IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| MARY BULL, et al.,<br><br>Plaintiffs/Appellees,<br><br>vs.<br><br>CITY AND COUNTY OF SAN FRANCISCO, et al.,<br><br>Defendants/Appellants. | 9th Circuit Case No. 06-15566<br><br>(Consolidated with Docket No. 05-17080)<br><br>(U.S. District Court No. C 03-1840 CRB N.D. Cal. San Francisco) |

# DEFENDANTS'/APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC* (FRAP 35, 40)

On Appeal from the United States District Court
for the Northern District of California

The Honorable Charles R. Breyer

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## INTRODUCTION AND REASONS FOR GRANTING REHEARING OR REHEARING *EN BANC*

Defendants-Appellants ("Defendants") petition for rehearing or rehearing *en banc* of the divided panel decision of August 22, 2008 affirming the district court's denial of qualified immunity to San Francisco Sheriff Michael Hennessey.

From April 2000 through December 2003, searches of the general jail population in San Francisco's urban jail system uncovered over 1,500 items of contraband. This contraband included shanks (home-made knives), lighters, needles, cocaine, methamphetamines, and heroin. The persons smuggling this contraband were not limited to those arrested on charges involving drugs, weapons, or violence. Instead, many were persons arrested for minor violations, such as shoplifting and traffic violations. These persons often hid the drugs or weapons on their body or inside their bodily orifices in an effort to evade confiscation.

Based on experience, San Francisco jail officials knew that new arrestees were the most likely smugglers of contraband into the general jail population. Those officials also knew that visual strip searches were effective at deterring and reducing contraband smuggling. Thus, San Francisco implemented a visual strip search policy. Under this policy, after determining that an arrestee was ineligible for citation release and after providing a reasonable opportunity to post bail, San Francisco visually strip searched those arrestees who were about to be transferred into the general jail population. As a result of these searches, San Francisco confiscated numerous items of contraband including drugs and weapons that it would not have discovered using other types of searches—such as a pat down search or a search using a metal detector. Indeed, the effectiveness of San Francisco's policy is starkly illustrated by the death of a jail inmate from a drug overdose soon after San Francisco halted its policy in response to the filing of this lawsuit.

Arrestees who were strip searched by San Francisco before January 2004 filed this class action under 42 U.S.C. § 1983, alleging that San Francisco's visual strip search policy violated the Fourth Amendment. In a divided opinion with a strong dissent, the panel majority held that, under Ninth Circuit precedents, San Francisco's visual strip search policy was unconstitutional under the Fourth Amendment and that the illegality of the policy was clearly established at the time. The panel held that strip searches of pretrial detainees are unconstitutional "in the absence of reasonable individualized suspicion." *Bull v. City and County of San Francisco*, 539 F.3d 1193, 1196, 1201 (9th Cir. 2008).

Although Judges Thomas and Ikuta affirmed the denial of qualified immunity, Judge Ikuta, compelled by Ninth Circuit precedents, concurred "with reluctance and grave concern." *Id.* at 1202. Because the panel's holding and Circuit precedents "contradict[ed]" the United States Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), and thereby placed lives at risk, she urged "a reconsideration of our case law." *Bull*, 539 F.3d at 1205. In dissent, Judge Tallman agreed that the majority's holding conflicted with *Bell* and placed lives at risk but concluded that San Francisco's policy "was reasonable under the Fourth Amendment and resulted in no constitutional violation." *Id.* at 1212. Thus, two judges on the panel—a majority—believed that San Francisco's strip search policy was constitutional notwithstanding Ninth Circuit case law.

San Francisco now petitions for rehearing or rehearing *en banc*. As explained below, this Court should grant this petition because the panel majority's decision contradicts the Supreme Court's decision in *Bell*—the seminal case regarding strip searches of pretrial detainees—and the rulings of this and other federal circuits.

First, the panel majority's decision strayed from *Bell*. In *Bell*, the Supreme Court held that a policy of strip searching inmates after contact visits without

individualized, reasonable suspicion was constitutional. After balancing "the need for the particular search against the invasion of personal rights that the search entails," the court concluded that prison administrators should be accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547. In its earlier precedents, this Court misconstrued *Bell's* balancing test and failed to accord the required deference to jail administrators when it suggested that arrestees transferred to the general population cannot be strip searched absent an individualized, reasonable suspicion that they have contraband. As Judges Tallman and Ikuta correctly observed: "[o]ur ship has sailed far from the course charted by the United States Supreme Court in *Bell*." *Bull*, 539 F.3d at 1205; *see also Id.* at 1203 ("Ninth Circuit precedent has wandered far from *Bell*, as the dissent points out"). Thus, this Court should grant rehearing or rehearing *en banc* and reconsider *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), and *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 714 (9th Cir. 1990).

