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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND RESTORE THE FOURTH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal-defense lawyers, public defenders, military-defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal-defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, assisting in cases like this one, which concern constitutional standards affecting arrestees and pretrial detainees and are of broad importance to criminal defendants, criminal-defense lawyers, and the criminal-justice system as a whole.

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[1] Pursuant to Rule 37.6, *Amici Curiae* certify that no counsel for a party has authored this brief in whole or in part and that no one other than *Amici Curiae* and their counsel has made any monetary contribution to the preparation and submission of this brief. Counsel of record for all parties received notice of *Amici Curiae*'s intention to file a brief at least 10 days prior to the filing deadline. All parties have consented to the filing of this brief.

Amicus Curiae Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment. Restore the Fourth believes everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right. Restore the Fourth oversees a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political respect for the Fourth Amendment. Restore the Fourth also files amicus briefs in significant Fourth Amendment cases.

REASONS FOR GRANTING THE PETITION

Amici Curiae respectfully urge the Court to grant certiorari to determine the proper Fourth Amendment standard for conducting penetrative searches of the vaginal and anal cavities of pretrial detainees. At stake are the rights of the nearly half of a million people detained pretrial in the United States each day, whose most sensitive and intimate body cavities, under the reasoning of the decision on appeal, may be penetrated by government officials based only on reasonable suspicion. This Court's attention is particularly warranted because pretrial detainees have not been convicted of a crime, and many have been detained only on minor charges and are not dangerous.

A manual probing of the vaginal and anal cavities is perhaps the most intrusive type of search that the government is legally permitted to

conduct and implicates the apex of Fourth Amendment interests that this Court is entrusted to safeguard. Setting appropriate limits on this most intrusive of searches is imperative to maintain trust in the criminal justice system by pretrial detainees passing through it and avoid unnecessary trauma. The psychological harms caused by intrusive body cavity searches have been likened to those faced by rape victims; they can include post-traumatic stress disorder and symptoms such as depression, anxiety, sleep disruption, and even suicide. Such harms are exacerbated for the significant population of pretrial detainees—particularly women detainees—who have suffered past physical and sexual abuse and can thus experience penetrative vaginal and anal cavity searches as retraumatizing. This Court should grant certiorari to ensure that searches of such an intrusive nature are carried out only with sufficient justification.

Unwarranted manual body cavity searches also increase the already weighty pressures on innocent pretrial detainees—particularly those facing only minor charges—to plead guilty merely to escape the harms of detention. Rigorous research taking advantage of natural experiments confirms *Amici Curiae*'s experience that the mere imposition of pretrial detention increases the prevalence of guilty pleas. This causal effect is most pronounced for those held on minor charges, who are often presented with the option to plead guilty to end their detention. Unjustified penetrative searches of pretrial detainees' vaginal and anal cavities heighten the risk that innocent detainees will plead

guilty solely to escape a traumatic detention. For that reason, such searches not only undermine trust in the criminal justice system for the individuals being searched, but also undermine the reliability of justice system outcomes. The standard for carrying out penetrative vaginal and anal cavity searches on pretrial detainees thus well merits this Court's attention.

I. PRETRIAL DETAINEES HAVE NOT BEEN CONVICTED OF ANY CRIME, AND, IN MANY CASES, HAVE BEEN DETAINED ONLY ON MINOR CHARGES.

The issue raised by the petition impacts the entire population of men and women in pretrial detention across the United States, whose most private, intimate body cavities, under the reasoning of the decision on appeal, may be manually probed and penetrated by jail staff without a warrant, exigent circumstances, or probable cause. Pretrial detainees have not been convicted of a crime, and a substantial proportion have been detained only on charges of minor offenses and are not dangerous. Given the ubiquity of pretrial detention, as well as the status and varied characteristics of the pretrial detainee population, the standard for conducting manual body cavity searches of pretrial detainees warrants this Court's attention.

This Court has consistently underscored the critical difference between pretrial detainees and those imprisoned pursuant to a judgment of conviction: pretrial detainees have "not been adjudged guilty of any crime." *Bell v. Wolfish*, 441

U.S. 520, 536 (1979). Rather, they are "shielded by the presumption of innocence, the 'bedrock, axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.'" *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (citing *Reed v. Ross*, 468 U.S. 1, 4 (1984)). Given their legally innocent status, they "may not be punished prior to an adjudication of guilt." *Bell*, 441 U.S. at 535-36.

