No. 15-903

In The
Supreme Court of the United States

J.B., a Minor, by Thomas Benjamin and Janet Benjamin, Parents and Natural Guardians,

Petitioner,

v.

JAMES B. FASSNACHT, Pennsylvania State Police Officer, in his individual capacity, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Third Circuit properly concluded, after considering the precedent of this Court in *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S.Ct. 1015 (2012) and other precedents from this Court applicable to evaluating the constitutional rights of juveniles, that a juvenile detention center may conduct a suspicionless strip search of a juvenile entering the general population of a juvenile detention center.

2. Whether the facts of this case provide an opportunity for this Court to determine whether *Florence* established a standard for suspicionless strip searches of individuals detained *prior to* judicial determination of the appropriateness of that detention where the record below indicates that J.B. was detained pursuant to a court order.

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OPINIONS AND ORDERS BELOW

The Court of Appeals for the Third Circuit's Opinion is reported at 801 F.3d 336. The Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, granting in part and denying in part, Summary Judgment is reported at 39 F.Supp.3d 635.

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STATEMENT OF JURISDICTION

The United Stated Court of Appeals for the Third Circuit entered its decision on September 15, 2015. Pursuant to an order granting an extension of the time for filing the Petition for Certiorari, Petitioner timely filed his Petition for Writ of Certiorari on January 12, 2016. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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STATEMENT OF THE CASE

Factual Background

The factual background of this matter is more fully set forth in the Opinion of the Court of Appeals for the Third Circuit. While the Petitioner's Petition summarizes part of the underlying factual background of the case, the Petition omits several key pieces of evidence, and most notably, omits the fact

that J.B. was committed pursuant to a court order. As this evidence is relevant to the issue before this Court, a brief supplement and re-statement of the case will be set forth herein.

The events that gave rise to this case involve a 12 year old, J.B., who spent most summer days home alone with his 10-year-old sister. On July 1, 2009, J.B. skillfully constructed a homemade flame thrower using PVC pipe, a lighter, and a spray paint can. (Pet. App. 3.) J.B.'s use of the flame thrower attracted the attention of some young girls from the neighborhood who told their babysitter about it, and the babysitter intervened and told J.B. to stop. (Id.) Later that day, the girls went back to J.B.'s yard, and they began teasing one another. (Id.) J.B. reacted by putting his hands on one of the girls, holding a homemade knife that he had crafted out of scrap metal within an inch of her head, and saying he was stronger than her, "so [he could] kill [her] and over power [her]." (Id. 4.) In addition to his flame thrower, and the homemade knife used to threaten the girls, J.B. had constructed several other homemade knives in his father's shop over an unknown period of time.

The babysitter reported the incident to the parents of one of the girls, who then called the Pennsylvania State Police. State Trooper Fassnacht responded to J.B.'s home to investigate the matter. After the initial investigation, Trooper Fassnacht left J.B. in his parents' custody. A few weeks later,

Trooper Fassnacht filed charges against J.B. with Lancaster County Juvenile Probation. (Id.)

The Opinion of the Court of Appeals states incompletely that Carole Trostle, a Juvenile Probation intake officer, informed Trooper Fassnacht that Lancaster County Juvenile Probation was ordering J.B.'s detention due to the seriousness of the charges. (Id.) However, the undisputed testimony in this case is that J.B. would not have been detained in the juvenile detention center under the circumstances present unless his detention was ordered by a judge.

The process for detention of a juvenile is described in detail in the deposition testimony. First, the charges are reviewed by a juvenile probation intake officer. If detention is recommended by the intake officer, a supervisor reviews the recommendation and must approve the detention. Thereafter, if the juvenile is not in the presence or custody of the police (like J.B. in this case), the detention recommendation would have to be reviewed and ordered by a judge.

Carole Trostle testified:

> "If it was going to be a situation where they didn't have the juvenile in custody, then we would file a detainer. And what that involves is writing an addendum to a detainer, indicating what the charges were, what the situation was, that we would recommend detention based on the seriousness of the offense.

> I would review that. I would sign it myself. Take it to a supervisor. They would sign it. And then we would walk it up to the judge. The judge would review it and then he would sign it."