Second, the panel majority's decision conflicts with a recent *en banc* decision from the Eleventh Circuit. In *Powell v. Barrett*, 2008 WL 4072800 (11th Cir. Sept. 4, 2008), the Eleventh Circuit, in an 11-1 decision, upheld a policy of "strip searching all arrestees" to be transferred into the general jail population "even without a reasonable suspicion to believe that they may be concealing contraband." Thus, the Eleventh Circuit has taken a position contrary to the position that the Ninth Circuit has taken here. And this Court should grant rehearing or rehearing *en banc* in order to address this intercircuit conflict.

Third, the panel majority should have distinguished Ninth Circuit case law based on the unique record in this case. Although prior Ninth Circuit cases have held that strip searches of individual pretrial detainees violate the Fourth

Amendment in the absence of individualized, reasonable suspicion, none of those cases had a well-documented record of contraband smuggling as in this case. Moreover, many of those cases involved detainees who were awaiting bail or citation release at the time of the search. Absent evidence of a serious smuggling problem, this Court concluded that the privacy concerns of detainees who would only spend a few hours in jail outweighed the security interests of the facility. The same is not true here. As Judge Tallman aptly observed, "[w]e have never before been presented with such a compelling record of dangerous smuggling activity." *Bull*, 539 F.3d at 1206. Balancing inmate privacy against the jail's security in light of this record as required by Ninth Circuit precedents compels a different conclusion—that San Francisco's strip search policy *is* constitutional. Finally, even if the panel majority properly held that San Francisco's policy violated the Fourth Amendment, it erred in holding that the unlawfulness of the policy was clearly established at the time. In light of the serious smuggling problem plaguing San Francisco's jails, a reasonable jail official could believe that it was lawful to strip search arrestees who were unavoidably about to be placed in the general jail population.

The panel majority's decision poses a real danger to detention facilities throughout the Ninth Circuit. Like San Francisco jails, these facilities face a serious contraband smuggling problem that threatens the lives of their inmates and employees. Visual strip searches offer an effective way for these facilities to combat this problem. If allowed to stand, this decision will substitute the Court's judgment for that of experienced jail administrators. And in so doing, the Court will expose jail inmates and employees throughout the Ninth Circuit to injury and, sadly, even death. As Judge Ikuta noted, “by disregarding the jail administrators’ urgent concerns about a serious contraband smuggling problem, I agree with the dissent that we are potentially putting lives in the San Francisco detention system

at risk." *Bull*, 539 F.3d at 1202. Rather than place lives at risk, this Court should grant rehearing or rehearing *en banc*.

## STATEMENT OF FACTS

This is a class action challenging San Francisco's former strip search policy. Until January 2004, San Francisco visually strip searched pretrial detainees who (a) had been given a reasonable opportunity to post bail or cite out (citation and release) before the search, and (b) were about to be transferred to the general jail population.[1] San Francisco jail administrators implemented this policy in order to combat contraband smuggling in its urban jails.

The smuggling problem in San Francisco jails is grave. From April 2000 through December 2003, searches of the general jail population uncovered over 1,500 items—including shanks, knives, lighters, rock cocaine, cocaine powder, methamphetamines, hypodermic needles, marijuana, heroin, and ecstasy pills. (E.R. IV: 669).[2] When prisoners smuggle drugs and weapons on or inside their bodies, employees, visitors, and inmates are put in danger. Indeed, courts have recognized the inherent danger posed by such smuggling. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984) (taking judicial notice of the "perplexing" problem of contraband flowing into prisons). And the record here shows that nothing less than the lives of inmates and staff are at stake.

All new arrestees in San Francisco are brought to County Jail No. 9, San Francisco's intake and release facility. At the facility, arrestees are booked and processed, and a determination is made as to whether they will be released or housed in the general jail population. (E.R. IV: 847). Because County Jail No. 9

[1] Because of this class action, the Sheriff instituted new search policies in January 2004 that are still in effect. These new policies are not at issue here.

