NO.15-903

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IN THE

Supreme Court of the United States

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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.

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

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARSHA L. LEVICK*
*Counsel of Record for J.B.
Jessica R. Feierman
Riya Saha Shah
JUVENILE LAW CENTER
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
Telephone: (215) 625-0551
Email: mlevick@jlc.org

Kevin C. Allen
CRYSTLE, ALLEN & BRAUGHT, LLC
143 North Duke Street
Lancaster PA 17602
Telephone: (717) 393-0600

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J.B.'s Petition for *certiorari* explained that this case raises two important, recurring, and unsettled questions of federal law concerning the Fourth Amendment rights of juvenile detainees. The court of appeals decision is contrary to this Court's precedents, and review should be granted. Eighteen organizations filing amicus briefs in support of J.B.'s petition agree.

Respondents' Brief in Opposition, by contrast, struggles to identify reasons why the Court should not review this case. Its arguments either misread this Court's precedent, retreat to the merits of the case that J.B.'s petition is asking this Court to resolve, or create factual disputes where none exist. None of Respondents' arguments detract from the compelling need for this Court's review. The petition should therefore be granted.

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT JUVENILE STATUS MUST BE CONSIDERED WHEN DETERMINING THE CONSTITUTIONALITY OF SUSPICIONLESS STRIP SEARCHES.

As J.B.'s petition explained, this Court should resolve the question of whether *Florence v. Board of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510 (2012), applies to juvenile detainees. This question is squarely presented in this case—a fact that even Respondents do not dispute—and is an important and unsettled question, as demonstrated by

the eighteen *amici* that have filed in support of J.B.'s petition.

A. Respondents Fail To Refute That The First Question Is Squarely Presented, Important, And Unsettled.

1. The Brief in Opposition does not assert that this case is an improper vehicle to address the first question presented. Nor does it dispute the importance of the question. Rather, Respondents argue the merits —stating their view that *Florence* applies equally to juvenile detainees and adult prisoners—and then use it as a justification for denying review. *See* Br. of Resp'ts in Opp'n to Pet. Cert. 7-10. That is the merits question for this Court to resolve if it *grants* review, not a reason to deny review in this case.

In any event, Respondents' argument is deeply flawed. They contend that *Florence*, a case that involved only *adult* detainees, must apply to *juvenile* detainees because the Court did not expressly exclude juvenile detainees from its holding. If that were the rule, it would mean that this Court's holdings apply to people and circumstances not at issue in its decisions unless expressly excluded from the scope of the holdings. That is not and has never been the law.

Florence did not involve juvenile detainees; it did not consider the special developmental concerns of juvenile detainees; and it certainly made no holding as to the Fourth Amendment rights of juvenile detainees. J.B.'s petition detailed why *Florence* should not reflexively apply to juvenile detainees. Pet. Cert. 9-22. *See also* Br. for Amici Curiae Child. & Fam. Just. Ctr. & Sixteen Other Orgs. in Supp. Pet'r 13-23. Because this Court has not yet decided this important

question of federal law, it should grant review to do so here.[1]

2. Respondents next boldly claim that the decision below conforms with this Court's precedents, asserting, incorrectly that this Court's precedents do not require distinct constitutional standards for children. Br. in Opp'n 10-21. In *J.D.B.*, for example, this Court adopted a youth-specific standard for purposes of the *Miranda* custody analysis under the Fifth Amendment. *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 2402-03 (2011) (applying a "reasonable child" standard rather than the "reasonable person" standard that applies to adults). The Third Circuit's application of *Florence*, without any adjustment for age, cannot be reconciled with *J.D.B.*

Respondents further assert that the constitutional rights of juveniles deserve greater protection than adults only in cases involving punishment under the Eighth Amendment. Br. in Opp'n 19-20. That too is incorrect. This Court has repeatedly held that constitutional standards must be calibrated for youth in a variety of other contexts as well. *See, e.g.*, *J.D.B.*, 564 U.S. 261 (relying on prior decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012) to establish a "reasonable child" standard for

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[1] Respondents further reason that no guidance is needed on the constitutionality of juvenile strip-search policies because the lower court decisions seeking guidance on the issue predate the *Florence* opinion, and there is no "clamoring" for guidance in the lower courts. Br. in Opp'n 9-10. To the extent that case law preceding *Florence* articulated a need for guidance about the proper standard for children, this Court's opinion in *Florence,* addressing only the appropriate standard for adults, could not, and did not, resolve the issue.

purposes of the Miranda custody analysis under the Fifth Amendment.). *See also Lee v. Weisman*, 505 U.S. 577 (1992) (recognizing unique protections needed for children under the First Amendment); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (same); *Bellotti v. Baird*, 443 U.S. 622, 635, (1979) (establishing unique standards for youth under the Fourteenth Amendment).

