you don't want to draw that line; you want to apply
18 it to --

19 MR. GOLDSTEIN: Yes.

20 JUSTICE ALITO: -- to everybody, and I'm
21 asking you whether the mere fact that someone has been
22 arrested for a violent offense would in your judgment be
23 sufficient to provide reasonable suspicion.

24 MR. GOLDSTEIN: If the jail made that
25 judgment, we would think that a court would not overturn

1 that judgment. We think that illustrates that, by
2 contrast to when someone is arrested for not paying a
3 fine, that there is no justification whatsoever, because
4 the logic of their own policy is that this is a person
5 who's inclined to violence --

6 JUSTICE KENNEDY: But I take it -- I take it
7 what we're trying to do is to protect the individual
8 dignity of the detainee. But it seems to me that you
9 risk compromising that individual dignity if you say we
10 have reasonable suspicion as to you, but not as to you.
11 You're just setting us up, and you're setting the
12 detainee up for a classification that may be questioned
13 at the time and will be seen as an affront based on the
14 person's race, based on what he said or she said to the
15 officers coming in.

16 MR. GOLDSTEIN: Right.

17 JUSTICE KENNEDY: And so, it seems to me
18 that your rule imperils individual dignity in a way that
19 the blanket rule does not.

20 MR. GOLDSTEIN: Well, a couple of points,
21 Justice Kennedy. I think it's an incredibly important
22 issue. They don't have a blanket rule. Remember, the
23 Respondents apply a reasonable suspicion standard. They
24 do strip everyone naked, but if they're going to look
25 for contraband -- that is, look at the person's mouth,

1 look at their anus -- they apply a reasonable suspicion
2 standard.

3 Now, to your very serious concern that maybe
4 we are inviting discrimination or at least an appearance
5 of discrimination, remember that their rule is going to
6 produce more of that problem than ours, because their
7 rule is not that they have to strip search -- they have
8 to strip search everyone for contraband, but their rule
9 is they can. They can make a choice.

10 This Court in the Fourth -- they say we --

11 JUSTICE KENNEDY: Well, I'm not sure if it's
12 their rule or our rule. Ultimately, it's going to be
13 our rule.

14 MR. GOLDSTEIN: Yes, okay. Well, then --
15 (Laughter.)

16 MR. GOLDSTEIN: First let me say I hope not.
17 I hope that your rule is that there has to be a
18 reasonable suspicion standard, which is the rule that
19 was applied almost everywhere in the wake of
20 Bell v. Wolfish, without --

21 JUSTICE GINSBURG: To do -- to do what?

22 MR. GOLDSTEIN: Yes.

23 JUSTICE GINSBURG: You just said that strip
24 naked is different from a strip search.

25 MR. GOLDSTEIN: Yes, exactly.

1 JUSTICE GINSBURG: So, what is permitted?
2 There are various things. One is showering in the
3 presence of officers?

4 MR. GOLDSTEIN: Showering in the presence of
5 officers is not something that requires reasonable
6 suspicion. The courts have uniformly concluded that if
7 you are just generally in an area in which you're being
8 monitored by the officers, that's not a Fourth Amendment
9 search that violates a reasonable expectation of
10 privacy. This is different.

11 JUSTICE GINSBURG: They -- they can be
12 inspected without their clothes; just nothing more than
13 that?

14 MR. GOLDSTEIN: There are two different
15 scenarios. One is a common room where everyone is
16 standing around, and for jail security purposes --

17 JUSTICE KENNEDY: A common?

18 MR. GOLDSTEIN: A common room, a common
19 shower area. And, of course, for security purposes.

20 This is different, Justice Ginsburg. You
21 asked what's prohibited in the absence of reasonable
22 suspicion. What's prohibited is standing 2 feet away
23 from the person --

24 JUSTICE GINSBURG: No, I want to know what's
25 permitted.

1 MR. GOLDSTEIN: Yes, what is permitted is
2 anything -- what is not subject to a reasonable
3 suspicion standard is anything other than looking at --
4 a close inspection of the person at arm's length. What
5 the courts of appeals have uniformly recognized, in the
6 lower Federal courts, what the literature recognizes and
7 really what I think concerned this Court in the Safford
8 case is that when you are standing so close to the
9 person inspecting their genitals, looking directly at
10 their most private parts of their bodies, that is a
11 direct intrusion on their individual privacy --

12 JUSTICE SOTOMAYOR: I'm sorry. Are you
13 --are you suggesting three different levels? Stripping
14 naked: It's okay to stand 5 feet away, but not 2?

15 MR. GOLDSTEIN: I don't think that the
16 courts have had to confront 5 feet versus 2 feet. What
17 they have confronted is they acknowledge that jails are
18 places that require security. And so, if you're just
19 observing a shower room, that does not implicate a
20 reasonable expectation of privacy.

21 JUSTICE SOTOMAYOR: All right. So, are you
22 -- are you taking the position that it's the purpose of
23 the search --

24 MR. GOLDSTEIN: No, I'm taking --

25 JUSTICE SOTOMAYOR: -- that's at issue?

1 MR. GOLDSTEIN: No, it's the closeness of
2 it. There is not a problem, I think, with the question
3 of 2, 3, 4, or 5 feet. These searches all occur in the
4 same way, and that is the officer stands directly in
5 front of you. The testimony here is 2 feet away. That
6 seems to be the common --

7 JUSTICE SOTOMAYOR: I'm still --

8 MR. GOLDSTEIN: Yes.

9 JUSTICE SOTOMAYOR: -- unsure if it's okay
10 to shower --

11 MR. GOLDSTEIN: Yes.

12 JUSTICE SOTOMAYOR: -- and have an officer
13 watch you shower naked.

14 MR. GOLDSTEIN: Yes.

15 JUSTICE SOTOMAYOR: What is -- the greater
16 intrusion is that you're standing 2 as opposed to 5 feet
17 away?

18 MR. GOLDSTEIN: Two versus 10 feet away or
19 just generally observing the room. This is exactly --

20 JUSTICE SOTOMAYOR: All right. If that's a
21 line, that doesn't make much sense to me.

22 MR. GOLDSTEIN: Okay.

23 JUSTICE SOTOMAYOR: Then let's go to the
24 next line, which is -- that's one kind of search.

25 MR. GOLDSTEIN: Yes.

1 JUSTICE SOTOMAYOR: The second is I think
2 what some have called a visual cavity search.

3 MR. GOLDSTEIN: Yes.

4 JUSTICE SOTOMAYOR: Whether you're going to
5 have the individual open or expose private parts.

6 MR. GOLDSTEIN: Yes.

7 JUSTICE SOTOMAYOR: Can you make an argument
8 that that's different than just a visual search?

9 MR. GOLDSTEIN: You can. So, let me just
10 say -- let me just try and close off my answer to the
11 question of the 5 versus 10 feet and then turn
12 immediately to this visual body cavity search.

13 Remember, this is -- the Court will recall
14 that this is a reprise of the argument in the Safford
15 case, where the schools there argued that, well, there's
16 an observation of these students in gym class, they
17 shower together naked, they undress naked. And the
18 Court said it's quite different when you're standing
19 right there looking over the student. Now, as to -- and
20 said that's what implicates a Fourth Amendment right of
21 privacy, and the distinction did make sense.

22 As to your question, yes, there is a
23 material difference, we think, although we think both
24 should be covered by our rule. But a visual body cavity
25 inspection as occurred in the Essex facility here, where

1 you require someone to bend over and cough, which is
2 what the testimony is in this case --

3 JUSTICE GINSBURG: One, not the other?

4 MR. GOLDSTEIN: That's correct.

5 That -- the second jail had a slightly
6 different search protocol, in which the testimony is
7 that he was required to bend over and cough and expose
8 his anus for inspection. And the Respondents themselves
9 regard that as a more significant intrusion, and they
10 apply a reasonable suspicion standard themselves to
11 that.

12 JUSTICE SCALIA: Mr. Goldstein, what -- what
13 you propose is reasonable enough, I suppose, and some
14 States could adopt that kind of a protocol instead of
15 what they have. But what you're asserting is that the
16 Fourth Amendment prohibits them from adopting it, and
17 the obstacle I see is that at the time the Fourth
18 Amendment was adopted, this -- this was standard
19 practice, to strip search people who were admitted to
20 prisons. So, how could it be deemed an unreasonable
21 invasion of privacy when it -- when it was done all the
22 time and nobody thought it was unconstitutional?