[2] "E.R." refers to Appellants' Excerpts of Record filed in the consolidated companion appeal, Docket No. 05-17080.

is a temporary detention facility and does not contain beds for extended stays, all arrestees who are classified for housing are transferred to another San Francisco jail within 24 hours. (E.R. IV: 857). County Jail No. 9 is thus the gateway into the San Francisco jail system for both people and contraband.

From their experience, San Francisco jail administrators knew that arrestees received for booking and transferred into the general jail population were the most likely smugglers of drugs and weapons into San Francisco jails. (E.R. IV: 644, 646). Thus, after giving arrestees a reasonable opportunity to post bail, persons who were not eligible for citation release and did not post bail were visually strip searched before entering the general jail population. (E.R. IV: 653, 849). These searches were visual only; they involved no touching, occurred in private, and were conducted by a deputy of the same gender as the arrestee. (E.R. IV: 653-55.) Arrestees were given as long as possible to post bail or cite out before being strip searched. (E.R. IV: 861, 863, 868). The purpose of these searches was to prevent contraband smuggling, for the safety of inmates and staff. (E.R. IV: 644, 852).

And these visual strip searches prevented a huge amount of contraband from entering the jails. The evidentiary record reveals that the strip searches uncovered numerous knives, scissors, syringes, cocaine, heroin, and other illegal drugs hidden in the rectums, vaginas, mouths, or ears of new arrestees.[3]

Arrestees who attempted to smuggle drugs and weapons into San Francisco jails were not limited to persons arrested on charges involving drugs, weapons or violence. Indeed, the record reveals that persons who were not arrested for crimes

[3] E.R. IV: 646, 667; E.R. III: 463, 464, 471-74, 476, 478, 480-81, 483-84, 486-87, 497-99, 502, 506, 517, 521-22, 525-26, 532, 534-35, 54-45, 547-48, 551, 553, 558, 560, 563, 565, 567, 571, 576-77, 579, 582-84, 586, 591, 595, 604, 607, 609, 611-14, 617, 621, 623, 627-30, 632-34, 636-37.

involving drugs, weapons, or violence secreted drugs and other dangerous contraband in their bodily orifices.[4]

Based on the experience of jail administrators, visual strip searches of new arrestees reduced the flow of contraband into the jails and decreased the risk of injury to inmates, staff, and visitors. (E.R. IV: 645-46). This too is borne out by the record. After San Francisco ended its strip search policy, an inmate died from an overdose of cocaine that was smuggled into the general jail population at the County Jail. (E.R. V: 1058-60).

## ARGUMENT

### I. THE COURT SHOULD GRANT REHEARING OR REHEARING EN BANC BECAUSE THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT AUTHORITY.

### A. The Panel's Holding Contradicts the Supreme Court's Decision In *Bell.*

Although the panel affirmed the district court's order holding that San Francisco's strip search policy violated the Fourth Amendment, a majority—Judges Ikuta and Tallman—agreed that the panel's holding contradicted *Bell*. Indeed, Judge Ikuta, who reluctantly concurred, stated that "a reconsideration of our case law is urgently needed." *Bull*, 539 F.3d at 1205. This Court should heed Judges Ikuta and Tallman and grant rehearing or rehearing *en banc*.

In *Bell*, the Supreme Court held that a detention facility may limit a pretrial detainee's constitutional rights in order to maintain "institutional security" and preserve "internal order and discipline." 441 U.S. at 546.[5] In determining whether a facility's measures are constitutional, courts apply a fact-intensive balancing test:

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[4] E.R. III: 474, 478, 527, 532, 534, 577, 595, 601, 603, 609, 612-14; Y.E.R. III: 414-15, 416-19, 427-28, 435-38, 439-42, 443-47, 448-49, 450-53, 454-57, 464-68, 488-89, 490-91. "Y.E.R." refers to Appellants' Excerpts of Record in *Yourke v. City and County of San Francisco*, Docket No. 06-16450, which were judicially noticed.

[5] Federal case law makes it clear that there should be no distinction between pretrial detainees and convicted inmates. As the Supreme Court explained in *Bell*,

(continued on next page)

> The test of reasonableness under the Fourth Amendment ... requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Id*. at 559.