The Director of the Office of Juvenile Probation, David Mueller, testified when asked if he believed there was an order for the detention of J.B. that "I do believe that" and "I believe it was expunged" and "destroyed." Mr. Mueller based this belief upon multiple factors and stated:

> "If a juvenile is in custody and they [Pennsylvania State Police] are making an arrest after an interview, we can authorize detention and we – they will take a juvenile here.
>
> But if there is a time lapse between the interview and the juvenile has actually left their custody, they [Pennsylvania State Police] are not willing to execute a detention run without a court order indicating that is what they should do."

The on-call probation officer, Robert Kling, was asked what he believed about the existence of a detention order based on the circumstances of this case. He stated, "There had to have been an order." Finally, Thomas Benjamin, J.B.'s father, stated that the officer who instructed him to bring his son to the State Police barracks told him that he had an order to pick up J.B. Thus, J.B. was detained pursuant to the

juvenile equivalent of a warrant for his arrest, a detention order.

Petitioner states that the Judge before whom J.B. appeared on Monday, July 27, 2009 determined that J.B.'s detention was unnecessary. (Pet. 2-3.) The Opinion of the Court of Appeals only indicates that J.B. was released to his parents when he appeared in Court on Monday morning. The record provides no indication of the Court stating that J.B.'s detention between Friday and Sunday was inappropriate. The only indication in the record is that the Court concluded J.B.'s ***further*** detention was not necessary.

Petitioner also states J.B. was never adjudicated delinquent.[1] (Pet. 3.) Petitioner provides an incomplete statement regarding the adjudication status and expungement of J.B.'s record. The record of testimony indicates that J.B. admitted to the conduct giving rise to the charges against him, wrote a letter of apology for his conduct, and accepted probation pursuant to a consent decree. However, the expungement of J.B.'s record, *upon the petition of J.B.'s lawyer* in the underlying criminal case, resulted in the destruction of all documents and records related to his charges, his appearance before a judge on July 27, 2009, the Order for his detention on July 24, 2009,

[1] This court has held adjudications on the merits, regardless of outcome, do not determine whether a pre-trial detention is punitive or wrongful. *Schall v. Martin*, 467 U.S. 253, 272 (1984).

and any other records in the arrest and prosecution file. This expungement, done at the request of J.B., has placed J.B. in the position to seek review by this Court of a question that is at odds with the actual facts.

Petitioner disingenuously represents to this Court that his detention was not reviewed by a judge before he was detained. This assertion is belied by the testimony and evidence that does still exist after the expungement of the court order. As such, Petitioner's representation to this Court that his detention was obtained without judicial review is inaccurate. As the undisputed testimony indicates, the procedure in the County required a court order prior to J.B.'s detention, and the court order is no longer available due the actions of J.B.'s criminal counsel.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS A CORRECT APPLICATION OF THIS COURT'S DECISION IN *FLORENCE V. BOARD OF CHOSEN FREEHOLDERS OF COUNTY OF BURLINGTON* AND OTHER CASES EXAMINING THE CONSTITUTIONAL RIGHTS OF JUVENILES.

A. *Florence* Provided The Guidance Required To Evaluate The Use Of Suspicionless Strip Searches In Juvenile Detention Facilities During Intake.

Petitioner argues that the problem of suspicionless strip searches of juveniles is regularly occurring and unsettled, worthy of this Court's consideration. Petitioner further claims that it has divided the lower courts, with district courts and courts of appeals struggling to decide the appropriate standard to apply to the constitutionality of juvenile strip-search policies (Pet. 6.) While this statement may have been accurate *before* this Court rendered its decision in *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S.Ct. 1510 (2012), there is no such post-*Florence* diversity of opinion and there is no evidence to suggest that courts are struggling with the issue.

In *Florence*, this Court did not state – either implicitly or explicitly – that the standard being promulgated therein does not apply to juveniles being admitted to the general population of a juvenile detention center. The dissenting and concurring

opinions describe possible exceptions to this Court's rule, but not a single one discusses the possibility of an exception for juvenile detainees. There is simply nothing in the majority, dissenting, or concurring opinions in *Florence* that would suggest that the standard set forth applies to adults only.

While this Court did not explicitly state that *Florence* applies to juveniles, the language used in *Florence* implies that juvenile detention facilities were included in the Court's definition of "jail." In the opening paragraph of *Florence*, this Court stated:

> This case presents the question of what rules, or limitations, the Constitution imposes on searches of *arrested persons* who are to be held in jail while their cases are being processed. The term "jail" is used here in a broad sense to include *prisons and other detention facilities*. The specific measures being challenged will be described in more detail; but in broad terms, the controversy concerns *whether every detainee admitted to the general population may be required to undergo a close visual inspection while undressed*.