23 MR. GOLDSTEIN: We don't believe that the
24 premise is correct. If you read history differently
25 than me, I'm not going to be able to persuade you. But

1 our understanding of the history is that the closest
2 they can come to is two things: First, that people were
3 strip searched upon arrest, and that's certainly not the
4 rule under the Fourth Amendment; and that in certain
5 jails at the time of the founding, other inmates in a
6 process of ablution, what is almost kind of a ritual
7 cleansing, would strip search new inmates. It had
8 nothing to do with the jail officials themselves or
9 trying to intercept contraband.

10 JUSTICE SCALIA: That is somehow less of an
11 intrusion --

12 MR. GOLDSTEIN: It's just a --

13 JUSTICE SCALIA: -- on your privacy, to be
14 naked in front of a whole bunch of inmates, rather than
15 one jail official inspecting?

16 MR. GOLDSTEIN: Well, first, it wasn't a
17 nearly -- the nearly uniform practice that I think your
18 question assumes. And it's just a different kettle of
19 fish entirely, that -- we don't believe, obviously, that
20 that historical lesson obtains today, that the prisoners
21 can strip search new inmates as they -- new arrestees as
22 they come in.

23 I do agree with the basic premise of your
24 question that it's -- our position can't just be that,
25 hey, I've got a reasonable rule. I do have to, in

1 either under the terms of Bell v. Wolfish or
2 Turner v. Safley, establish that this is an exaggerated
3 response, that this is much more, materially more than
4 is necessary to accomplish their goals.

5 JUSTICE GINSBURG: But less intrusive than
6 the one -- the search in Bell v. Wolfish, which involved
7 pretrial detainees?

8 MR. GOLDSTEIN: No, Justice Ginsburg, we
9 disagree with that. At least as to the second search,
10 we think that there is no difference between the degree
11 of intrusion here and in Bell. But there is another
12 significant reason that this -- not just in the nature
13 of the search, but a big difference between this case
14 and Bell is that the inmates in that case made a
15 voluntary choice. They decided to have the contact
16 visits that was --

17 JUSTICE GINSBURG: Do we know if the
18 pretrial detainees in Bell were also inspected on entry
19 into the facility?

20 MR. GOLDSTEIN: We do not. I tried
21 everything I could to check the record of that case, and
22 there was no record of an admission strip search at the
23 MCC at the time.

24 CHIEF JUSTICE ROBERTS: Counsel, is there --
25 there is a distinction between the simple strip search

1 and the visual body cavity search. You say that they
2 apply reasonable suspicion standard to the visual body
3 cavity search.

4 MR. GOLDSTEIN: Yes.

5 CHIEF JUSTICE ROBERTS: So, is the visual
6 cavity search therefore off the table?

7 MR. GOLDSTEIN: No, it is not. We contend
8 that the Fourth Amendment prohibited the visual body
9 cavity search at the Essex facility. So --

10 CHIEF JUSTICE ROBERTS: Right, right. But
11 you would say that they had to have a reasonable
12 articulable suspicion before they could do that?

13 MR. GOLDSTEIN: We say that under their
14 written policy, they should have, but they didn't. The
15 Burlington County -- the only evidence about a
16 conclusion of the jail about reasonable suspicion is
17 that the Burlington County intake officer filled out a
18 form saying there is no reasonable suspicion here. And
19 Essex I don't believe contends that there was reasonable
20 suspicion to engage in a visual body cavity search.
21 They deny, as a matter of fact, that it happened.

22 CHIEF JUSTICE ROBERTS: So -- so, you see a
23 distinction between what they actually do and the
24 written policy.

25 MR. GOLDSTEIN: I do with respect to the

1 Essex -- I apologize -- no. What happened here is that
2 Essex, after this search occurred -- and this is
3 described in the Essex brief in opposition, in case you
4 want to look at it later, at 3 in note 1. Essex, after
5 the search in this case, changed its policy.

6 CHIEF JUSTICE ROBERTS: Right.

7 MR. GOLDSTEIN: We were denied an injunction
8 going forward under L.A. v. Lyons. So, we -- it's just
9 a question of damages for the search that occurred at
10 the time under their old policy.

11 JUSTICE ALITO: I'm confused about your --

12 JUSTICE SOTOMAYOR: Could I --

13 JUSTICE ALITO: -- your position. Suppose a
14 jurisdiction has the policy of requiring every inmate
15 who is arrested and is going to be held in custody to
16 disrobe and take a shower and apply medication for the
17 prevention of the spread of lice and is observed while
18 this is taking place from some distance by a corrections
19 officer, let's say 10 feet away. Is that -- does that
20 require reasonable suspicion?

21 MR. GOLDSTEIN: It does not. The -- and --
22 and --

23 JUSTICE ALITO: And so, your -- your only
24 concern is searches that go further than that.

25 MR. GOLDSTEIN: That's exactly right. The

1 very close inspection of the individual's genitals,
2 which can occur absolutely so long as there is some
3 minimal level of suspicion that's created.

4 I do want to return to Justice Kennedy's
5 concern about dignitary interests here and whether
6 drawing any sort --

7 JUSTICE ALITO: Is there -- could I just
8 follow up on that? Is there a dispute of fact as to
9 whether anything beyond that occurred in Burlington
10 County?

11 MR. GOLDSTEIN: In Burlington County, there
12 is a dispute about the so-called genital lift, whether
13 Mr. Florence was required to lift his genitals or not.
14 There is no dispute that he was required directly in
15 front of an officer to strip naked, despite the officer
16 having made a finding, which is on page 390 of the joint
17 appendix, that there was no reasonable suspicion to
18 conduct a strip search. That is the only factual
19 dispute --

20 JUSTICE SOTOMAYOR: Counsel --

21 MR. GOLDSTEIN: -- in the entire case.

22 JUSTICE SOTOMAYOR: Could you clarify two
23 points for me? The first is, was he admitted into the
24 general population at Burlington?

25 MR. GOLDSTEIN: The record is not entirely

1 clear. What the record says is that for the first few
2 days of his stay -- remember, he inexplicably was kept
3 for 6 days. For the first several days, he was kept in
4 a cell with only one other inmate, or possibly two, and
5 one time he had lunch with other people. In Essex, he
6 was admitted to the general population.

7 JUSTICE SOTOMAYOR: The prior charge against
8 your client was the use -- involved the use of a deadly
9 weapon. Assuming the prison knew this, wouldn't that
10 provide the reasonable suspicion that you argue was
11 missing?

12 MR. GOLDSTEIN: No, because it depends --
13 because of the breadth of the phrase "possession of a
14 deadly weapon," as this case illustrates. The record
15 shows that the possession of the deadly weapon -- and
16 that's why this charge was not pursued by the State --
17 is -- was that he was pulled over at a traffic stop and
18 he drove away. The deadly weapon is the car in this --

19 JUSTICE SOTOMAYOR: So, now you're feeding
20 into your adversaries' arguments that what you're asking
21 the police to do on intake, or the corrections facility
22 on intake, is to investigate in that fine detail. They
23 can't even look at the rap sheet --

24 MR. GOLDSTEIN: No --

25 JUSTICE SOTOMAYOR: -- and see use of a

1 deadly weapon and say, ah, this guy could be dangerous?

2 MR. GOLDSTEIN: No, Justice Sotomayor. The
3 rap sheet does not contain that charge. What the rap
4 sheet does show -- and we are perfectly fine with them
5 looking at the rap sheet. The rap sheet -- and it's in
6 the joint appendix. The rap sheet says that he had a
7 single charge, he pleaded guilty, he got a term of
8 probation. There is nothing about that the jail would
9 have had any information suggesting that he had some
10 charge involving a deadly weapon. And that's why they
11 themselves certified that there was no reasonable
12 suspicion.

13 JUSTICE KENNEDY: Well, is the rap sheet
14 always available immediately? I thought it was rather
15 common -- correct me if I'm wrong -- just based on
16 practice some years ago, that it -- it would take maybe
17 24 hours, 48 hours for the wiretap -- for the wire
18 services and the Internet to -- to report that he was
19 wanted for questioning for some very, very serious crime
20 in some other State.

21 I mean, in my practice at least, county
22 jails were much more dangerous than penitentiaries,
23 because you don't know who these people are. You arrest
24 them for traffic, and it may be some serial killer. You
25 do not know.

1 MR. GOLDSTEIN: Sure. First, that is not
2 the view of the jails in this case. Remember, they
3 apply a reasonable suspicion standard. They did not
4 find any concern in their own policies, neither does the
5 Marshals Service, ICE, with this prospect of some prior
6 offense.

7 As to what the rule is and how common it is
8 and whether this works in practice, the jail here did
9 look him up in the New Jersey Criminal Justice
10 Information System. That's in the record. They're
11 required by New Jersey law to do that. It's a -- every
12 single one of these jails has computer access to the
13 NJ CJIS, and also to the NCIC; they just type in his
14 identifying information.