Under this test, "even when an institutional restriction infringes a specific constitutional guarantee ... the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Id*. at 546-47. Courts must accord "wide-ranging deference" to prison officials "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id*. at 547. Further, "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id*. at 548 (internal quotations omitted).

Applying these principles, the Supreme Court in *Bell* upheld the detention facility's policy of conducting a body-cavity search after a detainee had a contact visit with a person outside the facility. It did so even though only one search conducted by the facility had resulted in the discovery of contraband. *Id.* at 558. "Balancing the significant and legitimate security interests of the institution against the privacy interest of the inmates," the Court concluded that the strip search policy was reasonable under the Fourth Amendment. *Id.* at 560.

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441 U.S. at 546 n.28, "there is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." *Id.* *See also Dufrin v. Spreen*, 712 F.2d 1084, 1087-88 (6th Cir. 1983) ("It is clear that prison officials need not distinguish between convicted inmates and pretrial detainees in reviewing their security practices").

Under *Bell*, San Francisco's strip search policy is constitutional. The smuggling of drugs and weapons into San Francisco jails is pervasive and poses a serious danger to jail inmates and employees. Based on their experience, jail administrators concluded that visual strip searches were effective in combating this smuggling problem and protecting inmates and staff. The subsequent death of an inmate due to a drug overdose after San Francisco halted its policy supports this conclusion. Balancing the "significant and legitimate security interests" of San Francisco jails against privacy concerns as required by *Bell*, this Court should have upheld the constitutionality of San Francisco's strip search policy. *Bell*, 441 U.S. at 560.

Both Judges Tallman and Ikuta agreed. As Judge Tallman explained:

> San Francisco has demonstrated beyond cavil that the smuggling of drugs, weapons, and other contraband into the general jail population is a common and pervasive problem that imposes a security risk endangering both jail inmates and jail employees. While acknowledging the existence of this evidence, the majority extends Ninth Circuit restrictions and adopts a per se rule requiring reasonable suspicion to strip search a pretrial detainee transferred into the general population for housing who does not otherwise meet the category of arrestees the majority approves for strip-searching. But the newly-minted rule runs contrary to Supreme Court precedent, impedes jail administration, and further endangers the safety of jail inmates and employees. *Bull*, 539 F.3d at 1206.

Similarly, Judge Ikuta stated:

> In considering whether the policy was reasonable, we must defer to the judgment of jail administrators. If we did so, and thereby followed the directive of the Supreme Court, we would be compelled to uphold the strip search policy as reasonable given the substantial evidence in the record illustrating the dire security needs facing the facility. *Id.* at 1203.

Only prior Ninth Circuit precedents—whose "balancing test bears little relation to *Bell*'s"—compelled Judge Ikuta to "reluctantly concur in the majority's determination that the strip search policy was unconstitutional." *Bull*, 539 F.3d at

1204-1205. Those precedents should be reconsidered not only because of *Bell* but to ensure the safety of jail inmates and employees.

### B. The Panel's Decision Conflicts With Other Federal Circuit Authority.

Just weeks after the panel concluded that San Francisco's strip search policy violated the Fourth Amendment, the Eleventh Circuit reached the opposite conclusion. In an 11-1 *en banc* decision, the Eleventh Circuit upheld a policy of "strip searching all arrestees as part of the process of booking them into the general population of a detention facility, even without a reasonable suspicion to believe that they may be concealing contraband." *Powell*, 2008 WL 4072800, at *1. Relying on *Bell*, it reversed prior Eleventh Circuit precedents that had held—like the Ninth Circuit—that individualized reasonable suspicion was necessary. As the court explained, "[e]mployees, visitors, and (not least of all) the detained inmates themselves face a real threat of violence, and administrators must be concerned on a daily basis with the smuggling of contraband by inmates accused of misdemeanors as well as those accused of felonies." *Id.* at *13. "These reasons support the expert opinion of jail administrators that all of those who are to be detained in the general population of a detention facility should be strip searched when they enter or re-enter it." *Id.* Because the panel's decision conflicts with *Powell*, the Court should grant rehearing or rehearing *en banc*.

## II. THE COURT SHOULD GRANT REHEARING OR REHEARING EN BANC BECAUSE SAN FRANCISCO'S STRIP SEARCH POLICY IS CONSTITUTIONAL UNDER NINTH CIRCUIT PRECEDENTS.

