No. 06-1034

In The

Supreme Court of the United States

JODIE SMOOK, Individually and on behalf of all other persons similarly situated,

Petitioners,

v.

MINNEHAHA COUNTY, SOUTH DAKOTA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Fourth Amendment prohibit a policy that in all instances requires a strip search of all juveniles brought to a juvenile detention facility without regard to individualized considerations, such as the individual's circumstances, the alleged offense, or whether individualized suspicion exists to believe that the juvenile is carrying or concealing weapons or contraband?

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STATEMENT OF THE CASE

Factual Background

There is no genuine dispute in this case about the facts surrounding Petitioner's search or the policy in place at the time of that search. Further, it is undisputed that the Minnehaha County Juvenile Detention Center ("JDC") changed its policy in 1999 to allow a two-hour grace period during which any juvenile arrested for minor offenses could be held pending contact with that juvenile's parent without being admitted and searched. Pet. App. 3. After South Dakota passed legislation in 2000 barring visual searches for juveniles detailed solely for curfew violations, the JDC again adjusted its policies to comply with the new law. Pet. App. 4 n. 4 (citing SDCL § 26-11-1.1 (2006)). Thus, it is undisputed that the type of search conducted upon Petitioner is no longer taking place.

Opinions Below

The district court held that Petitioner's search violated her Fourth Amendment right to be free from unreasonable search and seizure. Pet. App. 40a-68a. It further held that juveniles charged with non-felony offenses could only be subjected to visual searches if JDC officials had reasonable suspicion of concealed weapons or contraband. *Id.* Shortly after the district court's decision, Minnehaha County brought a motion for reconsideration in light of *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004), a case decided in the interim between the briefing of the case and the district court's decision. The district court granted Minnehaha County's request to reconsider its ruling. Pet. App. 21a-39a. Upon reconsideration, the district court

again held that Minnehaha County's search policy and the search of Petitioner specifically were unconstitutional. *Id.*

In August 2006, the Court of Appeals for the Eighth Circuit reversed the district court's decision and remanded the case back to the district court. Pet. App. 1a-20a. The court of appeals held, *inter alia*, that Petitioner's search was constitutional and that the class lacked standing to seek injunctive relief due to the JDC's change in policies. *Id.* The court of appeals declined to rule on the facial challenge to the JDC's policy and remanded the case to the district court for further determination on a case-by-case basis if a suitable replacement class representative could be located. *Id.* at 17a.

REASONS FOR DENYING THE WRIT

As Petitioner concedes in her petition for writ of certiorari, the JDC has adjusted its policy to discontinue the conduct of which Petitioner complains. Pet. App. 3-4. As such, any purported constitutional violations by Minnehaha County are no longer taking place, and Petitioner's argument that the JDC policy is unconstitutional is moot. Under Article III of the Constitution, Petitioner's attempt to seek the Court's determination as to the constitutionality of a now defunct policy does not meet the jurisdictional requirements of a live controversy.

Further, the decision of the court of appeals is interlocutory in nature. It simply reversed the district court's erroneous decision granting summary judgment in favor of the plaintiff class, held that the lead plaintiff's constitutional rights had not been violated, and remanded the case to the district court for further proceedings with respect to

the remaining class members. Pet. App. 1a-20a. Upon the dismissal of the lead plaintiff's case, the plaintiff class now has the opportunity to locate a suitable replacement class lead. Pet. App. 17a. In the event a new class representative is located, the potential for an actual trial and an ensuing record for review would exist. *Id.* As the record now exists, it is insufficient to determine whether other class members' constitutional rights have been violated.

Moreover, the decision of the court of appeals on the merits of the lead plaintiff's claim is correct and does not conflict with any decision of this Court or any other court of appeals. In fact, the Eighth Circuit decision is only the second decision nationwide to determine the constitutionality of visual searches of juveniles being admitted to secure detention facilities. Pet. App. 8a-9a; see also *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004). The prior court to make such a determination, the Court of Appeals for the Second Circuit, decided a very similar case in the same manner as the court of appeals did in this case. *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004) (holding that visual searches of juveniles upon admission to secure detention facilities did not violate the Fourth Amendment). In the instant case, the Court of Appeals for the Eighth Circuit agreed with the rationale of the Second Circuit. Pet. App. 9a-20a. By following the Second Circuit, the Eighth Circuit decision created unity between the circuits, not a split in the circuits. In fact, the Eighth Circuit decision built upon the foundation laid by the only other court to have considered this very issue. Thus, there is no split in the circuits, the Eighth Circuit decision is correct under the law, and further review at this time is unwarranted.

1. Petitioner's argument is moot because the JDC policies being complained of are no longer in effect or being enforced.

The question presented by Petitioner is whether the Fourth Amendment prohibits a policy that in all instances requires a strip search of all juveniles brought to a juvenile detention facility without regard to individualized considerations, such as the individual's circumstances, the alleged offense, or whether individualized suspicion exists to believe that the juvenile is carrying or concealing weapons or contraband. Pet. App. *i*. Petitioner hopes to appeal a very broad constitutional issue "of national importance." Pet. App. 10.

However, it is undisputed that Minnehaha County's policy on this issue has changed dramatically since the date of Petitioner's search. Pet. App. 3-5. The JDC is no longer performing visual searches of minors accused of curfew violations unless the JDC official has reasonable suspicion that the juvenile is harboring weapons or contraband. Pet. App. 4 n. 4. Thus, the very type of search of which Petitioner complains is no longer being conducted, making the question presented by Petitioner moot.