15 They were able to pull him up without any
16 difficulty, and they have not complained that they
17 didn't have enough information about him. They filled
18 out a form saying there is no reasonable suspicion here.
19 And remember, our rule only operates in a system,
20 Justice Kennedy, in which the jail does have enough
21 information. When -- our point is this: If the jail
22 has the facts, as it did here, to affirmatively
23 determine that there is no reasonable suspicion, which
24 is what they decided about Mr. Florence, then it is an
25 extraordinary intrusion on dignity and autonomy to strip

1 him naked --

2 CHIEF JUSTICE ROBERTS: Counsel --

3 MR. GOLDSTEIN: -- when they have no reason
4 to do so.

5 CHIEF JUSTICE ROBERTS: Counsel, my
6 understanding of the statistics -- and correct me if I'm
7 wrong -- is that they get about 70 new people going
8 through this process a day. Is there anything in the
9 record about how much additional time it would require
10 to look at each one, to look at their record, to
11 determine which category they should fall into, to strip
12 search or not, as opposed to having a blanket rule?

13 MR. GOLDSTEIN: Sure. There is because they
14 do this already. They -- it is not an administrative
15 problem. They apply our rule today. Remember,
16 Mr. Chief Justice, when he arrived at the Burlington
17 County Jail, they did an assessment of him and
18 determined that there was no reasonable suspicion. The
19 jails in this case did pull up his prior criminal
20 history, and they have no problem doing that. They
21 apply our standard today. It is not a difficult one.

22 But --

23 JUSTICE SCALIA: Mr. Goldstein, you -- YOU
24 have acknowledged that we have held that when you have
25 visitors, you may be strip -- strip searched after the

1 visit and the same kind of close examination that you
2 object to here. Now, your explanation why that is okay
3 is that that is voluntary.

4 MR. GOLDSTEIN: I have two explanations.

5 JUSTICE SCALIA: That you don't have to have
6 visitors. Can you really condition your -- your having
7 visitors on your waiver of your Fourth Amendment rights?

8 MR. GOLDSTEIN: Yes. Block establishes that
9 you have no right whatsoever to have contact visits.
10 So, under *Schneckloth v. Bustamonte*, of course, you can
11 say I voluntarily relinquish my Fourth Amendment right
12 in exchange for this privilege.

13 But I have a second --

14 JUSTICE SCALIA: Are -- are you sure about
15 that?

16 MR. GOLDSTEIN: I --

17 JUSTICE SCALIA: You can -- you can
18 condition certain -- certain privileges upon a waiver
19 of constitutional privileges?

20 MR. GOLDSTEIN: Yes, I believe that
21 that's -- I think that's a fair statement of the law.

22 I do have a second point, though, and that
23 is that the principal reason underlying
24 *Bell v. Wolfish*'s holding that those searches were
25 reasonable is that it was essential to deter smuggling,

1 and that deterrence rationale has much more of an
2 attenuated relationship to this case.

3 Remember that the inmate in that case was
4 having a planned meeting with someone, and the
5 representation of the government is that our problem is
6 if you plan to have somebody come visit you and you're
7 going to have a contact visit, you can plan for them to
8 try and sneak something to you. This Court has set --

9 JUSTICE KAGAN: Mr. Goldstein, there, of
10 course, were guards there who were watching the visits.
11 And, as I understand that case, there was really no
12 empirical evidence that smuggling came about as a result
13 of these visits.

14 MR. GOLDSTEIN: Well, can I just read to you
15 what the Court said about that? Just so -- the Court
16 did have a slightly different take, I think. And this
17 is from page 559 of the Court's opinion: "That there
18 has been only one instance where an MCC inmate was
19 discovered attempting to smuggle contraband into the
20 institution on his person may be more a testament to the
21 effectiveness of the search technique as a deterrent
22 than to any lack of interest on the part of the inmate
23 to secrete and import such items when the opportunity
24 arises."

25 And our point is that that -- when you have

1 an unexpected arrest here -- remember, Mr. Florence
2 showed the paperwork that he was not wanted for arrest.
3 And that's going to be generally true in all kinds of
4 traffic stops and the like --

5 JUSTICE BREYER: Well, which is it you're
6 doing? I mean, I imagine -- I thought you were saying
7 you always need reasonable suspicion. So, I imagine a
8 case where the person is going to be arrested, put into
9 the general prison population. There is a warrant out
10 against him for second-degree murder, and the policeman
11 stopping him for a traffic offense arrests him because
12 he knows he is wanted on a warrant in another place.
13 And the jail has a policy that says when you're -- come
14 in here because of second-degree murder, we strip search
15 you. Okay? Can they do that under your rule or not?

16 MR. GOLDSTEIN: Yes.

17 JUSTICE BREYER: That's all they know.

18 MR. GOLDSTEIN: Yes. That's reasonable
19 suspicion.

20 JUSTICE BREYER: Then you do not want to --
21 then you are not saying it always has to be reasonable
22 suspicion.

23 MR. GOLDSTEIN: It's just a debate about
24 words. We think that is reasonable suspicion.

25 JUSTICE BREYER: Oh, all right. Well, that

1 isn't helping me.

2 MR. GOLDSTEIN: I'm sorry.

3 JUSTICE BREYER: What helps me is to know
4 what the category of things is that the jail in your
5 opinion is going to have to look into the
6 characteristics of this individual person, and when I
7 look at the ABA, they talk about minor arrests.

8 MR. GOLDSTEIN: Yes.

9 JUSTICE BREYER: And when I look at some of
10 the cases, there's a long list, like violence, drugs,
11 and so forth, where you don't have to, where you can
12 just use a general -- the fact that he was arrested --

13 MR. GOLDSTEIN: Right.

14 JUSTICE BREYER: -- for the thing. But there
15 are other ones, minor ones, where you do. So, what's
16 your rule on that?

17 MR. GOLDSTEIN: Our rule that we would
18 accept is that, with respect to minor offenders, that's
19 when you assess --

20 JUSTICE BREYER: Okay. Then the next
21 question which we'll get --

22 MR. GOLDSTEIN: Yes.

23 JUSTICE BREYER: -- who is a minor offender
24 and how do you administer that rule?

25 MR. GOLDSTEIN: Okay. I think that is a

1 great question for them, because that's their rule.
2 They have a rule that says for minor offenders that you
3 have to have reasonable suspicion to search for
4 contraband.

5 JUSTICE GINSBURG: But you are trying to
6 state the constitutional rule, and you keep talking
7 about what is their rule, and we're trying to find out
8 what are the limits --

9 MR. GOLDSTEIN: Yes.

10 JUSTICE GINSBURG: -- of the rule, and I
11 think you've already qualified what you said opening.
12 Opening, you said reasonable suspicion is the rule for
13 everyone, the felon as well as the minor offenders. Now
14 you seem to be saying, well, this case involves only
15 minor offenders; so, let's limit it to that. That's
16 what I thought you were saying now.

17 MR. GOLDSTEIN: Yes, that's right. Because
18 this case only involves minor offenders, we have
19 articulated a rule with respect to minor offenders.

20 JUSTICE BREYER: All right. That's what
21 I'm --

22 MR. GOLDSTEIN: Okay.

23 JUSTICE BREYER: Unfortunately, I'm asking
24 you and not them, and it's the same question.

25 MR. GOLDSTEIN: Okay. Sure.

1 JUSTICE BREYER: How do you want us to write
2 this so that jail personnel all over the country --

3 MR. GOLDSTEIN: Yes.

4 JUSTICE BREYER: -- have to be able to
5 follow it and know exactly what they're supposed to do.

6 MR. GOLDSTEIN: For three decades the rule
7 that was articulated by the Federal courts and applied
8 without difficulty is one that says for minor offenses.
9 When that was applied in practice it was basically done
10 at a felony versus misdemeanor line. The court accepted
11 that if you are -- the courts accepted that if you are
12 suspected of a more serious offense, then for
13 administrative reasons and because we just think you
14 might be engaged in more criminality, then you don't
15 have to have any individualized inquiry whatsoever.

16 JUSTICE SCALIA: I can understand that -- I
17 can understand that for cavity searches, but -- but why
18 for the search to see that -- if the person has any
19 fleas or cooties or, you know, any -- any other
20 communicable disease before he's put into the general
21 population? Are -- are felons more likely to have those
22 than non-felons?

23 MR. GOLDSTEIN: No, they are not.

24 JUSTICE SCALIA: So, that line makes no
25 sense for that aspect of the search which is -- is just

1 we want to make sure that we have a clean prison.