Florence, 132 S.Ct. at 1513 (emphasis added).

To support the proposition that the lower courts are divided on this issue, Petitioner cites to a string of cases – the majority of which were decided *before Florence*. The lack of post-*Florence* decisions on the issue of suspicionless juvenile strip searches implies that the lower courts are not struggling with the issue, as Petitioner suggests. *Florence*'s guidance sets

forth the rights of individuals being admitted to the general population of a detention facility, regardless of age.

Petitioner cited one case that was decided after *Florence*, *Mabry v. Lee County*, 100 F.Supp.3d 568 (N.D. Miss. 2015) in support of his argument. In *Mabry*, the court found that the conduct at issue occurred prior to this Court's decision in *Florence* and the *Florence* decision was not applicable to its qualified immunity analysis. *Florence* could not have played any role in what the defendants in *Mabry* knew or should have known at the time. Id. The court in *Mabry* awarded qualified immunity to the defendants, finding that juveniles had no clear right to be free from suspicionless strip searches. Id.

As the Court of Appeals explained, one other Circuit has considered the applicability of *Florence* to juveniles. (Pet. App. 12.) In *T.S. v. Doe*, the Court of Appeals for the Sixth Circuit held that the right of juveniles to be free from strip searches was not clearly established at the time of the conduct in question and, accordingly, granted qualified immunity. 742 F.3d 632 (6th Cir. 2014). Significantly, the search at issue in *T.S.* occurred prior to this Court's ruling in *Florence*. Thus, like in *Mabry*, this Court's ruling in *Florence* could not have impacted what the defendants knew or should have known at the time of the search at issue.

After a diligent search, Respondents are unable to locate a single case evaluating the constitutionality of a post-*Florence* suspicionless search of a juvenile.

Thus, it cannot be said that courts are clamoring for guidance from this Court on the issue beyond what was provided in *Florence*. Moreover, there is no split among the Circuit Courts of Appeals as to the applicability of *Florence* to suspicionless strip searches in juvenile detention facilities.

The dearth of decisions on this issue demonstrate that the direction given in *Florence* was clear and unambiguous regarding the ability to conduct an unclothed visual inspection of an individual who will be released into the general population of a detention facility, regardless of age.

B. The Court Of Appeals' Decision To Apply *Florence* To Suspicionless Strip Searches Of Juveniles On Intake To Juvenile Detention Facilities Without Modification Is Aligned With Prior Precedents Of This Court.

Petitioner argues that this Court should review the Court of Appeals' decision because "the Third Circuit decided the case in a manner that is inconsistent with this Court's case law." (Pet. 9.) According to Petitioner, the Court of Appeals failed to apply the "rule that constitutional standards must calibrate for juvenile status. . . ." (Id.) Petitioner argues, in essence, that a different constitutional standard must be arrived at simply because a juvenile is involved. Rather, this Court has declared that the ***analysis*** of constitutional rights must consider the fact that a juvenile is involved when weighing constitutional

rights, but an analysis of this Court's decision reveals that the analysis does not require that a different standard be set.

The Petition should be denied because the Court of Appeals did follow this Court's guidance and considered J.B.'s juvenile status when reaching its decision. In fact, the sole purpose of the Court of Appeals' review of the District Court's partial denial of Summary Judgment was to determine if *Florence* applies to juvenile detainees equally as it did to adults. After considering J.B.'s age at the time of the search, the Court of Appeals determined that, for a variety of reasons, *Florence* applies to suspicionless strip searches of juveniles who, like J.B., will be admitted to the general population of a juvenile detention center.

Circuit Judge Fuentes, writing for the Court of Appeals Panel, stated in the opening paragraph of the court's opinion

> In *Florence v. Board of Chosen Freeholders of County of Burlington*, the Supreme Court held that all arrestees who are committed to the general population of a detention center may be subject to a close visual inspection while undressed. *Today we are asked whether Florence applies to juvenile offenders admitted to the general population of a juvenile detention center.* We hold that it does.

(Pet. App. 3.) (emphasis added).