Respondents' premise is therefore entirely unsupported. A clear tension exists between the Third Circuit's application of the *Florence* adult standard to strip searches of juvenile detainees and this Court's jurisprudence recognizing the importance of adolescent development in constitutional analyses. *See Miller*, 132 S. Ct. 2455; *J.D.B.*, 564 U.S. 261; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551. The Brief in Opposition does nothing to dispel that tension.

3. Respondents contend that school search cases are not applicable because juvenile detention centers pose unique safety concerns. In school search cases, courts must consider whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction," *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985), taking into account that youth are uniquely vulnerable to harm from strip searches. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009). Respondents set up a false dichotomy: requiring an assessment of the vulnerability of youth to harm does not preclude a court from also taking into account the security needs of the facility.

Moreover, even under the balancing test established in *Bell v. Wolfish*, 441 U.S. 520 (1979), the

heightened intrusion of blanket strip-search policies on youth in juvenile detention settings outweighs the security concerns.

B. Respondents' Defense Of The Third Circuit's Analysis Does Not, and Cannot, Justify Denying Review.

Respondents' remaining arguments involve the supposed correctness of the decision below. Their merits arguments are irrelevant at the *certiorari* stage. They are also wrong.

1. Respondents repeat the Third Circuit's view that an individualized reasonable suspicion test cannot work in juvenile facilities for the same reason the *test* fails in adult facilities. Br. in Opp'n 14-17. In *Florence*, this Court found that jails needed blanket strip policies to detect: (1) contagious infections and diseases; (2) gang affiliation as evidenced by tattoos; and (3) contraband, i.e., any unauthorized item, concealed by new detainees. *Florence*, 132 S. Ct. at 1518-20.

These goals do not outweigh the extreme harms to children posed by strip searches. In juvenile detention, medical screening can identify contagious infection and diseases more effectively than strip searches.[2] Comprehensive intake processes in juvenile court make information about a young person's

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[2] Such screening occurred in J.B.'s case. Choi Dep. 14:18—15:6 (C.A. J.A. A299-300). All jurisdictions mandate a medical screen upon admission, with the time for conducting the screen varying by state. Kathleen A. Pajer et al., *Psychiatric and Medical Health Care Policies in Juvenile Detention Facilities*, 46 J. Am. Acad. Child & Adolescent Psychiatry, 1660–1667 (2007).

gang membership more readily available than it is in the adult system, reducing the need for a strip search.[3] Moreover, a search based on reasonable suspicion would allow facility staff to determine when the potential harm of a strip search is outweighed by the likelihood that a young person may have contraband—a blanket strip-search policy is not needed. Indeed, most children do not have the sophistication or knowledge of the system to make hiding contraband in body cavities or underwear the widespread problem it may be in the adult system.

Children held in detention for their own welfare and those who are very young are particularly unlikely to have the knowledge and experience to bring and hide contraband. Indeed, the fact that even very young children may be subject to juvenile detention further illustrates the importance—and feasibility—of the individualized suspicion test in juvenile detention. J.B. was only 12 years old at the time of his detention. Eight states explicitly allow children as young as six, seven, or eight years old to be processed in the juvenile justice system. Ariz. Rev. Stat. Ann. § 8-201 (2016); Conn. Gen. Stat. § 46b-120 (2016); Md. Code Ann., Cts. & Jud. Proc. § 3-8A-05 (West 2016); Mass. Gen. Laws 119 § 52 (2016); Nev. Rev. Stat. § 194.010 (2016); N.Y. Fam. Ct. Law § 301.2 (McKinney 2016); N.C. Gen. Stat. § 7B-1501 (2016); Wash. Rev. Code 9A.04.050 (2016). Only 11 states set the lower limit at age ten or higher. Ark. Code Ann. § 9-27-303 (2016); Colo. Rev. Stat. § 19-2-104 (2016); Kan. Stat. Ann. 38-2302 (2016); La. Child. Code Ann. 804 (2016);

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[3] Furthermore, children in most states, including Pennsylvania, are not permitted to get tattoos without parental consent. *See, e.g.*, 18 Pa. Cons. Stat. § 6311 (2016).