2 MR. GOLDSTEIN: That is not correct. That
3 aspect -- what the testimony in this case establishes is
4 that the jail guards allow any sort of medical rationale
5 for the search to be conducted by medical personnel, not
6 by the guards themselves. All these inmates are
7 examined by a medical person, a nurse or the like, and
8 they are responsible for -- for --

9 JUSTICE SCALIA: And that -- that's where
10 the Fourth Amendment invasion of privacy line is to be
11 drawn? If you're examined close up by someone who has a
12 medical degree, it's okay? And, on the other hand, if
13 it's someone who does not have a medical degree, it's
14 not okay?

15 MR. GOLDSTEIN: That is --

16 JUSTICE SCALIA: That can't be the line as
17 to whether your privacy is being invaded.

18 MR. GOLDSTEIN: It -- it can be the line,
19 and it is the line that's been accepted for decades.

20 JUSTICE GINSBURG: Even for --

21 JUSTICE KENNEDY: But you -- you would --

22 JUSTICE GINSBURG: -- body lice?

23 JUSTICE KENNEDY: -- have to keep the person
24 in custody, say, for 24 or 48 hours until the medical
25 personnel could come. Do you have 24-hour medical

1 personnel for intakes that are at 2 in the morning?

2 MR. GOLDSTEIN: Yes. The intake process,
3 the testimony is that --

4 JUSTICE GINSBURG: But they are --

5 JUSTICE KENNEDY: You're telling us that
6 every county jail in -- in the United States has medical
7 personnel on duty 24 hours a day ready to do a -- a
8 search?

9 MR. GOLDSTEIN: No, I apologize,
10 Justice Kennedy. I'm telling you what's in the record
11 in this case. And that is --

12 JUSTICE BREYER: You said before was 2 feet
13 is too close, but 5 feet is okay. Are you sticking with
14 that?

15 MR. GOLDSTEIN: Justice Breyer, I'm saying
16 that a close inspection which is intended to examine the
17 person's individual --

18 JUSTICE BREYER: Yes.

19 MR. GOLDSTEIN: -- genitals, and whether
20 it's at 2 feet or 4 feet I don't think is the relevant
21 line.

22 If I could make one point, and then reserve
23 the remainder of my time, that that --

24 JUSTICE GINSBURG: May I just ask, on your
25 medical personnel, children in school get inspected for

1 -- for head lice, prisoners for body lice. You don't
2 need a doctor to do that?

3 MR. GOLDSTEIN: No, that's right, but if
4 that is right, what happens is that medical
5 professionals are the people who are assigned that
6 responsibility. That's the testimony in this case. The
7 only last point that I wanted to make is --

8 JUSTICE GINSBURG: But that's not
9 constitutionally required.

10 MR. GOLDSTEIN: I -- I agree. That --

11 JUSTICE GINSBURG: So, that's another thing
12 that -- that you don't need to -- they can inspect for
13 body lice, and that's -- that's okay?

14 MR. GOLDSTEIN: If that's what they're
15 doing, I think that that is okay. The courts have said
16 that that is not itself a -- because of the prospect of
17 handling that problem with shampoo, which is what these
18 jails do, that that's not a sufficient -- a sufficient
19 justification to require the person to strip naked.

20 The only other point that I did want to make
21 is that this is the rule, not just at Burlington and
22 Essex, but also of the U.S. Marshals Service, which has
23 the intake of 220,000 inmates every year, and also of
24 the Bureau of Immigration Customs Enforcement, which
25 intakes 384,000 a year.

1 JUSTICE GINSBURG: But the Government tells
2 us that that's true only if they don't put the arrestee
3 in the general population.

4 MR. GOLDSTEIN: That's not correct. That is
5 only the policy of the U.S. Bureau of Prisons, which has
6 an intake of minor offenders of only a few thousand
7 people a year. For the Marshals Service and for ICE,
8 which have a combined 600,000 people every year, they do
9 not have that separate housing rule.

10 If I could reserve the remainder of my time.

11 CHIEF JUSTICE ROBERTS: We'll give you
12 rebuttal time, but maybe just to be clear --

13 MR. GOLDSTEIN: Yes.

14 CHIEF JUSTICE ROBERTS: -- you don't -- do
15 you or do you not have an objection to the superseding
16 ECCF policy?

17 MR. GOLDSTEIN: We -- if the -- we do,
18 because they still have to stand naked directly in front
19 of the correctional officer under the superseding
20 policy. What the superseding policy is, which is
21 Burlington's policy throughout this, is that they will
22 not search the person for contraband, which is their
23 supposed interest here, for contraband, in the absence
24 of reasonable suspicion.

25 Both jails at the time of this search and

1 also now will still require the person to strip naked,
2 supposedly for contraband, even though their own policy
3 says we won't search for -- we won't engage in the depth
4 of search that's required, we won't look at the anus, we
5 won't look in the person's mouth, in the absence of
6 reasonable suspicion.

7 CHIEF JUSTICE ROBERTS: That's the current
8 policy?

9 MR. GOLDSTEIN: That is the current policy.

10 CHIEF JUSTICE ROBERTS: And you have no
11 problem with that.

12 MR. GOLDSTEIN: We do have -- I --

13 CHIEF JUSTICE ROBERTS: I mean, you have no
14 problem with the reasonable, articulable suspicion
15 aspect of the body cavity search.

16 MR. GOLDSTEIN: That's correct.

17 CHIEF JUSTICE ROBERTS: Okay. And with
18 respect to the simple strip search --

19 MR. GOLDSTEIN: Yes.

20 CHIEF JUSTICE ROBERTS: -- your only
21 objection is that the guard is too close to the inmate?

22 MR. GOLDSTEIN: That's right.

23 CHIEF JUSTICE ROBERTS: Okay. Thank you.

24 Mr. Phillips.

25 ORAL ARGUMENT OF CARTER G. PHILLIPS

1 ON BEHALF OF THE RESPONDENTS

2 MR. PHILLIPS: Thank you, Mr. Chief Justice,
3 and may it please the Court:

4 I actually appreciate the clarification that
5 your questions brought to this case, because I think
6 there's a bit of confusion that I'd like to try to clear
7 up, although my -- my colleague's movement in terms of
8 answering some of the questions left me a little bit
9 perplexed as to exactly what the nature of their claims
10 are.

11 The -- the first question that it seems to
12 me the Court should focus on is what policy is at issue
13 here. And, obviously, since the class certification
14 deals with one set of issues and the plaintiff's claims
15 deal with another set of issues, I think you have to be
16 careful.

17 I think you have to focus on the policies
18 that existed in 2005. That was the basis on which he
19 was in fact searched under these circumstances. And the
20 policy in Burlington was that -- was primarily aimed,
21 frankly, at health and tattoos, and the policy at Essex
22 was aimed primarily at contraband and then secondarily
23 at tattoos and health.

24 And the policy at Burlington was largely
25 a -- you come into prison, you give up your clothes,

1 they look through your clothes, you take a shower, they
2 examine you fairly cursorily, but look at you, and then
3 -- then give you prison garb and move along your way.

4 CHIEF JUSTICE ROBERTS: I'm sorry. Is the
5 shower and look at you cursorily -- are those separate
6 things? Or is it during the shower?

7 MR. PHILLIPS: It -- it's before or during.

8 CHIEF JUSTICE ROBERTS: Because your friend
9 places a lot of significance on how close --

10 MR. PHILLIPS: Right.

11 CHIEF JUSTICE ROBERTS: -- the examination
12 is. So, under that policy, how close was the
13 examination?

14 MR. PHILLIPS: It almost certainly would
15 have been about an arm's length, because at that -- I
16 mean, the problem is if you're exchanging clothes with
17 somebody, you're handing them clothes to change into,
18 it's sort of hard to be longer than arm's length and
19 actually get the clothes into his hand. So that --

20 JUSTICE SCALIA: Two arms' lengths. I mean,
21 he could reach out, right?

22 MR. PHILLIPS: Okay. Two arms' lengths.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: Well, that's not
25 right. They could take --

1 MR. PHILLIPS: But I'm not --

2 CHIEF JUSTICE ROBERTS: That's not right.

3 You could take the clothes off, put them in a bin --

4 MR. PHILLIPS: Right.

5 CHIEF JUSTICE ROBERTS: The person examines
6 the bin.

7 MR. PHILLIPS: Right. And that's actually
8 what they do in Essex. In Essex, they do it that way.
9 The difference between Essex is that Essex, in fact,
10 does have -- I mean, part of the problem is
11 terminological, all right?

12 CHIEF JUSTICE ROBERTS: Yes.

13 MR. PHILLIPS: You know, Burlington is
14 basically a body visual observation, and the district
15 court said that's unconstitutional, that just observing
16 at all is unconstitutional.

