No. 20-982

In The
Supreme Court of the United States

SHARON LYNN BROWN,

Petitioner,

v.

POLK COUNTY, WISCONSIN, ET AL.,

Respondents.

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

It is well settled that the Fourth Amendment protects pretrial detainees against unreasonable searches and seizures. Petitioner Sharon Lynn Brown's case raises the urgent question of whether that protection affords proportional safeguards against the most intrusive, humiliating search that jail officials can visit upon a pretrial detainee: a hands-on, penetrative search of the detainee's anus and/or vagina (i.e., a manual body-cavity search). Polk County and its fellow Respondents present no convincing reason why this question should wait any longer. Instead, Respondents encourage blind acceptance of the Seventh Circuit's extraordinary position that jail security permits *any* search of a detainee's body—no matter how intrusive or demeaning—on reasonable suspicion alone.

Both *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318 (2013) and *Bell v. Wolfish*, 441 U.S. 520 (1979) make clear that jail security is not a blank check to engage in "searches that involve the touching of detainees." *Florence*, 566 U.S. at 339 (plurality opinion); *see Bell*, 441 U.S. 559 n.39 ("The inmate is not touched by security personnel at any time . . . ."). Hands-on penetrative searches of pretrial detainees raise "legitimate concerns" requiring careful examination. *Florence*, 566 U.S. at 339.

Rather than acknowledge this obvious point, Respondents maintain that Petitioner "disregard[s] this Court's holdings" in *Florence* and *Bell*. BIO 1. In reality,

Florence and *Bell* do not reach as far as Respondents wish. The end result is that courts nationwide are hopelessly confused about what rules or limits the Fourth Amendment imposes on manual body-cavity searches of pretrial detainees. For example, pretrial detainees being held in New York jails cannot be subjected to this most-intrusive, most-humiliating search without a warrant, probable cause, or exigency while pretrial detainees being held within the Seventh Circuit's jurisdiction can be. *Compare People v. Holton*, 160 A.D.3d 1288 (N.Y. App. Div. 2018), *with* Pet. App. 10.

Fourth Amendment protections should not "vary from place to place"—especially against hands-on penetrative searches. *Virginia v. Moore*, 553 U.S. 164, 176 (2008). A uniform rule is vital to ensure "[r]ights declared in words" are not "lost in reality." *Weems v. United States*, 217 U.S. 349, 373 (1910). Only this Court can pronounce such a rule for manual body-cavity searches of pretrial detainees, and this case finally affords the right vehicle to do so. The Court should therefore grant review in Petitioner's case.

A. Federal and state courts are divided on the question presented.

This Court has diligently refused to decide the validity of any jail search "not implicated on the facts of th[e] case." *Florence*, 566 U.S. at 339 (plurality op.). The Court thus has not yet decided what limits govern jail searches "where intrusions into the human body are

concerned." *Schmerber v. California*, 384 U.S. 757, 770 (1966). The Court also has not yet decided the extent to which legitimate concerns about extremely-intrusive bodily searches are amplified insofar as a detainee is charged only with a minor non-violent non-drug offense; can be held outside a jail's general population; and has not yet had her detention reviewed by a judicial officer. *See, e.g.*, *Florence*, 566 U.S. at 340 (Roberts, C.J., concurring); *see id.* at 341–42 (Alito, J., concurring); *see id.* at 354–55 (Breyer, J., dissenting).