Minn. Stat. § 260C.007 (2016); Miss. Code Ann. § 43-21-105 (2016); 42 Pa. Cons. Stat. § 6302 (2016); S.D. Codified Laws § 26-8C-2 (2016); Tex. Fam. Code. Ann. § 51.02 (West 2016); Vt. Stat. Ann. Hum. Servs. 33 § 5102 (2016); Wis. Stat. § 938.12 (2016). The remaining states set no lower age limit for juvenile court jurisdiction. And, children as young as eight years old do indeed enter juvenile detention.[4]

Finally, while juvenile facilities have a legitimate interest in detecting contraband, metal detectors are a far less intrusive, yet highly effective, means to search for weapons.

2. Respondents then echo the Third Circuit's holding that the Lancaster Youth Intervention Center's obligation to act *in loco parentis* requires invasive strip searches upon admission. Br. in Opp'n 14, 19, 21. The unclothed search, Respondents argue, allows staff to ensure that contraband, weapons, or drugs do not enter the facility and to identify and treat those who show signs of abuse. *Id.* at 22.

This rationale flips the principle of *in loco parentis* on its head to justify the unwarranted infliction of potentially serious trauma to already vulnerable youth. A doctrine originally adopted to shield children from harm, *in loco parentis* is wielded here as a sword to invade the most personal zone of privacy—one's body. Moreover, strip-searching children to identify signs of victimization is a particularly ironic strategy, as such

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[4] *See, e.g.*, Yesenia Amaro, *Juvenile justice officials struggle with handling Clark County's youngest offenders*, Las Vegas Review-Journal, Apr. 19, 2014, *available at* http://www.reviewjournal.com/news/crime-courts/juvenile-justice-officials-struggle-handling-clark-county-s-youngest-offenders.

searches risk re-traumatizing and amplifying psychological harm. *See N.G. v. Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004) (Sotomayor, J., concurring in part, dissenting in part) (noting "adverse psychological effect of a strip search is likely to be more severe upon a child than an adult, especially a child who has been the victim of sexual abuse"). *See also* Amici Br. Child. & Fam. Just. Ctr. 10-12; Br. of *Amicus Curiae* Am. Acad. Child & Adolescent Psychiatry in Supp. Pet'r 16-19.

Attempting to find information about a child's abuse history, recent self-mutilation, contagious disease, or gang affiliation are valid goals: these goals, however, do not justify a blanket strip-search policy that jeopardizes the well-being of every child who enters detention.

In short, the rationales offered by the Third Circuit, and repeated by Respondents here, do not stand up to undisputed facts. As described in J.B.'s Petition, individualized suspicion searches are more feasible in juvenile detention centers than in adult facilities. Pet. 19. *See also* Amici Br. Child. & Fam. Just. Ctr. 22 (citing state statutes providing for detailed intake procedures). In addition, the unique rehabilitative purpose of the juvenile justice system and the legal authority to detain children for their own protection and welfare mean that the balance tilts heavily in favor of protecting young people from such searches. Pet. 15.

C. The Unique Developmental Status Of Children Demands A Distinct Standard.

Respondents mechanistic application of an adult standard to young, vulnerable children entering de-

tention facilities flies in the face of this Court's precedent. Research demonstrating that children are at greater risk of harm than adults from strip searches[5] must be weighed heavily in the assessment of the constitutionality of strip-search practices. *See Miller*, 132 S. Ct. 2455; *J.D.B.*, 564 U.S. 261; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551 (recognizing the importance of youth status to constitutional interpretation). *See also Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 661 (2004); *Ginsburg v. New York*, 390 U.S. 629, 637 (1968) (recognizing that constitutional protections must take into account the unique vulnerabilities of children).