17 To some extent, it seems to me my -- my
18 friend here has given up that part of the district
19 court's decision, which -- then clearly the court of
20 appeals, to the extent it reversed that part, ought to
21 be affirmed on that ground alone.

22 JUSTICE BREYER: Visual observation from
23 more than 2 feet, or less than 2 feet?

24 MR. PHILLIPS: Right, although that -- that
25 was not the district court's theory. The district court

1 didn't say 2 to 3 feet.

2 JUSTICE BREYER: Okay. What happened? Do
3 we know? Was the search within 2 feet or not within 2
4 feet?

5 MR. PHILLIPS: Well, it depends on whose
6 version of it.

7 JUSTICE BREYER: We don't know.

8 MR. PHILLIPS: You have to remember, the
9 district court granted summary judgment to the plaintiff
10 in this case. So, you would have to -- you would have
11 to interpret -- you'd have to give us the benefit of the
12 interpretation, which was that it was more than 2 feet.

13 But the court of appeals reversed, of
14 course, without regard to that, because the court of
15 appeals said, look, if you -- if you apply this Court's
16 decision in *Bell v. Wolfish*, it doesn't matter, because
17 you can engage in a much more intrusive true body cavity
18 search, which frankly is more intrusive than even what
19 Essex County asks -- has -- does in this case, because
20 he wasn't asked to bend over and to -- and to have a
21 body cavity anal search. What he was asked to do was to
22 squat and cough, in the event that -- because ordinarily
23 that will cause the contraband then to fall out, and you
24 can -- and you can catch it under those circumstances.

25 So, this is -- that's sort of the context in

1 which this issue comes up.

2 JUSTICE KAGAN: Mr. Phillips, if I could
3 understand your position, you think that there's no
4 reasonable suspicion even for that more intrusive body
5 cavity search; is that right?

6 MR. PHILLIPS: That's correct. That's my --
7 that's the rule of law I'm asking for.

8 JUSTICE KAGAN: And does it matter to you
9 whether the person is being introduced into the general
10 prison population, or would you also say that if the
11 person is not being introduced into the general prison
12 population? Do you still think that there's no
13 reasonable suspicion requirement?

14 MR. PHILLIPS: I would say, from my
15 perspective, I think even -- even if they weren't going
16 to be admitted into the general prison population,
17 because the risks remain too substantial. But the truth
18 is I don't have to defend that argument, because both --
19 both of these jails admit the -- their inmates into the
20 -- into the general population 99.9 percent of the time.

21 JUSTICE SOTOMAYOR: Would a manual search --

22 MR. PHILLIPS: So, that's not a line we
23 draw.

24 JUSTICE ALITO: Would you say that
25 regardless of the offense for which the person is

1 arrested? There have been some stories in the news
2 recently about cities that have taken to arresting
3 people for traffic citations. So, suppose someone is
4 just arrested because they have a lot of tickets for
5 being caught on speed cameras, let's say. That person
6 can be subjected to the searches that you're describing?

7 MR. PHILLIPS: Yes, Justice Alito. I think
8 the basic principle we're asking for is that deference
9 to the jails and -- and to the administrators of the
10 jails requires that this Court respect their judgment
11 that you can't make a distinction based on that specific
12 individual; that whether somebody is a minor offender or
13 a major offender, one, is never all that clear in the
14 first place, and, two, isn't a basis on which to
15 distinguish the risks that it poses to the --

16 JUSTICE BREYER: Try the ABA. The ABA is
17 minor offenses, not drugs, not violence, and there you
18 have to have reasonable suspicion. Now, I've read
19 through the briefs, and I can't find a lot of
20 contrabanders that were caught in that category. In
21 fact, my law clerk thinks it's one out of 64,000 or
22 less. So -- so, what is the justification for a rule to
23 avoid reasonable suspicion in that category?

24 MR. PHILLIPS: If -- if you look at the
25 expert testimony that was before the court, in the

1 district court in this case, both the expert testimony
2 of the plaintiff and the expert testimony of the
3 defendant -- this is at 348a of the joint appendix. It
4 says "a greater presence of contraband amongst those
5 individuals that have minor offenses." That's his --
6 that's their expert's characterization, that minor
7 offenders bring in more contraband than major offenders.
8 Our experts said misdemeanants can be more dangerous and
9 more likely to bring in contraband --

10 JUSTICE BREYER: It's a conclusion --

11 MR. PHILLIPS: Yes.

12 JUSTICE BREYER: -- and we have a lot of
13 practical experience because different States have
14 different rules, and San Francisco came in with I think
15 the toughest on your side, for your side. I just say,
16 looking through that, it's very hard to find somebody
17 who really was in this minor offender category, who
18 really was found to have contraband. So, what should I
19 look at to show that my initial reaction from a quick
20 reading is wrong.

21 MR. PHILLIPS: Well, I mean --

22 JUSTICE BREYER: I mean, do I just say this
23 is a --

24 MR. PHILLIPS: -- I think you can go back to
25 Bell v. Wolfish, where this Court said that the fact

1 that there is not a lot of contraband being found may be
2 a testament to the effectiveness of the deterrent.

3 JUSTICE SOTOMAYOR: So, why do we change the
4 policy? In Bell, we found that the policy was
5 successful. Even though there were searches, contraband
6 still got in. So, virtually every circuit -- in
7 practice, the Federal system -- have been following this
8 reasonable suspicion for minor crimes, and they've been
9 fairly successful. So, why do we change the
10 constitutional rule to let them do more?

11 MR. PHILLIPS: Well, I think that --

12 JUSTICE SOTOMAYOR: To invade more.

13 MR. PHILLIPS: Well, I mean, I think, first
14 of all, anybody who thinks that the problems of
15 contraband are less serious today than they were in 1978
16 is -- is ignoring reality.

17 JUSTICE SOTOMAYOR: I -- I understand
18 contraband is serious, but most of the studies point to
19 it not being on intake, but coming in through guards,
20 coming in through contact visits.

21 MR. PHILLIPS: Yes.

22 JUSTICE SOTOMAYOR: The great cause today is
23 that from corrupt correction officials.

24 MR. PHILLIPS: Well, I mean, we can debate
25 that. But, Justice Sotomayor, it seems to me that the

1 -- that the fundamental principle that ought to
2 undergird the entirety of the Court's analysis here
3 comes out of Turner v. Safley and that line of cases,
4 where --

5 JUSTICE SOTOMAYOR: Counsel, could I ask you
6 something just in terms of your rule? I think your
7 brief says your rule is you're not entitled
8 constitutionally to any right of privacy in prison.

9 MR. PHILLIPS: No.

10 JUSTICE SOTOMAYOR: If that's the case, are
11 you saying that if the prisons decide on a manual
12 search, every prisoner who comes in, correction officers
13 can manually check their cavities, is that --

14 MR. PHILLIPS: No, Justice Sotomayor. No.

15 JUSTICE SOTOMAYOR: So, there is some
16 privacy right?

17 MR. PHILLIPS: Yes, I can be clear about
18 this. It seems to me that Hudson v. Palmer and the --
19 and the history of the Fourth Amendment clearly suggest
20 that there is no reasonable expectation of privacy of
21 being viewed naked in a prison. And, therefore, the
22 ordinary Burlington approach of having somebody take a
23 shower and looking at him or her naked for tattoos and
24 health and incidental contraband, clearly
25 constitutional, clearly doesn't even raise a Fourth

1 Amendment issue.

2 When you get beyond that point and start to
3 begin the -- what Essex does, which is not a true anal
4 cavity search but simply an anal-focused and
5 genital-focused search, I think that is subject to the
6 Turner v. Safley and/or the Bell v. Wolfish standard.

7 JUSTICE SOTOMAYOR: Can we go back to
8 Justice Alito's question? Isn't one of the factors that
9 we look at under the Fourth Amendment reasonableness?
10 And should we be thinking about the fact that many of
11 these people who are now being arrested are being put
12 into general populations or into jails, sometimes not
13 just overnight but for longer periods of time, like this
14 gentleman, for 6 days before he sees a magistrate?
15 Should we be considering a rule that basically says your
16 right to search someone depends on whether that
17 individual has in fact been arrested for a crime that's
18 going to lead to jail time or not, whether that person's
19 been presented to a magistrate to see whether there is
20 in fact probable cause for the arrest and detention of
21 this individual? I mean, there is something unsettling
22 about permitting the police to arrest people for things,
23 like kids who are staying out after curfew with no
24 other -- based on probably nothing else.