The very question before the Court of Appeals necessarily required that court to consider J.B.'s status as a juvenile at the time of the search. The Court of Appeals followed this Court's precedent for evaluating the constitutional rights of a juvenile and concluded the standard set forth in *Florence* was applicable. In so doing, the Court of Appeals explained "[w]e do not underestimate the trauma inflicted upon a youth subjected to a strip search. Yet, we must also acknowledge the realities of detention, irrespective of age." (Pet. App. 14.) The Court of Appeals conducted a thoughtful and careful analysis of the application of *Florence* to the juvenile detention center setting and considered a multitude of factors before ultimately deciding that the standard set forth by this Court in *Florence* applies equally to juveniles. In conducting this analysis, the Court of Appeals explained that "[u]sing *Florence* as a guidepost, we must balance juvenile detainees' constitutional rights against the overarching security interests to determine whether a strip search upon admission to the general population of a juvenile detention facility is reasonably related to legitimate penological interest." (Id. 15.) (internal quotations omitted).

1. Juveniles implicate the same institutional security risks as adults.

The Court of Appeals considered multiple factors in rejecting Petitioner's argument that this Court's ruling in *Florence* should not apply to juveniles. The difficulties of operating a detention center must not

be underestimated by the Courts. *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). "[M]aintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to problems they face." *Florence*, 132 S.Ct. 1510, 1515 (2012). This logic applies equally to institutions housing juveniles and adults.

The Court of Appeals explained that "the institutional security reasons identified in *Florence* similarly implicate juvenile detention centers. Indeed, juveniles represent the same risks to themselves, staff, and other detainees as adults in similar facilities." (Pet. App. 15.) Juveniles, like adults, "may carry lice or communicable diseases, possess signs of gang membership, and attempt to smuggle in contraband." (Id.)

The Court of Appeals noted that this particular case is "exemplary" of the risk of juveniles bringing contraband into juvenile detention centers explaining that "J.B. possessed the guile to craft a homemade flame thrower and knife – he was clever enough, then, even at the young age of twelve, to smuggle contraband into the detention facility." (Id. 16.)

In addition to the risks shared by juvenile and adult detainees, "juveniles pose risks unique from those of adults as the state acts as the minor's de facto guardian, or *in loco parentis*. This status creates an enhanced responsibility to screen for signs of disease, self-mutilation, or abuse in the home." (Id.) This Court has acknowledged that, in appropriate

circumstances, a juveniles' interest may "be subordinate to the State's 'parens patriae' interest in preserving and promoting the welfare of the child." *Schall v. Martin*, 467 U.S. 253, 265 (1984) (quoting *Snatosky v. Kramer*, 455 U.S. 745, 766 (1982)).

The Court of Appeals considered the multiple factors articulated in *Florence* and added the additional concern of the operators of a detention facility acting in a *de facto* guardian role for the detainees. Under these circumstances, the Court of Appeals weighed all the *Florence* factors, the additional obligation of acting *in loco parentis*, and the duty to screen the youth for signs of abuse, illness or drug use and correctly concluded that the status of the detainee as a juvenile does not overcome the multitude of interests identified by *Florence* and the additional responsibilities identified by the Court of Appeals.

2. Individualized reasonable suspicion inquiries fail in juvenile detention facilities for the same reasons they do in adult detention facilities.

The Court of Appeals acknowledged "any individualized, reasonable suspicion inquiry falters in juvenile detention centers for the same reasons it does so in adult facilities." (Pet. App. 19.) Petitioner seeks to refute this finding and refers to this Court's

opinion in *Schall*.[2] Petitioner's reference to *Schall* is misplaced. Although the dissent in *Schall* describes a thorough intake procedure at the New York juvenile detention facility at issue, this does not mean that an individualized, reasonable suspicion inquiry before a strip search at a juvenile detention facility will not falter for the same reasons as those set forth in *Florence* and by the Court of Appeals here.[3]

The Court of Appeals, quoting from this Court's decision in *Florence*, acknowledged that it "would be 'a difficult if not impossible task' to identify 'inmates who have propensities for violence, escape, or drug smuggling.'" (Id. 21.) Moreover, "deterring the possession of contraband depends in part on the ability to conduct searches without predictable exceptions . . . because inmates would adapt to any pattern or

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[2] As a preliminary matter, the passages cited by Petitioner are found in the dissenting opinion of Justice Marshall; and do not reflect the holding of the Court but merely a recitation of facts related to procedures in New York.