In the absence of a clear, uniform rule on these issues, federal and state courts have reached wildly varying conclusions about the level of justification required before a pretrial detainee (or arrestee) may be subjected to a manual body-cavity search. There are the federal cases that Respondents cite for the view that reasonable suspicion is enough. *See* BIO 11–12. Then there are the myriad state cases—which Respondents ignore—that require a warrant, probable cause, or exigency. *See State v. Barnes*, 159 P.3d 589, 591 (Ariz. Ct. App. 2007) ("an officer must secure a warrant" to the extent they "exert[] force within an arrestee's body"); *State v. Harding*, 9 A.3d 547, 569 (Md. Ct. Spec. App. 2010) ("medical or quasi-medical search[es]" require a "warrant or court order"); *Commw. v. Jeannis*, 93 Mass. App. Ct. 856, 856 (2018) ("manual search of a body cavity" is permissible "only with a warrant"); *Young v. Gila Reg'l Med. Ctr.*, No. A-1-CA-36474, 2020 N.M. App. LEXIS 26, at *14–15 (N.M. Ct. App. June 4, 2020) (the "clear weight of authority" is that "body cavity searches . . . require a warrant supported

by probable cause"); *People v. Hall*, 886 N.E.2d 162, 168 n.7 (N.Y. 2008) (Fourth Amendment "prohibits all warrantless intrusions into an arrestee's body if there is no probable cause and exigent circumstances").

Unable to overcome this reality, Respondents insist that federal courts clearly endorse manual body-cavity searches on reasonable suspicion alone. But Respondents' citations evince confusion—not clarity—on this point. *See* BIO 11, 13. For example, Respondents cite *Sanchez v. Pereira-Castillo*, in which the First Circuit seems to uphold a manual body-cavity search of a state prisoner (not a pretrial detainee) based on "**suspicion** that plaintiff had contraband in his rectum." 590 F.3d 31, 44 (1st Cir. 2009) (bold added). But in *Spencer v. Roche*, the First Circuit describes *Sanchez* as permitting a "rectum [search] **when supported by probable cause**." 659 F.3d 142, 147 (1st Cir. 2011) (bold added) (further citing for the same view *Rodriques v. Furtado*, 950 F.2d 805 (1st Cir. 1991)).

Such confusion cements the need for review. Division and confusion are not constitutionally tolerable for the most "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive" search that jail officials can perform. *Mary Beth G. v. Chicago*, 723 F.3d 1263, 1272 (7th Cir. 1983). Just the opposite: for this most traumatic invasion of "the privacies of life," it is "the duty of courts to be watchful for the constitutional rights of the citizen" and "any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 630, 635 (1886).

B. This Court's precedent contains an intolerable gap regarding body-cavity searches of pretrial detainees.

1. Physical penetration of the anus or vagina is unlike any other search that a person may suffer at a jail official's hands. As the *amici* supporting certiorari note, these searches (especially when unjustified) result in lasting scars similar to those "faced by rape victims." Br. of *Amici Curiae* Nat'l Ass'n of Criminal Defense Lawyers & Restore the Fourth, Inc. at 3. These lasting scars include "post-traumatic stress disorder" as well as "depression, anxiety, sleep disruption, and even suicide," *id.*—scars that Petitioner indisputably suffered here. Pet. 18 (detailing Petitioner's undisputed testimony that Respondents' penetrative search of her anus and vagina left her "with ongoing depression, anxiety at the possibility of being pulled over again, and fear of being alone with males").

Respondents then beggar belief in asserting "[t]his Court has already concluded that pretrial detainees . . . may be subjected" to manual body-cavity searches—and the lasting scars they cause—"**without any semblance of a suspicion** that they may be carrying contraband." BIO 20–21 (bold added). The Court has done no such thing, as the majority and dissent in *Florence* take great pains to observe. For example, in his *Florence* concurrence, Justice Alito "emphasize[s]" that *Florence* is limited to "**visual** strip searches **not involving physical contact** by corrections officers." 566 U.S. at 340 (bold added). And in his *Florence* dissent, Justice Breyer emphasizes that *Florence* leaves

the Court "open" to consider more intrusive detainee searches "in an appropriate case." *Id.* at 355.