The record of drug and weapons smuggling in this case is unprecedented. As Judge Tallman aptly noted, this Court has "never before been presented with such a compelling record of dangerous smuggling activity." *Bull*, 539 F.3d at 1206. Even under Ninth Circuit precedents, this record constitutionally justifies San Francisco’s strip search policy.

Under prior Ninth Circuit cases, a strip search policy must be reasonably related to the penal institution's interest in maintaining security—which must be sufficiently documented. *See Kennedy*, 901 F.2d at 713 ("the enacted policy, if it is to be constitutional, must be 'reasonably related' to the penal institution's interest in maintaining security"); *Giles*, 746 F.2d at 618 (holding that strip search must bear some "discernible relationship to security needs")(citations and quotations omitted). And in those prior cases, this Court invalidated various strip search policies because they were not reasonably related to the institution's security interest.

But this Court has never considered "a record as fully developed and complete as that provided by San Francisco in support of its policy." *Bull*, 539 F.3d at 1207. In *Giles*, 746 F.2d at 617, "the incidence of smuggling activity at the" jail was "minimal." Similarly, in *Kennedy*, 901 F.2d at 713, jail officials provided no "documentation (or even assertion) that felony arrestees have attempted to smuggle contraband into the jail in greater frequency than misdemeanor arrestees."[6] Finally, the Court in *Thompson*, 885 F.2d 1438 makes no mention of any contraband smuggling in the record.[7]

By contrast, San Francisco has documented the serious smuggling problem in its jails and has demonstrated that a substantial risk of smuggling exists regardless of whether the detainee is arrested for crimes involving drugs, weapons,

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[6] The strip search in *Kennedy* was far more intrusive than the strip searches at issue here. In *Kennedy*, the detainee was "required to insert her fingers into her vagina and anus"—and a policewoman touched her—in order to "check whether she had concealed any drugs or contraband in these body cavities." 901 F.2d at 711. San Francisco's strip searches involve no physical penetration and no touching.

[7] Because San Francisco only searched arrestees who were going to be transferred into the general jail population, other Ninth Circuit decisions – which do not involve arrestees transferred to the general jail population – are inapposite. *See Ward v. County of San Diego*, 791 F.2d 1328, 1333 (9th Cir. 1985); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-872 (9th Cir. 1993).

or violence. Thus, San Francisco has established that its strip search policy is "reasonably related" to its interest in maintaining jail security.

According to the panel majority, San Francisco's failure to clearly document any smuggling by an arrestee who would qualify as a member of the class – i.e., a person who was not arrested on a charge involving drugs, weapons, or violence, who did not have a criminal history involving drugs, weapons, or violence, and whose behavior did not create an individualized suspicion warranting a search – establishes that its strip search policy was not reasonably related to security interests. But the panel majority ignores the practical realities of the smuggling problem. As Judge Tallman explained, "[i]nmates returning from a court appearance outside jail pose the same risk to the general jail population upon return as do new arrestees coming in from the outside." *Bull*, 539 F.3d at 1211. Moreover, as evidenced by the record, arrestees who were not arrested on charges involving drugs, weapons, or violence regularly attempted to smuggle drugs and weapons into San Francisco jails. Finally, "officials at a county jail . . . usually know very little about the new inmates they receive or the security risk they present at the time of their arrival." *Id.* at 1211 (internal quotations omitted). In light of these practical realities, the panel majority's parsing of the record is fallacious. By restricting San Francisco's options for dealing with its serious smuggling problem based on the vagaries of the class definitions used by plaintiffs, the majority not only jeopardizes jail security, but also the lives of jail inmates and employees.

Because he gave insufficient weight to the security risks, Judge Thomas quite amazingly, stated that “we cannot conclude that there is any reasonable relationship between the criteria triggering a search (classification for housing) and the interest in conducting the search (eliminating the introduction of contraband).” *Bull*, 539 F.3d at 1199. If the panel majority had conducted the "reasonable

relationship" inquiry that Ninth Circuit precedents require, it would have found San Francisco's strip search policy constitutional.