Given the importance of protecting young people from harm, this case provides this Court with the opportunity to clarify that an appropriate test must consider the government's interest in institutional safety, as it does under *Bell* and *Florence,* and *also* whether the manner of the search was appropriately calibrated to the unique developmental status and needs of youth. *See, e.g.*, *T.L.O.*, 469 U.S. at 341-42 (a search must not be "excessively intrusive in light of the age and sex of the [individual] and the nature of the infraction"). While adults may be subjected to strip searches for minor offenses, regardless of whether alternative means exist for locating contraband, the rule for children should ensure that such searches take place only upon individualized suspicion and when no reasonable alternative exists to ensure the safety of the facility.

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[5] *See* Pet. 20. *See also* Amici Br. Child. & Fam. Just. Ctr. 4-13; Amicus Br. Am. Acad. Child & Adolescent Psychiatry 8-14.

II. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT STRIP SEARCHES OF YOUTH ARE UNCONSTITUTIONAL PRIOR TO A JUDICIAL DETERMINATION.

This Court should also grant certiorari to address the second question petitioner raised—the constitutionality of strip searches of youth held prior to judicial determination of the propriety of detention.

1. Respondents do not dispute that this question was identified and left open in *Florence*, as applied to juvenile detainees. They instead contend that this case is not the right vehicle to answer that question because, according to Respondents, J.B.'s detention *was* judicially authorized. Their attempt to manufacture a factual dispute to avoid this Court's review—by, among other things, describing the decision below as "incomplete[]" in its recitation of the facts, Br. in Opp'n 3—is unjustified. There is no genuine factual dispute, and this case does indeed squarely present the question of whether blanket strip searches are unconstitutional for youth prior to judicial approval of detention.

While asserting that J.B.'s detention was authorized after a judicial determination, Br. in Opp'n 23-24, Respondents have never produced an order of detention. They rely only on their own assumption that "[t]here had to have been an order." Br. in Opp'n 4. Moreover, the argument that any order would have been expunged, Br. in Opp'n 5-6, is unavailing. J.B. did seek expungement of his records under a statute designed to prevent juvenile records from posing barriers to education or employment. 18 Pa. Cons. Stat.

§ 9123 (2016).[6] Notably, the records, although expunged, are still available, as Respondents have relied upon juvenile court documents throughout the pendency of this case; in fact J.B.'s juvenile records, including all records related to his consent decree, are included as exhibits in the lower court pleadings. *See, e.g.*, (C.A. J.A. App. A236-240, 259, 270, 307, 308, 312-232, 324, 327-328, 329, 332-333, 334-335, 336-344).[7]

2. Respondents also argue that this case is not the right vehicle for assessing the constitutionality of juvenile strip searches because J.B. did not certify the narrower question of the constitutionality of strip searches prior to a judicial determination on the appropriateness of detention in the appeal to the Third Circuit. This concern has no bearing on the overarching question, which was clearly certified for appeal—whether *Florence* applies to all youth. Moreover, the targeted question about the constitutionality of searches prior to a judicial determination is subsumed in the certified question: in deciding whether *Florence* applies, this Court can reach a broad ruling about all youth in detention or a narrower ruling about youth in detention prior to a judicial determination.

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[6] In fact, expungement of consent decree records are routine and universally granted. 18 Pa.Cons. Stat. § 9123(a)(2). *See also In re John W.*, 446 A.2d 621 (Pa. Super. Ct. 1982).

[7] Respondents further conflate J.B.'s consent decree with a finding of guilt. Br. in Opp'n 5. A consent decree is not equivalent to an adjudication of delinquency or finding of guilt. 42 Pa. Cons. Stat. § 6340 (2016); *Muhammad ex rel. J.S. v. Abington Tp. Police Dept.*, 37 F. Supp. 3d 746, 754 (E.D.Pa. 2014); *Commw. v. Hughes*, 865 A.2d 761, 795 (Pa. 2004). Moreover, a warrant, if issued, is not equivalent to a judicial detention hearing with full process.

CONCLUSION

For the foregoing reasons, J.B. respectfully requests that this Court grant the petition for a *writ of certiorari*.

Respectfully Submitted,

Marsha L. Levick*
**Counsel of Record*
Jessica Feierman
Riya Saha Shah
JUVENILE LAW CENTER
1315 Walnut Street
4th Floor
Philadelphia, PA 19107
(215) 625-0551
mlevick@jlc.org

Kevin C. Allen, Esquire
CRYSTLE, ALLEN &
BRAUGHT, LLC
143 North Duke Street
Lancaster PA 17602
(717) 393-0600

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