Respondents then have no answer to the basic fact that this Court has never addressed manual body-cavity searches of pretrial detainees—a point that has not escaped other courts. *See, e.g.*, *Bonitz v. Fair*, 804 F.2d 164, 171 (1st Cir. 1986) ("In analyzing . . . body-cavity searches, the Court has emphasized . . . . [the searches] did not involve touching or physical penetration . . . ."). The Court should not allow this unsettling gap to persist. "[T]he right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

2. Respondents also ignore that the Court has never decided the extent to which individual factors require greater justification for detainee searches. In *Florence*, the Court determined that jails may reasonably subject pretrial detainees *upon intake* to a blanket visual strip search in the name of jail security. 566 U.S. at 336. This rule turned on the "practical" difficulties of sorting detainees "by their current and prior offenses before the intake search." *Id.* "[I]t would be illogical to require [jail] officers to assume the arrestees in front of them do not pose a risk of smuggling something into the facility." *Id.* at 336–37.

The Court has never addressed a case like Petitioner's: a *post-intake* penetrative search of a single

pretrial detainee's anus and vagina despite the detainee only being charged with a minor non-violent non-drug offense (shoplifting) and despite ample, less-intrusive alternatives for searching the detainee (some of which Respondents in fact used). As the Seventh Circuit concedes in its decision below, Petitioner "was not searched as part of a practice that applied to everyone housed in the Polk County Jail." Pet. App. 9. "[Petitioner] alone was selected for a search, and a quite invasive one at that." *Id.*

Florence, by contrast, concerned a jail intake search of a person detained "pursuant to a warrant for his arrest." 566 U.S. at 340 (Roberts, C.J., concurring). *Florence* did "not afford" a chance to consider the reasonableness of a non-intake search of a pretrial detainee jailed for "a minor traffic offense," or a non-intake search of a pretrial detainee for whom there was an "alternative" to confinement "in the general jail population." *Id*. It was then "important" to Chief Justice Roberts that *Florence* did not "foreclose" an "exception" on these or other grounds. *Id.*

Justice Alito was also sensitive to "the limits" of *Florence*'s "holding." 566 U.S. at 340 (Alito, J., concurring). He observed that for persons arrested on minor offenses, "admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible." *Id.* at 341–42. He joined the lead opinion only because the opinion did "not address whether it is always reasonable, without regard to the offense or the reason for detention, to strip search an

arrestee before the arrestee's detention has been reviewed by a judicial officer." *Id*. ("The lead opinion explicitly reserves judgment on th[is] question.").

Petitioner's case now raises these questions—and in the context of a hands-on penetrative search far exceeding the visual body searches at issue in *Florence*. Respondents offer no substantive response. *See* BIO 22–26. For example, Respondents do not deny that Petitioner could have been segregated from the general jail population to ensure jail security while jail officials looked into the "third and fourth-hand reports" falsely alleging that Petitioner was hiding drugs internally. Pet. App. 34. In fact, Respondents did just this at Petitioner's request—*after* having a doctor penetrate Petitioner's vagina and anus. *See* Pet. 18 (citing Dist. Ct. Dkt. 17 at 124:12–15).

Respondents also do not deny that they had time in Petitioner's case to gather probable cause and even get a warrant to conduct a manual body-cavity search. Nor do they contest the observation of the *amici* supporting certiorari that Respondents could have tried "to obtain [Petitioner's] consent" to a cavity search by explaining their "concerns about the risks" of hidden drugs. Br. of *Amici Curiae* Nat'l Alliance to End Sexual Violence, et al. at 10. And had Petitioner not consented, Respondents could have then asked Petitioner to sign a waiver "releas[ing] the county from liability should any harm result" from her denial of consent. *Id*.

Respondents instead used the most intrusive search possible against Petitioner without regard for any individual factors (e.g., Petitioner's status as a minor non-violent non-drug detainee) or the availability of less-intrusive alternatives. *Cf. Welsh v. Wisconsin*, 466 U.S. 740, 752 (1984) ("[A]n important factor . . . when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."). Nothing in *Florence* affirms such excess. On the contrary, *Florence* expressly leaves open the possibility that such overzealous conduct may be held unreasonable in the right case.