Although this Court has instructed that pretrial detention should be the "carefully limited exception" and liberty "the norm," *United States v. Salerno*, 481 U.S. 739, 755 (1987), the pretrial detainee population has increased approximately fivefold since 1970. Léon Digard, et al., *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INSTITUTE OF JUSTICE 2 (Apr. 2019), http://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf. Each day, nearly half a million people are held pretrial in jails across the United States. Zhen Zeng, *Jail Inmates in 2018*, Bureau of Justice Statistics, U.S. Department of Justice 1, 5 (Mar. 2020), available at https://www.bjs.gov/content/pub/pdf/ji18.pdf. Jails reported nearly eleven million admissions in 2018 alone. *Id.* at 1.

The pretrial detainee population includes many individuals accused of only minor violations or offenses, "most" of whom "are not dangerous." *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 341 (2012) (Alito, J., concurring); *see also Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (arrests permitted for non-

jailable offenses). Well over a quarter of the United States jail population has been detained solely for misdemeanor charges or civil infractions. *See* Zeng, *Jail Inmates in 2018*, at 6. For example, one analysis of jail booking records from many Texas counties revealed that in nine of ten large counties, more than half of all jail bookings were for misdemeanor offenses, and across eleven counties analyzed, more than 30,000 people were detained pretrial for fine-only misdemeanors in a single year. *An Analysis of Texas Jail Bookings*, TEXAS APPLESEED, 2-4 (Apr. 2019), available at https://www.texasappleseed.org/sites/default/files/An%20Analysis%20of%20Texas%20Jail%20Bookings%20Apr%202019.pdf.

Charges for minor violations and offenses can, and do, result in pretrial detention. *See, e.g.*, *Amaechi v. West*, 237 F.3d 356 (7th Cir. 2001) (home occupant detained for violating a noise ordinance); *Blake v. Lambert*, No. 1:17-CV-89-SA-DAS, 2021 WL 107253, at *1 (N.D. Miss. Jan. 12, 2021) (aunt who lacked custody of nephew detained for his unexcused school absences); *Nibeck v. Marion Police Dep't,* No. 16-CV-114-LRR, 2016 WL 6246782, at *3 (N.D. Iowa Oct. 25, 2016) (property owner detained for displaying posters on his property); *Mglej v. Gardner*, 974 F.3d 1151, 1159 (10th Cir. 2020) (home occupant detained for failing to furnish identification when accused of taking $20 from a convenience store that was later determined not to be missing); *Gates v. Khokhar*, 884 F.3d 1290, 1295 (11th Cir. 2018) (wearing a "V for Vendetta" mask at a protest); *Atwater*, 532 U.S. 318 (not wearing a seatbelt); *Revely v. City of*

Huntington, No. 3:07-0648, 2009 WL 1097972 (S.D. W. Va. Apr. 23, 2009) (not stopping parallel to a stop sign); *Henneberry v. City of Newark*, No. 13-CV-05238-MEJ, 2017 WL 1493006, at *4 (N.D. Cal. Apr. 26, 2017) (attending a city council meeting without a reservation); *Chortek v. City of Milwaukee*, 356 F.3d 740 (4th Cir. 2004) (selling tickets next to a sports arena before an event); *Lee v. Ferraro*, 284 F.3d 1188, 1192-93 (11th Cir. 2002) (improperly using a car horn); *Sands v. City of New York*, No. CV 04 5275 BMC CLP, 2006 WL 2850613 (E.D.N.Y. Oct. 3, 2006) (littering by ripping up a parking ticket and dropping it on the street); *Shipp v. Bucher*, No. 8:07-cv-440-T-17TBM, 2009 WL 179668 (M.D. Fla. Jan. 26, 2009) (discarding a lit cigarette on the ground); *Bennett v. Booth*, No. Civ. A. 3:04-1322, 2005 WL 2211371 (S.D. W.Va. Sept. 9, 2005) (displaying a "Friends of Police" emblem on a car when not a member of the organization); *Tanberg v. Sholtis*, 401 F.3d 1151 (10th Cir. 2005) (visiting a park after hours); *Thomas v. City of Peoria*, 580 F.3d 633 (7th Cir. 2009) (failing to pay parking tickets); *Holloman v. City of Myrtle Beach*, No. 4:04-1868, 2006 WL 4869353, at *5 (D.S.C. June 8, 2006) (driving "more closely than is reasonable and prudent"); *Lorenzo v. City of Tampa*, 259 F. App'x 239 (11th Cir. 2007) (per curiam) (distributing handbills without a permit).