25 MR. PHILLIPS: Justice Sotomayor, I think

1 what is disturbing about -- about this case is, in fact,
2 the -- that he was arrested under circumstances in which
3 he candidly shouldn't have been arrested as a matter of
4 State law. I understand that. But I think to change
5 the constitutional rule and to change the
6 Turner v. Safley and Bell v. Wolfish standards and
7 ignore what the underlying inquiry should be here, which
8 is these policies which apply across the board impinge
9 constitutional protections, but nevertheless
10 represent --

11 JUSTICE SOTOMAYOR: But what --

12 MR. PHILLIPS: -- the good-faith judgment of
13 our jailers.

14 JUSTICE SOTOMAYOR: But what are we doing
15 with the presumption of innocence? That's also a
16 constitutional right. And so, shouldn't the degree to
17 which a search is permitted be conditioned in some way
18 on whether or not this person has been presented to a
19 magistrate?

20 MR. PHILLIPS: I -- if you ask me the way I
21 would analyze it, I would -- if you want to adopt a
22 different set of standards about who ought to be
23 arrested and who ought to be taken to jail, that's fine.
24 I understand that.

25 JUSTICE SOTOMAYOR: Well, I mean --

1 MR. PHILLIPS: But I think once you're
2 talking about actually bringing someone into the jail to
3 be admitted into the general population and what is
4 without question one of the most dangerous, most risky
5 environments, in that context I would hope that this
6 Court, rather than asking individual jailers to make
7 decisions on the basis of -- where they clearly will not
8 have the kind of information you're asking them to make
9 and where if they make a judgment wrong in either
10 direction, all it means is litigation. Either they --

11 CHIEF JUSTICE ROBERTS: I thought -- I
12 thought your friend said that is exactly what you do
13 with respect to the visual body cavity search,
14 reasonable articulable suspicion, under the new policy.

15 MR. PHILLIPS: That's what we do with a true
16 anal body cavity search. What we -- I mean, we changed
17 the policy, to be sure.

18 CHIEF JUSTICE ROBERTS: Right.

19 MR. PHILLIPS: We changed the policy because
20 of litigation concerns.

21 CHIEF JUSTICE ROBERTS: Well, now, as I
22 understand it, with respect to --

23 MR. PHILLIPS: Liability concerns.

24 CHIEF JUSTICE ROBERTS: -- with respect to
25 visual body cavity searches, you require a particular

1 individual reason, right?

2 MR. PHILLIPS: Yes.

3 CHIEF JUSTICE ROBERTS: Okay. And you don't
4 require that with respect to simple strip search?

5 MR. PHILLIPS: Right.

6 CHIEF JUSTICE ROBERTS: Okay. So, you agree
7 with your friend that the only thing at issue here is
8 how close the guard is going to be to the individual who
9 you have no reasonable suspicion to think is different
10 than anybody else during a simple strip search?

11 MR. PHILLIPS: Well -- no --

12 CHIEF JUSTICE ROBERTS: You want -- he says
13 2 feet is too close; 5 feet or whatever is okay. You
14 want to go to 2 feet. You don't want to have to stand
15 back to 6 feet. That's all the case comes down to?

16 MR. PHILLIPS: I don't -- well, I mean, you
17 can characterize it that way. I mean, I think the
18 better way to think about it is that what Essex wants,
19 what -- you know, what Essex policy permitted it to do
20 was to examine the --

21 CHIEF JUSTICE ROBERTS: I'm not interested
22 in what Essex policy permitted it to do in the past.
23 I'm looking at the new policy, all right? Under the new
24 policy, you have reasonable articulable suspicion --

25 MR. PHILLIPS: Right.

1 CHIEF JUSTICE ROBERTS: -- for everything
2 except simple strip search and observation.

3 MR. PHILLIPS: Well, see, that's the
4 problem, is that the language there is different.
5 Because the -- the truth is that the line that the new
6 policy draws is between a true -- what I -- what I think
7 Bell v. Wolfish was describing, where you ask the inmate
8 to bend over and expose his or her anus for a cavity
9 search. On that score, that's what -- we don't do that.
10 But we do, in fact, ask --

11 JUSTICE KAGAN: And, Mr. Phillips --

12 CHIEF JUSTICE ROBERTS: I'm sorry. Could I
13 finish and find out what you do? You said: We don't do
14 that. We do -- what?

15 MR. PHILLIPS: Right. What we do is ask the
16 individual to lift his genitals and to squat and cough.

17 CHIEF JUSTICE ROBERTS: Okay. So, you do
18 more than a simple strip search.

19 MR. PHILLIPS: Right, slightly more than a
20 simple strip search.

21 JUSTICE SCALIA: But, Mr. Phillips, there --
22 there --

23 MR. PHILLIPS: But I don't think that's the
24 line to draw. I think --

25 JUSTICE SCALIA: There is still an issue in

1 the case beyond the ordinary visual inspection, and that
2 is this: Even though you have changed your policy
3 now --

4 MR. PHILLIPS: Right, we're still liable.

5 JUSTICE SCALIA: -- the question remains
6 whether that change in policy was constitutionally
7 required, so that when -- when you treated the -- the
8 plaintiff in a different fashion under the old policy,
9 that was a violation of the Constitution.

10 Doesn't -- doesn't that question remain in
11 the case?

12 MR. PHILLIPS: That question clearly remains
13 in the case. I'm not --

14 JUSTICE SCALIA: Okay. So, there are two
15 questions.

16 MR. PHILLIPS: Right.

17 JUSTICE SCALIA: So, we have to consider
18 both, the pure visual and also the inspection for
19 contraband.

20 MR. PHILLIPS: Right. And all I'm -- all I
21 -- the only point I've been trying to make here is that
22 if you -- if you look at the way the district court
23 analyzed the case, the district court split it up, and
24 it's the basis of the class distinction versus the --

25 JUSTICE KENNEDY: Does the record or common

1 experience justify an argument that if you have the
2 person who's stopped just for a traffic ticket, but that
3 person is going to be in custody for 5 or 6 days, that
4 person might well prefer an institution where everyone
5 has been searched before he or she is put into the
6 population with --

7 MR. PHILLIPS: Justice Kennedy, there
8 actually is testimony in the record from the warden
9 saying that in order to ensure everybody's safety, we
10 are better off with a blanket policy that says that
11 we're going to engage in -- in some form of the search.
12 Essex has a slightly more intrusive one. But it is all
13 designed to accomplish the same thing. It's not just
14 designed to ensure against contraband and -- and that.
15 It's designed to ensure that there isn't somebody like
16 Mr. Florence who's going to end up being poked or
17 otherwise --

18 JUSTICE BREYER: Is there any evidence -- I
19 count seven or eight States anyway that have some
20 variation of the reasonable suspicion rule like what
21 they want, roughly. Is there any evidence at all that
22 in those seven or eight States, there is more contraband
23 being smuggled in?

24 MR. PHILLIPS: Well, there is the testimony
25 in the record from their expert, who said that in

1 Kentucky, there is today -- the single biggest problem
2 in Kentucky prisons and the biggest cause of death is
3 drug overdose, which suggests that there's a serious
4 contraband issue in Kentucky. Kentucky is in one of
5 those -- is one of those -- is inside one of the
6 circuits that has had a reasonable suspicion requirement
7 as a constitutional matter forever.

8 So, I would say there -- yes, there is some
9 evidence from which you could infer that it's worse now
10 than it was. But I would also ask the Court to rely on
11 its common sense and its own -- and what it essentially
12 took judicial notice of in *Bell v. Wolfish* and
13 *Rutherford v. Black*, which is this is a serious problem,
14 and it is no less a serious problem today than it was
15 more than 30 years ago, when the Court addressed --

16 JUSTICE GINSBURG: Are there any limits --
17 are there any constitutional limits, in your view? You
18 say you didn't attempt the kind of search that was done
19 in *Bell v. Wolfish*. Is there any constitutional
20 impediment to your doing so?

21 MR. PHILLIPS: I -- I don't believe that --
22 my position would be, no, there isn't a constitutional
23 impediment, but --

24 JUSTICE GINSBURG: So, there's no --

25 MR. PHILLIPS: -- the balance would tip in

1 favor of the -- of the institution under those
2 circumstances. I do think -- obviously, there is a
3 limit between a manual physical body cavity search, and
4 that it seems to me, yes, I -- that would -- that would
5 be a very different balance of the equation, and I -- I
6 suspect I would be very hard pressed to just -- to
7 convince five members of this Court that that's the --

8 JUSTICE SCALIA: You -- you want us to write
9 an opinion that applies only to squatting and coughing.
10 Is that it?

11 MR. PHILLIPS: Well, you may want to write
12 it slightly differently --

13 JUSTICE SCALIA: Yes.

14 (Laughter.)