C. The question presented is extremely important.

Perhaps realizing the difficulties in opposing certiorari based on the above-discussed points, Respondents pivot to arguing there is "no evidence" that "manual cavity searches of pretrial detainees are happening en masse." BIO 20. But given the severity of the harm posed by these searches, even one penetrative search of a detainee's anus and/or vagina without proper justification is one too many.

At any rate, Respondents' contention is belied by the sweep of lower court cases involving manual body-cavity searches. *See* Pet. 22–26. Respondents' contention is also belied by Respondents' own past express *policy* allowing these searches (including that of Petitioner)—a policy that Respondents could readily reinstate if certiorari is denied, and a policy Respondents

give no reason to think was an outlier. *See* Pet. 14–15. As Justice Jackson noted long ago, "there are many unlawful searches"—both under official policies and discretionary decisions—"about which we never hear" since they "turn up nothing incriminating." *Brinegar*, 338 U.S. at 181 (Jackson, J., dissenting). This goes double for jail searches of the anus or vagina—i.e., embarrassing one-off incidents "conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search." *Id.* at 182.

D. This case is the right vehicle to decide the question presented.

Petitioner's case is the right vehicle for the Court to decide what rules and limitations govern manual body-cavity searches of pretrial detainees. This case fully ventilates the issues that *Florence* emphasizes should be decided by the Court. Pet. 30–32. Respondents offer no meaningful argument otherwise.

1. Respondents argue that the Court may look past the penetrative search of Petitioner's vagina and anus because it was done "in a hygienic situation, by a licensed physician" and resulted in "no physical ailments." BIO 22. Respondents wrongly discount the "crushing [of] the spirit" and "terror" instilled by their search. *Brinegar*, 338 U.S. at 180 (Jackson J., dissenting); *see* Pet. 18 (detailing the lasting trauma inflicted by Respondents' search). Also, Respondents' manner of

conducting manual body-cavity searches does not resolve the threshold issue of what justification is needed to permit this gross "invasion of . . . personal security." *Boyd*, 116 U.S. at 630 ("It is not the breaking of . . . doors . . . [or the] rummaging of . . . drawers that constitutes the essence of the offence . . . .").

2. Respondents argue it is irrelevant whether their search of Petitioner revealed "drugs or other contraband." BIO 22. To be sure, an unlawful search is unlawful search even if the search reveals suspected contraband. *See, e.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018) (search of curtilage not authorized by automobile exception to warrant rule even though the search revealed a stolen motorcycle). But the fact that Respondents' search revealed no hidden contraband brings into sharp relief the injurious nature of this search and the concomitant need for strong Fourth Amendment safeguards in this context.

3. Respondents argue that "the lower courts never had the occasion to address whether the information obtained by Respondents constituted probable cause." BIO 22. Not so: the courts below had occasion to consider any search-justifying ground that Respondents wanted to assert. Respondents argued reasonable suspicion and nothing else, forfeiting all other grounds (including probable cause). *See* Pet. 19–22. Additionally, the Court has recognized the importance of granting review to resolve important Fourth Amendment questions even when a challenged search might be justified on other grounds. *See, e.g.*, *Collins*, 138 S. Ct. at 1675 ("We leave for resolution on remand

whether Officer Rhodes' warrantless intrusion . . . may have been reasonable on a different basis.").

4. Respondents argue that Petitioner's view of her case as bearing out "the virtues of the question [presented]" is a disguised challenge to the lower courts' finding of reasonable suspicion. BIO 22. It is not. Petitioner's view is that a standard higher than reasonable suspicion—i.e., a warrant requirement, or at least probable cause—would have saved Petitioner from a deeply harmful and ultimately fruitless search of the most private parts of her body. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2181 (2016) ("[W]arrant[s] limit[ ] the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought.").

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CONCLUSION

The Court should grant this certiorari petition.

Respectfully submitted,

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