Individuals detained pretrial for minor offenses are typically released before appearing before a magistrate, or released on their own recognizance or minimal bail, and "in the end, few are sentenced to incarceration." *Florence*, 566 U.S. at 341 (Alito, J., concurring). Still, many spend days, weeks, or

even longer in detention while awaiting resolution of their cases. *See, e.g.*, Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 732-33 (2017) (noting that 35% of misdemeanor defendants in New York City and 53% of misdemeanor defendants in Harris County, Texas, spend 7 days or more in jail pretrial). During this time, even individuals held on charges for minor, non-dangerous and non-drug offenses—such as Petitioner Sharon Lynn Brown, who was detained for shoplifting (Pet. App'x 2)—are subject to the risk of unwarranted penetrative searches of vaginal and anal body cavities. The parameters pursuant to which government agents may conduct such intrusive searches on the sizeable, legally innocent, and varied pretrial detainee population is thus an issue that deserves this Court's attention.

II. MANUAL BODY CAVITY SEARCHES IMPLICATE THE APEX OF FOURTH AMENDMENT INTERESTS THAT THIS COURT IS ENTRUSTED TO SAFEGUARD.

A coerced, penetrative search of an individual's vaginal and anal body cavities is perhaps the most intrusive, traumatizing, and dehumanizing search that the government can legally commit. The violation of privacy, dignity, and personal security occasioned by such a search is difficult to overstate and implicates the apex of Fourth Amendment interests that this Court is entrusted to safeguard. Unwarranted manual body cavity searches cause devastating harm and eviscerate trust in the

criminal justice system by pretrial detainees passing through it.

"Compelled physical intrusion" into an arrestee's body "implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). As this Court recognized more than a century ago, "[t]o compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 252 (1891). Although "virtually any intrusion into the human body will work an invasion of cherished personal security," *Maryland v. King*, 569 U.S. 435, 446 (2013), the involuntary probing of the intimate vaginal and anal cavities effects "a drastic and total intrusion of the personal privacy and security values" protected by the Fourth Amendment. *Rodriques v. Furtado*, 950 F.2d 805, 811 (1st Cir. 1991); *see also Bonitz v. Fair*, 804 F.2d 164, 172 (1st Cir. 1986) (the intrusion that occurs when private body cavities are searched not merely through visual observation, but instead touched, probed, or penetrated "is significant and has been noted by courts") (collecting authority).

During a manual body cavity search, a pretrial detainee must expose her most private and sensitive body parts to close scrutiny by a complete stranger, who then manually, or using an instrument, enters that most intimate of domains without permission. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 535-39 (2006). Such a search intrudes upon the spatial

distance that humans offer one another out of respect for bodily integrity, *see id.* at 552-57, and invades a realm over which society otherwise affords complete decisional autonomy to individuals over who is permitted to enter, *see id.* at 559-60. The concealment and safeguarding of "private parts" is a core aspect of personal dignity pursuant to societal norms. *E.g.*, Yofi Tirosh & Michael Birnhack, *Naked in Front of the Machine: Does Airport Scanning Violate Privacy?*, 74 OHIO ST. L.J. 1263, 1287-89 (2013). Because these norms have been internalized, involuntary exposure and penetration of private body cavities can engender "strong feelings of shame." *See* Solove, 154 U. PA. L. REV. at 537-38.

The psychological effects experienced by those subjected to intrusive body cavity searches "can be likened to those of rape victims." David C. James, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033, 1049-50 (1982). The required submission to entry of a person's body against her will can eviscerate personal dignity, and "weaken the individual's sense of self." *Id.* "Post-search symptoms include sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions," and even suicide ideation and attempts. M. Margaret McKeown, *Strip Searches Are Alive and Well in America*, 12 HUM. RTS. 37, 37-38, 42 (1985). "Victims may feel helpless, indignant, and shocked, and may experience, for several years, psychological symptoms of trauma similar to those endured by rape survivors." Daphne Ha, *Blanket Policies for*

Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness, 79 FORDHAM L. REV. 2721, 2740 (2011). Even strictly visual searches of private body cavities can cause feelings of "deep degradation" and "terror," *Bell*, 441 U.S. at 593 (Stevens, J., dissenting), and are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying degradation and submission," *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (quotation omitted). When private body cavities are not just visually inspected, but penetrated involuntarily, the level of intrusion is even more extreme. *See, e.g.*, *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985) (manual body cavity searches caused plaintiff to suffer severe depression, sexual dysfunction, and post-traumatic stress syndrome); *Florence*, 566 U.S. at 339; *Bell*, 441 U.S. at 558 n.39; *Bonitz*, 804 F.2d at 172.