Finally, contrary to the panel majority's assertion, *Id*. at 1197, 1199, neither *Giles* nor *Thompson* adopted a per se rule requiring individualized reasonable suspicion for a strip search of a pretrial detainee transferred into the general jail population.[8] *Giles*, 746 F.2d at 618-9, held that placement in the general jail population was not enough to validate a strip search because "intermingling [was] both limited and avoidable." *Thompson*, 885 F.2d at 1447, held that the placement of an arrestee "into contact with the general jail population" "by itself cannot justify a strip search." By contrast, San Francisco did not strip search a pretrial detainee until intermingling with the general jail population was unavoidable. And San Francisco did not implement its strip search policy *solely* because detainees would be placed into contact with the general jail population. It implemented the policy also based on (1) the grave, well-documented smuggling problem (not present in *Giles* or *Thompson*) in San Francisco jails, which has caused injuries and death, and (2) the judgment of experienced jail administrators that arrestees transferred into the general jail population pose the greatest risk of smuggling contraband. These additional factors render San Francisco's policy constitutional under Ninth Circuit precedents.

## III. THE COURT SHOULD GRANT REHEARING OR REHEARING EN BANC BECAUSE SAN FRANCISCO'S VIOLATION OF THE FOURTH AMENDMENT WAS NOT CLEARLY ESTABLISHED.

According to the panel majority, "it was clearly established in this Circuit that conducting strip searches of pre-arraignment arrestees based solely on the fact

[8] To the extent *Giles* and *Thompson* appear to hold otherwise, these pronouncements are dicta, as Judge Tallman rightfully observed. *Bull*, 539 F.3d at 1208 ("[N]either case [*Giles* or *Thompson*] addressed a record as persuasive as that presented by San Francisco, and both cases based their holdings on separate legal grounds, making their broad pronouncements dicta.")

that they were assigned for transfer to the general population was unconstitutional." *Bull*, 539 F.3d at 1199. It therefore concluded that no reasonable person could have believed that San Francisco's strip search policy was lawful at the time of its implementation. But the evidentiary record in this case distinguishes this case from every other case. Because the majority erred in denying qualified immunity, this Court should grant rehearing or rehearing en banc.

Qualified immunity ensures that officers, before they are held liable for constitutional violations, have "fair notice that [their] conduct was unlawful." *See Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The inquiry into whether conduct violates clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id*. at 198 (citation and quotations omitted).

As explained above, prior Ninth Circuit cases did not involve a well-documented record of contraband smuggling or inmates being searched only after failing to post bail or failing to be cited and released. Unlike the defendants in those cases, San Francisco did not search detainees awaiting bail or citation release and whose transfer to the general jail population was avoidable. And unlike those defendants, San Francisco has demonstrated a serious smuggling problem in its jails—involving all arrestees, and not just persons arrested for offenses involving drugs, violence, or weapons. This smuggling problem jeopardizes the lives of its jail inmates and employees. Balancing privacy concerns against the security interests in light of the unique record in this case, a reasonable jail official could believe that San Francisco's strip search policy was constitutional. Accordingly, this Court should grant rehearing or rehearing en banc.

## IV. PERMITTING THE PANEL MAJORITY OPINION TO STAND WILL HAVE SERIOUS NEGATIVE REPERCUSSIONS FOR DETENTION FACILITIES THROUGHOUT THE NINTH CIRCUIT.

The San Francisco jails are not the only ones facing the troubling problem of contraband smuggling. For example, the County of San Mateo submitted an amicus brief explaining that San Mateo jails face a similar scourge. And there can be little doubt that this issue affects county jails and federal prisons throughout the Ninth Circuit. *See, e.g.*, *Johannes v. Alameda County Sheriff's Dep't.*, 2006 WL 2504400, at *4-6 (N.D. Cal. Aug. 29, 2006) (discussing the contraband problem in a large county jail and the usefulness of strip searches in combating the problem). Like San Francisco, the administrators of these jails and prisons believe that a visual strip search policy is the only way to effectively combat the problem. Preventing these administrators from implementing such a policy jeopardizes the safety of inmates and employees. As the dissent succinctly and powerfully stated, "When people are dying as a result of our errant jurisprudence, it is time to correct the course of our law." *Bull*, 539 F.3d at 1213.

## V. CONCLUSION

Based on the foregoing, the Court grant rehearing or rehearing *en banc*.

DATED: October 3, 2008

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. Pursuant to Federal Rule of Appellate Procedure 35(b)(2), this Petition For Rehearing and Rehearing En Banc does not exceed 15 pages, excluding material not counted under Rule 32.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 3, 2008.

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