[3] There is nothing in the record to support a finding that the Lancaster County Juvenile Detention Center conducts a similar pre-detention investigation in all cases. While Petitioner references a Pennsylvania Rule of Juvenile Court Procedure requiring the *juvenile probation officer* to conduct an investigation, which *may* include an intake conference with the juvenile, the juvenile attorney, and/or the guardian, there is nothing in the record to indicate that a similar investigation is conducted at the detention center or that the results of the juvenile probation investigation are reported to the detention center. Nor is there anything in the record demonstrating that the investigation performed by juvenile probation assesses, in any way, the juvenile's potential risk to the security of the detention center.

loopholes they discovered in the search protocol and undermine the security of the institution. Thus, any argument for an individualized inquiry of new detainees is impractical, if not dangerous, given the realities of jail administration." (Id.) Even if a thorough pre-detention investigation were to be performed on every juvenile being admitted to a juvenile detention facility, these concerns would remain.

A thorough intake investigation may not prevent abuse of an individualized inquiry, another concern expressed by the Court of Appeals and by this Court in *Florence*.

> Classifications based on individual characteristics risk discriminatory application on the part of officers. Officers might strip search a juvenile based on sex, race, accent, age, or any other number of characteristics. . . . Because officers in any detention facility have an "essential interest in readily administrable rules," blanket strip search policies upon admission to the general population of a jail, regardless of whether the detainee is a juvenile or adult, makes good sense. Any other policy would "limit the intrusion on the privacy of some detainees but at the risk of increased danger to everyone in the facility."

(Id. 23.) The performance of a thorough pre-detention investigation would not eliminate this concern.

This case presents an example of the very concern that the Court of Appeals discusses. An

industrious and unsupervised 12 year old constructed a flame thrower from a video he saw online. He additionally fashioned homemade weapons – including the knife used in his underlying criminal conduct in this case – in his father's shop. When his conduct was challenged by an older responsible babysitter, and when the other kids teased him, his response was to wield his homemade knife and hold it to the head of a young girl, threatening that he was bigger than her, and could overpower and kill her.

Even if this Court were to find that a thorough intake investigation at a juvenile detention facility may assist detention center staff members in understanding the background of a juvenile at the time of admission into the facility, such an investigation does not address any of the other concerns identified by this Court and the Court of Appeals with regard to individualized inquiries prior to a strip search at the time of admission into a juvenile detention facility.

3. The Court of Appeals' decision was in line with this Court's precedent regarding the constitutional rights of juveniles as compared to those of adults.

The Court of Appeals' reasoning and conclusion is in line with precedent from this Court regarding the protection of juveniles' Constitutional Rights. This Court has, depending on the circumstances, found that the constitutional rights of juveniles may receive additional protection, be partially restricted,

or receive the same protection as those of adults. (*Compare Ginsburg v. State of New York*, 390 U.S. 629 (1968), limiting availability of sexual material to minors under 18 is not a First Amendment violation; *H.L. v. Matheson*, 450 U.S. 398 (1981), a statute setting out a requirement of parental notice of an abortion for a minor does not violate the minor's constitutional rights; *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), school officials need not be held to the requirement that searches be based on probable cause; *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), student's offensively lewd and indecent speech had no claim to First Amendment protection; *Morse v. Frederick*, 551 U.S. 393 (2007), the First Amendment does not prevent educators from suppressing, at a school-supervised event, student speech that is reasonably viewed as promoting illegal drug use, where rights of juveniles are partially restricted; *with Graham v. Florida*, 560 U.S. 48 (2010), Eighth Amendment prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide; *Roper v. Simmons*, 543 U.S. 551 (2005), execution of individuals who were under 18 years of age at time of their capital crimes is prohibited by Eighth and Fourteenth Amendments, where the rights of juveniles received additional protection; *with In Re Gault*, 387 U.S. 1 (1967), juvenile has same rights to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to privilege against self-incrimination as adults; *In Re Winship*, 397 U.S. 358 (1970), juveniles, like adults, are constitutionally entitled to proof

beyond reasonable doubt when they are charged with a violation of a criminal law; and *Fare v. Michael C.*, 442 U.S. 707 (1979), juvenile's waiver of his *Miranda* rights would be evaluated under the same totality of circumstances test applied to adult waivers, where rights of juveniles receive the same protection as adults.)