Penetrative vaginal and anal cavity searches can be particularly harmful when conducted on the substantial share of pretrial detainees—particularly women—with histories of past physical and sexual abuse. "More than fifty percent of women detained in jails report a history of physical or sexual abuse." David M. Shapiro, *Does the Fourth Amendment Permit Indiscriminate Strip Searches of Misdemeanor Arrestees?*, 6 CHARLESTON L. REV. 131, 152 (2011); *see also* Melissa E. Dichter, *Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update*, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, 2-3 (July 2015), available at https://vawnet.org/sites/default/files/materials/files/

2016-08/AR_IncarcerationUpdate%20%281%29.pdf. A penetrative body cavity search can trigger flashbacks to prior abusive incidents, retraumatizing the subject of the search by forcing her to contend not only with the degradation and humiliation caused by the search, but also to simultaneously relive past traumas. *E.g.*, Ha, 79 FORDHAM L. REV. at 2742-43; *see also Jordan v. Gardner*, 986 F.2d 1521, 1525-26 (9th Cir. 1993) (detailing expert testimony about the severe psychological harms that even clothed bodily searches involving cross-gender touching of sensitive areas can have on abused women, including re-victimization, anxiety, depression, and increased suicide risk).

Unwarranted penetrative vaginal and anal cavity searches thus cause devastating trauma and erode trust in the criminal justice system. Consistent with the research on the effects of such searches, Petitioner Brown reported that immediately after she was subjected to an involuntary, prolonged penetration of her vagina and anus using a speculum by a male searching official, she started to cry and could not stop until she cried herself to sleep. Dist. Ct. Dkt. 17 at 121:14-121:25, 52:2-58:2. She was left with ongoing depression, fear of being alone with men, and anxiety over the possibility of being pulled over by police. *Id.* at 121:14-121:25, 52:2-58:2, 61:23-62:17. This Court's careful consideration of the standard for carrying out this most intrusive form of bodily search is required to avoid unnecessary injuries and resulting mistrust of the criminal justice system.

III. UNWARRANTED MANUAL BODY CAVITY SEARCHES INCREASE THE PRESSURE ON INNOCENT DETAINEES TO PLEAD GUILTY TO END A TRAUMATIC DETENTION.

Because of the traumatizing and dehumanizing impact of manual body cavity searches, such searches can also increase the pressure on pretrial detainees to plead guilty to escape the harms of detention, even when they are innocent of the charges that they face. For that reason, unwarranted manual body cavity searches can not only erode trust in the criminal justice system by pretrial detainees subjected to such searches, but also undermine the reliability of justice system outcomes.

Pretrial detainees—particularly those charged with minor or relatively minor offenses—face strong incentives to plead guilty to shorten or end their time in detention. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173-76 (2014). Rigorous studies taking advantage of natural experiments confirm *Amici Curiae*'s experience that the mere imposition of pretrial detention increases the prevalence of conviction amongst similarly situated persons. *See* Digard, *Justice Denied*, at 3-5; Patrick Liu, et al., *The Economics of Bail and Pretrial Detention*, THE HAMILTON PROJECT 11-12 (Dec. 2018), available at http://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf.

For example, one natural experiment that leveraged the random assignment of cases to judges with different leniency rates "found that more than three days of pretrial detention increased the likelihood of conviction by 13 percent," primarily because defendants who would otherwise have been acquitted or had charges dropped pled guilty. *See* Digard, *Justice Denied*, at 3 (citing Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511, 516 & 532 (2018)). Another similar study of hundreds of thousands of misdemeanor defendants in Harris County, Texas, found that pretrial detainees were 25% more likely than similarly-situated releases to plead guilty, after fully controlling for the initial bail amount, offense, demographic information, and criminal history characteristics. Heaton, et al., 69 STAN. L. REV. at 747, 756-57 (confirming the causal link between detention and guilty pleas through a natural experiment leveraging days of the week in which similarly-situated criminal defendants were more likely to make bail).

The causal effect of pretrial detention on conviction "is almost exclusively driven by an increased likelihood of pleading guilty." Liu, et al., *The Economics of Bail and Pretrial Detention*, at 11; Heaton, et al., 69 STAN. L. REV. at 747. It is most pronounced for those facing minor charges, who can receive "time served" in exchange for a guilty plea. Digard, *Justice Denied*, at 5. Research supports that "at least part of the effect of pretrial detention on conviction is due to a greater likelihood that those who are detained will plead

guilty . . . even if they did not commit the alleged offense." *Id.* at 4; *see also* Blume & Helm, 100 CORNELL L. REV. at 173-76.

In *Amici Curiae*'s experience, pressures on innocent detainees to plead guilty to escape detention are informed not only by considerations such as the risk of job loss or the need to provide childcare, but also by the level of trauma experienced in jail settings. Continuing to allow dehumanizing penetrative vaginal and anal cavity searches that are supported by nothing more than reasonable suspicion ensures that pressure persists on innocent pretrial detainees to plead guilty to escape detention, undermining the reliability of justice system outcomes.

CONCLUSION

For the foregoing reasons, *Amici Curiae* National Association of Criminal Defense Lawyers and Restore the Fourth respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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