15 MR. PHILLIPS: -- Justice Scalia. No, but
16 what -- but what I would really like is an opinion that
17 recognizes that deference to the prisons and to their
18 judgment is what's appropriate under these
19 circumstances, and that extends all the way to the
20 Bell v. Wolfish line. The only difference being that I
21 would like for the Court to analyze it under Turner
22 v. Safley, in which -- in which the analysis is -- is
23 this -- you know, is there a logical nexus between the
24 rule that the -- that the prisons have and preventing a
25 problem? And the answer is yes. And are there

1 reasonable alternatives? And there, the answer is no.
2 If the --

3 JUSTICE GINSBURG: You are saying that they
4 can do the full -- as far as the Constitution is
5 concerned, all of these searches are permissible.

6 MR. PHILLIPS: All -- clearly, all of our
7 searches are permissible, and I would go --

8 JUSTICE GINSBURG: In Bell v. Wolfish --

9 MR. PHILLIPS: In Bell v. Wolfish. Yes. I
10 think that's exactly the holding of Bell v. Wolfish.
11 Bell v. Wolfish was not tied in its opinion itself to
12 the fact that they --

13 JUSTICE GINSBURG: But they did -- they did
14 stress that there was a visitor who could -- who could
15 give the inmate contraband. Bell v. Wolfish doesn't --
16 and I asked Mr. Goldstein whether we know whether the
17 pretrial detainees in New York were searched that way on
18 entry, and he said there's nothing that shows one way or
19 the other.

20 MR. PHILLIPS: Right. I think that's -- I
21 think that's correct. We don't know. And, of course,
22 part of the -- and part of the empirical problem in --
23 in that is that that facility had only been open for 4
24 months anyway. So, it was really going to be difficult,
25 if you were going to adopt the policy they adopted in

1 Bell, to insist on some sort of empirical proof.

2 JUSTICE KAGAN: The one significant
3 difference between Bell and this case is that in Bell,
4 there was a real opportunity for people to plan, to
5 conspire together to bring in contraband. Here, you're
6 talking about somebody who's arrested on the spot,
7 there's no opportunity for planning, for conspiracy with
8 respect to contraband, is there?

9 MR. PHILLIPS: No, but the policy itself --
10 may I answer the question?

11 The policy is aimed at all people, not just
12 at Mr. Florence, and if you aim it at all people, there
13 are people who self-report who've obviously got an
14 opportunity to bring in contraband, and there are a lot
15 of people who just get arrested and happen to have drugs
16 or something on them and, rather than show those when
17 they're being stopped for a speeding ticket, will likely
18 stick it in their pocket or put it somewhere else.

19 Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Ms. Saharsky.

22 ORAL ARGUMENT OF NICOLE A. SAHARSKY

23 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

24 SUPPORTING THE RESPONDENTS

25 MS. SAHARSKY: Mr. Chief Justice, and may it

1 please the Court:

2 The searches at issue in Bell are very
3 similar to the searches at issue in this case, and they
4 should be upheld. I want to start with Justice Kagan's
5 question. It is true that contact visits in Bell are
6 different from a person coming into the -- to the jail
7 for the first time in that there might be a greater
8 opportunity for planning, but as one of the Justices
9 pointed out, there was less of an opportunity to
10 actually get contraband, the person coming in was going
11 to be searched, the inmate, as Justice Marshall pointed
12 out, was wearing a one-piece zip-up jumper, and he's
13 being watched the entire time.

14 The visit -- the contraband situation in
15 this case at intake, the person does have an
16 opportunity, even if they are not self-reporting,
17 knowing that they're going to be arrested. Protesters,
18 for example, who decide deliberately to get arrested.
19 They might be stopped by the police, they see the squad
20 car behind them. They might have a gun or contraband in
21 their car and think, hey, I'm going to put that on my
22 person; I just need to get it somewhere that's not going
23 to be found during a pat-down search. And then
24 potentially they have the contraband with them.

25 Also, the process of going from the

1 arrest -- point of arrest to the general jail population
2 is not a quick one. The person typically goes, for
3 example, to a metropolitan police department -- that's
4 what happens here -- and the person would mix
5 potentially there in a holding cell with other
6 offenders.

7 If this Court, for example, adopted a rule
8 saying that minor offenders would not be searched in a
9 way that other offenders would, I have no doubt that
10 there are some offenders in those circumstances, all on
11 the bus together to go to the general jail population,
12 who would give the stuff to the minor offenders --

13 JUSTICE GINSBURG: Then how does that --

14 MS. SAHARSKY: -- to try to get them to
15 bring it in.

16 JUSTICE GINSBURG: That's not the Federal
17 rule. And, by the way, the brief was really confusing.
18 When what -- when I read page 1, page 1 tells me that
19 the BOP policy requires all incoming pretrial detainees
20 to be subject to visual body cavity inspections. And
21 then it isn't until page 30 that I learn there is an
22 exception for the very category of arrestee that we're
23 talking about here, that they are not subject to body
24 cavity inspections unless there's reasonable suspicion
25 that they're concealing contraband. That the

1 misdemeanor or civil contempt offender is not subject.

2 MS. SAHARSKY: I'm sorry if that was
3 confusing. The Bureau of Prisons' policy is that a
4 person will not be put in the general population, being
5 allowed to mix with other offenders, unless he or she
6 has undergone the strip search.

7 JUSTICE GINSBURG: Yes, but I want to know
8 how people in this category are treated in the Federal
9 system. And you -- you --

10 MS. SAHARSKY: The people --

11 JUSTICE GINSBURG: You reversed it. They --
12 those people are not subject to this visual body cavity
13 search.

14 MS. SAHARSKY: Those people, when they go
15 into the jail, would be asked whether they're willing to
16 consent to this type of search. In most cases, they do
17 consent. If they don't consent and there is not
18 reasonable suspicion, then they are not placed in the
19 general jail population; they are kept separate from the
20 other offenders. So, it is the case, the rule that the
21 Third Circuit identified, which is a blanket policy that
22 anyone that's going to go into the general jail
23 population and mix with everyone else has to be strip
24 searched. That is the Federal Bureau of Prisons'
25 policy. I should note that --

1 CHIEF JUSTICE ROBERTS: I'm sorry. I'm sure
2 I missed something. You say when they go in they're
3 asked: Will you consent to a more intrusive body cavity
4 search and be put into the general population; or if you
5 don't, you don't have to be searched and we put you in
6 some place else. Who consents to that?

7 (Laughter.)

8 MS. SAHARSKY: Well, the general jail
9 population has certain facilities, you know, computer
10 facilities and others that you don't get when you're in
11 a cell by yourselves. As a practical matter, this
12 arises very, very infrequently in the Federal system.
13 We're talking about fewer than 1 percent of offenders.

14 And the question before the Court at this
15 point really is you have before you a blanket policy
16 saying we need to strip search everyone, and is that
17 something that's unreasonable or irrational in the way
18 that the Court has considered its normal deference to
19 prison officials? And I just -- I would like to --

20 JUSTICE KENNEDY: I understand most of the
21 general propositions that your side is advancing, but I
22 have to say I was somewhat surprised at the evidence of
23 the amount of contraband that was discovered, the amount
24 of weapons that was discovered that's in the literature
25 and that's in the citations, of course, was somewhat

1 skimpy. I thought there would be a stronger showing
2 than I -- than I found in the briefs.

3 MS. SAHARSKY: Well, there -- there are not
4 empirical studies of this type of information.
5 Typically it arises when there are incidents at a
6 facility, and incident reports are written up. They're
7 not published regularly. There's not some kind of
8 laboratory study that you can do. The facilities have
9 an incident that they try to deal with. Sometimes it
10 makes the news. Those are some of the things that we
11 reported. And I would hate for the Court to think that
12 there is not evidence of people who've committed --
13 minor offenders in the record bringing in very serious
14 things into prisons and jails.

15 I'd point you to footnote 15 in the
16 Government's brief, which talks about people being
17 arrested for traffic offenses and smuggling crack pipes
18 in body cavities. I'd point the Court to both experts
19 in this case cited by Mr. Phillips. I'd point the Court
20 to the record in Bull, the San Francisco case.

21 JUSTICE SOTOMAYOR: The issue has to be
22 certainly some misdemeanor. Some people charged with
23 misdemeanor crimes will try to smuggle things in. The
24 issue is how many of them would not have been found on a
25 reasonable suspicion standard? I think Justice Breyer

1 said, in the San Francisco study, it appears only one.