Generally, when this Court has concluded that the constitutional rights of juveniles are deserving of greater protection than those of adults, the decisions involved questions of constitutional rights related to unreasonable punishment. In cases that do not involve punishment, this Court has generally concluded that the constitutional rights of juveniles are entitled to equal protection or partial restriction when compared to the rights of adults.

It is beyond dispute that the strip search in question is not a punishment. Rather, it is a means of protecting all of the juveniles in custody, as well as detention center staff and volunteers, and serves the stated purpose of seeking signs of abuse, illness and disease, which fulfills the juvenile detention center's obligation to act *in loco parentis*.

Justifying the heightened constitutional standard for juveniles when it comes to punishment, this Court has explained that "[t]he general differences between juveniles under 18 and adults demonstrate the juvenile offenders cannot with reliability be classified among the worst offenders." *Roper v. Simmons*, 543

U.S. 551, 569 (2005) (citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988)). This Court went on to explain these differences, including the "susceptibility of juveniles to immature and irresponsible behavior" which "render suspect any conclusion that a juvenile falls among the worst offenders." *Id.* While this reasoning applies to the level of punishment inflicted for a particular crime, it does not apply here, where no punishment is being rendered. Moreover, juveniles' susceptibility to immature and irresponsible behavior – such as what J.B. exhibited in his underlying threats to overpower and kill his young neighbor with his homemade knife – makes it *more likely* that they will attempt to smuggle contraband into a detention facility.

This Court need not review the decision of the Court of Appeals, which was well-reasoned and in line with this Court's precedent in carefully considering the constitutional standard in light of J.B.'s status as a juvenile.

4. The in-school strip search cases are not applicable in the juvenile detention center setting.

Petitioner argues that the constitutional standard for juvenile strip searches *must* be different than the standard for adults and, in support of that proposition, relies upon this Court's *school-based* strip search cases. (Pet. 11-12.) It is a far different

thing for a school student to be strip searched by school personnel than for a juvenile who is ordered to be detained and placed into the general population of a detention center to undergo a similar search. The school-based strip search cases do not apply because a "detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

The dangers inherent in a detention facility are simply not the same as those that may be present in a school setting. Accordingly, Petitioner's reliance on the school-based cases is misplaced.

C. The Developmental Status Of Children Does Not Demand A Distinct Standard For Suspicionless Strip Searches In Juvenile Detention Centers.

While this Court must consider the vulnerability of juveniles and adolescents when weighing its decisions, it cannot discount the potential for victimization or traumatic events in circumstances where the juvenile detention center is impaired from its obligation to provide a safe environment for housing juveniles. The juvenile detention system is required to act *in loco parentis*, which imposes the added responsibility beyond adult detention facilities of looking after the health, safety, and well-being of each detainee and providing an opportunity for rehabilitation.

Petitioner cites to statistics identifying that 75% of youth in the juvenile justice system have experienced "traumatic victimization" and 50% have post-traumatic stress disorder. While the statistics are noteworthy, Petitioner does not attribute or differentiate between the *origin* of the trauma and whether conduct of other individuals or other events prior to entry in the juvenile detention facilities inflicted the trauma. (Pet. 21 fn.7.)

To the extent that these youths have experienced traumatic events in their lives prior to entry into the justice system, they nonetheless find themselves in a situation where they are under the care, custody, and control of the juvenile detention system. In these circumstances, the juvenile detention center is required to not only act to protect the safety of these juvenile offenders, but also to protect every juvenile in the facility. The juvenile detention system is additionally responsible for identifying signs of abuse and providing opportunities for rehabilitation and treatment that will begin the healing process for individuals who enter their care. Under such circumstances, an unclothed visual inspection of a juvenile provides an opportunity to not only ensure that contraband, weapons, or drugs are not smuggled into the facility, but also provides the juvenile detention center with the chance to identify and treat any individuals who exhibit signs of current or past abuse or victimization.

The Court of Appeals was not cavalier about the potential difficulty that might arise from strip

searching every juvenile upon entry to the facility. It weighed the possible damage against the overarching responsibilities of the juvenile detention system and concluded that the potential for harms that may befall youths undergoing a strip search are outweighed by the benefits that result from careful examination and identification of potential issues upon entry into the juvenile detention center.

II. THIS CASE DOES NOT PROVIDE FACTS TO ADDRESS THE QUESTION IDENTIFIED, AND LEFT UNRESOLVED, IN *FLORENCE*.

Petitioner argues that this case fits squarely within an open question raised by Justice Alito in his concurring opinion in *Florence*. Namely, Petitioner claims that this Court did not decide whether a suspicionless strip search of an arrestee is appropriate where the detention was not reviewed by a magistrate or other judicial officer. 132 S.Ct. at 1523 (Alito, J., concurring). Petitioner's assertion that this case presents an opportunity to address that question is inaccurate because Petitioner was detained pursuant to a court order.[4]

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[4] Petitioner asks this Court to review a question that was not accepted for review by the Court of Appeals. The question presented to the Court of Appeals was direct and simple. The Court of Appeals was asked to review whether or not the ruling of this Court in *Florence* applied equally to individuals entering the general population of a juvenile or adult detention center. Petitioner indicates to this court that the detention of J.B. was

(Continued on following page)

All the witnesses who testified regarding the procedure for detaining a juvenile were clear that Petitioner could not have been directed to report to the Ephrata barracks of the Pennsylvania State Police or been detained unless there was a court order for his detention. Thomas Benjamin testified that he was told there was an order, but he could not recall seeing one. Three other witnesses who worked in the juvenile probation department all testified that a court order was required for Petitioner's detention because he was a juvenile and he was not presently in the custody of the police. One of the juvenile probation employees testified "there must have been an order."

The record of testimony in this case indicates that there had to be a court order to pick up and detain J.B. The juvenile probation officer testified that she was not able to order J.B.'s detention because he was not currently in the custody of the Police. Under such circumstances, juvenile probation must obtain a court order before detention. There is no testimony of record refuting that there was an Order for his detention.

Anticipating Petitioner's response that no detention order was produced in discovery, this Court must

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without review by the Court, but all indications of the record below reveal that J.B. would not have been brought to the Juvenile Detention Center without a Court Order directing his detention.

consider Petitioner's conduct during and after his juvenile proceedings. Petitioner avoided adjudication by entering into a consent decree. The terms of the consent decree required him to admit to his conduct and accept the punishment agreed to by the parties. After the completion of his period of probation, J.B. had an opportunity to have his record expunged and he took advantage of that opportunity, even though the family was already considering filing a lawsuit on the basis of his arrest and detention.

Petitioner attempts to benefit from his own conduct in trying to present this question to the Court. As a result of the entry into the consent decree and upon completion of his probation, J.B. petitioned the Court to expunge his juvenile record. By obtaining expungement of his juvenile record, J.B. has destroyed any documentation related to his adjudication below, including the court order authorizing his detention.

J.B. comes to this Court attempting to utilize the inability of Respondents to produce an order for detention as a proof of his pre-adjudication detention. In fact, a judge reviewed this case before J.B. was detained and it was determined that he was to be held until he would appear in court. The reasoning for this was stated in the record and herein.

This case does not fall within the unanswered question presented by *Florence*. In fact, in this case, the detention was reviewed and ordered by a judicial officer. Each of the officers involved in this case, and

even J.B.'s father, testified that the detention was pursuant to a court order. As such, the question posed by Justice Alito in *Florence* regarding a strip search prior to judicial review is not present here.

If this Court wishes to entertain the question left open by *Florence*, Respondents submit it should be done in another case with facts that are excepted from the holding in *Florence*. If this Court opines in this case, it is Respondents' belief this Court would be issuing an advisory opinion because the facts in this case do not comport with the proposed open question.

"The federal courts are forbidden by Article III of the Constitution from giving advisory opinions." *Boston Firefighters Union Local 718 v. Boston Chapter NAACP, Inc.*, 468 U.S. 1206, 1210 (1984). In fact, "[e]arly in its history, this Court held that it had no power to issue advisory opinions." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). "To be cognizable . . . a suit 'must be definite and concrete, touching the legal relations of parties having adverse interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts.'" *Id.* (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937)).

This case does not present a situation where the juvenile was detained without judicial review, so an opinion on the constitutionality of strip searches

before an opportunity for judicial review of the charges would be nothing more than an advisory opinion which is prohibited by Article III and this Court's prior holdings.

CONCLUSION

For all the reasons articulated herein, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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