2 MS. SAHARSKY: I think that that's a very
3 hazardous thing for courts to do with 20/20 hindsight.
4 You know, the Court could look back at individual
5 offenders and might have information --

6 JUSTICE SOTOMAYOR: But we don't have 20/20.
7 We have how many years? Fifteen years since Bell --

8 MS. SAHARSKY: What I --

9 JUSTICE SOTOMAYOR: -- where prisons have
10 been applying the reasonable suspicion standard. And
11 the most you can muster under that standard is one
12 example of a case where someone has entered? At some
13 point, empirical evidence has to mean something in terms
14 of us judging the question of reasonableness.

15 MS. SAHARSKY: I agree with you, but what
16 I'm saying is that the individuals who are doing the
17 searches at issue have very limited information about
18 people. This is when you have people who are coming
19 into the first -- the system for the first time. They
20 have had the most contact with the outside world. You
21 have the least amount of information about them. In the
22 Federal system, you don't know --

23 JUSTICE SOTOMAYOR: Well, I -- I do have a
24 question about that today. I know that when -- it's bad
25 to base your judgments on your own personal experiences.

1 When I was a prosecutor, it took sometimes days to get a
2 rap sheet. I understand that that's no longer the case
3 today, that they're virtually almost always accessible
4 by computers today.

5 MS. SAHARSKY: That may be true, but it's
6 not the information that the people who do intake and
7 are doing the searches have. They do not have that
8 information at their fingertips in the Federal system.
9 They have name, date of birth, and they have the offense
10 that the person was charged with. They don't know
11 anything else.

12 And the question before the Court, if I may,
13 is whether there are reasons for a blanket rule that
14 this Court should defer to. And I would say there are
15 several.

16 First of all you cannot say that there are
17 some minor offenders that don't pose a contraband risk.
18 They are documented in the record. Second, you have
19 individuals who are making very quick determinations.
20 They're -- they have large numbers of people to -- to
21 get through -- into the general prison population. They
22 have very little time, and if they guess wrong, those
23 mistakes can be deadly. Third, the rule needs to be --

24 JUSTICE ALITO: Suppose we accept the
25 Petitioner's concession that it is permissible to

1 require everybody who is arrested to disrobe and shower
2 under the observation of the corrections officer from a
3 certain distance. Now the question would become: How
4 many people who do that will still be able to smuggle in
5 contraband?

6 MS. SAHARSKY: Well, there would be
7 contraband found in -- that would be in body cavities.
8 And we have documented in this record and other records
9 in our brief that there are folks who do that, and that
10 contraband is not found until they do these squat and
11 cough procedures.

12 JUSTICE BREYER: That's my -- that's my
13 problem. I don't -- I overstated the -- the strength of
14 your evidence. I was just trying to throw it out -- or
15 I understated it. San Francisco's point is really that
16 30 to 60 percent or some very high percentage of people
17 who come in for minor crimes are high on drugs or have
18 been -- and there is just that footnote really which has
19 a few examples. Definitely, they're there in this
20 category. So, would it be helpful if you included in
21 the excluded part people who are high on drugs? You
22 see? So, we give you the high on drugs people. It's
23 the drug offense, and those who are high on drugs and
24 those -- I mean, is there a way of drawing this rule
25 that we can even catch most of the people in footnote

1 50 --

2 MS. SAHARSKY: I think the fundamental
3 question for the Court is who is supposed to be doing
4 this line drawing. And you've said case after case
5 after case that you're going to defer to the prison and
6 jail officials who are seeing this stuff on the ground
7 day to day.

8 JUSTICE BREYER: But it's obvious that the
9 simplest thing for any prison official is say do it for
10 everybody.

11 MS. SAHARSKY: That's --

12 JUSTICE BREYER: And so, the fact they do it
13 for everybody and don't try to make some exclusion for
14 traffic violators or something might be consistent with
15 little or no evidence; it might be consistent with some.
16 That's why I keep looking for it.

17 MS. SAHARSKY: There are many good reasons,
18 though, to have a policy to do it for everyone. It is
19 easily -- easy to administer when you have lots of
20 people. It is done for the protection of people like
21 Petitioner who don't want to be knifed in the shower --

22 JUSTICE GINSBURG: What is the reason? If
23 there's so much sense to that policy, why isn't it the
24 Federal policy? Before you said because there aren't
25 that many offenders. If there were more, then would

1 there be -- would the Federal policy change so that even
2 people who are in on a contempt charge or a minor
3 crime --

4 MS. SAHARSKY: Yes. The Federal Government
5 thinks that that blanket policy is a good one. It made
6 one modification to its policy in 2003 when the weight
7 of the circuits was against it. But, again, this is a
8 policy that is done for everyone's protection. A point
9 that Justice Kennedy made earlier is that there --

10 JUSTICE GINSBURG: I'm sorry, I didn't
11 understand. You think the Feds think it's a good policy
12 to inspect everyone?

13 MS. SAHARSKY: Yes, to inspect everyone who
14 would be put in the general jail population. That is
15 the Third Circuit's holding, and that's what we're
16 defending in this case. That's -- because when you have
17 a rule that treats everyone the same, you don't have
18 folks that are singled out. You don't have any security
19 gaps. We urge you to affirm the judgment of the court
20 below.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Goldstein, take 4 minutes.

23 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

24 ON BEHALF OF THE PETITIONER

25 MR. GOLDSTEIN: Thank you, sir.

1 I have three points to make: The first is
2 that my friend from the United States says defer to the
3 experts. But the point that the United States
4 consistently omits is that there are 600,000 offenders
5 that go into the Federal system every year. I don't
6 understand the claim that -- this only involves 1
7 percent of Federal offenders.

8 The Marshals Service and ICE admit 600,000
9 offenders every year under our standard. They are not
10 kept in separate housing. These are cited in our brief.
11 Six hundred thousand people, is their expert judgment,
12 are subject to a reasonable suspicion standard when
13 they're admitted to jail.

14 The second point, about numbers,
15 Justice Breyer, there is a significant empirical study,
16 and that is the County of Orange case. The district
17 judge there did an unbelievably detailed job going
18 through the record of 26,000 admissions into the system
19 and was able to identify only a single instance where
20 contraband would have gotten in under a reasonable
21 suspicion standard.

22 There is also evidence in this case, and it
23 is the evidence, to my surprise, that my friends keep
24 pointing to. There's a memorandum from the Essex jail
25 system. It's at page 70a to 71a of the joint appendix.

1 And it tells you two really relevant things. It says
2 every year they admit 25,175 people into this jail, and
3 that they only found 14 instances of contraband. And
4 they don't even make the claim that those 14 instances
5 out of 25,000 would not have been found under a
6 reasonable suspicion standard. So, you have evidence in
7 this record about this particular case.

8 Third, a couple of points have been made
9 about whether -- Justice Breyer, you asked whether
10 someone who's high on drugs. The uniform rule -- and
11 this is not just the ABA but the expert standard of the
12 American Correctional Association. What they say is
13 that essentially almost anything will do. What will not
14 amount to reasonable suspicion is when you have a minor
15 offender -- and we do have -- there are 700,000 people
16 in jail in the United States every year for misdemeanor
17 offenses. This is -- this is a lot of people who are
18 having a very significant intrusion on privacy.

19 And the expert standard, the rule that was
20 applied under *Bell v. Wolfish*, is that when you have
21 people who come in on a minor offense -- they don't have
22 any drug history. They are not high on drugs. There
23 was no opportunity to hide a weapon. I'm not sure where
24 they think the gun is going to be hidden that's not
25 going to show up in the very close manual pat down that

1 they do of every one of these people that isn't going to
2 show up in --

3 JUSTICE ALITO: I don't think you're really
4 arguing for a -- an individualized reasonable suspicion
5 standard. I think you're arguing for a rule that draws
6 distinctions based on categories that correspond only
7 perhaps very roughly to reasonable suspicion.

8 MR. GOLDSTEIN: Well, first, there are real
9 categories that are overinclusive in favor of the jails,
10 like if it's a serious offense or if they have any drug
11 history. And then on top of that, if there's any
12 individualized basis that the jails can articulate, that
13 will do as well.

14 We are not saying that categorically people
15 will be excluded from being searched. We're saying that
16 there are entire categories that will automatically be
17 searchable. We're just saying don't throw the baby out
18 with the bath water.

19 When somebody is pulled over like Mr.
20 Florence, and there's just -- it's laugh-out-loud funny
21 to think he's smuggling in -- something into this jail;
22 that it's too much of an intrusion to put him under the
23 direct, you know, 2 feet away, I'm going to look at your
24 genitals, as opposed to the ordinary intrusion of saying
25 we're going to oversee the showers.

1 There is no evidence when it comes to that
2 group of people, and there are a lot of them, that they
3 represent anything like a material threat of smuggling.
4 And this is a very significant intrusion on individual
5 privacy and individual dignity.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 11:05 a.m., the case in the
10 above-entitled matter was submitted.)

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