Under Article III § 2 of the Constitution, the federal courts lack jurisdiction to entertain cases that no longer present live controversies. See, e.g., *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (per curiam).

> This means that, throughout the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer*, 523 U.S. at 7 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477

> (1990)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate ... The parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478, 110 S.Ct. 1249, 1254, 108 L.Ed.2d 400 (1990). See also *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334-35, 45 L.Ed.2d 272 (1975). This means that, throughout the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis*, supra, at 477, 110 S.Ct., at 1253.

Spencer, 523 U.S. at 7.

Because the JDC is no longer conducting the type of searches of which Petitioner complains, a favorable decision will not necessarily change the JDC's current policy and will not redress Petitioner's perceived wrongs. Accordingly, the Article III requirement is no longer satisfied in this case, and the petition should be denied.

2. The interlocutory nature of the Eighth Circuit decision makes plenary review premature.

Petitioner brought her claim as the lead plaintiff in a class action. Pet. App. 4. The court of appeals held that Petitioner's claim has no merit. Pet. App. 12a. However, the court of appeals left the door open to other class members whose claims will now be allowed to continue, provided that a suitable class representative is located. Pet. App. 16a. Further proceedings before the district court may make it unnecessary for the Court to address any number of the questions currently presented in this case. If the district court determines that another class

member's constitutional rights have been violated, the Court can avoid Petitioner's question altogether.

Because of the interlocutory nature of this case, review of Petitioner's claims at this juncture would be premature. See *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 21, 258 (1916) (interlocutory nature of a case is sufficient reason to deny application for writ of certiorari); see also *Virginia Military Inst. v. United States*, 508 U.S. 946 (1992) (opinion of Scalia, J., denying certiorari prior to final judgment). Any review of constitutionality by the Court would necessarily take place in a vacuum due to the undeveloped nature of the record, making informed resolution nearly impossible. See *Kremens v. Bartley*, 431 U.S. 119, 134 (1977) (declining to make a determination of constitutionality of unnamed class members' claims in a class action due to the "unfocused" nature of those claims).

The interlocutory character of the case "itself alone furnishe[s] sufficient ground for the denial" of Petitioner's request for this Court's review. *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of petition for certiorari) ("[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); Robert L. Stern *et al.*, *Supreme Court Practice* § 4.18, at 258-261 (8th ed. 2002).

Regardless of whether the case is moot or whether the circuit court's decision is correct, the procedural posture of this case alone is sufficient to warrant denial of review by the Court. Indeed, such review would be premature if

granted at this juncture. Because the court of appeals remanded the case back to the district court for further proceedings, there is no need for review of the constitutional question now. The lack of a developed record on important factual issues is reason enough to deny the petition at this stage of the proceedings. Only after the district court has made a further determination on the other class members' claims would appellate review be appropriate if warranted.

3. Petitioner contends that the Eighth Circuit decision creates a conflict with decisions of other circuits. The Eighth Circuit decision is correct, and none of the purported conflicts withstands scrutiny.

The court of appeals correctly concluded that Petitioner's constitutional rights had not been violated, and its decision does not conflict with any decision by this Court or any other court. In fact, the Eighth Circuit decision comports with the only other federal case law to squarely address the issue of suspicionless searches of juveniles upon intake to a secure detention facility, *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004).

Petitioner argues that the circuit court's decision "is at odds with the ten circuit court opinions to consider a policy of strip searching adults arrested for minor offenses and a circuit court opinion considering such a policy as applied to minors." Pet. App. 9-11. However, Petitioner ignores the fact that the court of appeals clearly differentiated the adult search cases from those involving juveniles in reaching its decision. Pet. App. 8a.

Following the Second Circuit in *N.G. v. Connecticut*, the Eighth Circuit decision allows visual searches of

juveniles being admitted to detention centers in the absence of reasonable individualized suspicion. Pet. App. 10a (citing *N.G. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004)). The court of appeals initially surveyed the law regarding strip searches of adult detainees and recognized that it, along with other circuits, did not permit strip searches of *adults* confined for minor offenses. Pet. App. 8a-9a. The court of appeals, however, then went on to adopt a very different rule in the context of *juvenile* detainees and held that such searches are constitutionally permissible. *Id.* at 10a.

At the core of the circuit court's decision is a recognition of the state's obligation to protect minors housed in its juvenile detention facilities. *Id.* at 8a-10a. This rationale is what differentiates the Eighth Circuit decision from the adult search cases cited by Petitioner. The circuit court held that protecting juveniles from harming themselves or others and protecting the overall safety of the institution are valid purposes to conduct searches at admission, purposes which must be weighed when considering the reasonableness of such searches. Pet. App. 10a.

Petitioner argues that the age of the juveniles being admitted to the JDC renders them especially vulnerable to the distressing effects of a strip search. Pet. App. 16-17. However, age is the very reason that the Eighth Circuit decision stands apart from the circuit court cases dealing with adults. The age of the juveniles being admitted to the JDC creates an enhanced responsibility to take reasonable action to protect them from hazards resulting from the presence of contraband where they are confined. Pet. App. 10a.

Because the JDC temporarily becomes the *de facto* guardian of minors lawfully removed from their homes,

the government effectively acts as a guardian. *Id.* It is this unique role that begs the question of whether the search is one that a reasonable guardian would potentially make. *Id.* 12a-13a. Acting *in loco parentis*, the JDC has a pervasive responsibility for its charges. *Id.* at 8a. In addition, visual searches upon admission to the JDC protect admittees by locating and removing concealed items that could be used for self-mutilation, suicide or attacks on other juveniles. *Id.* Finally, visual searches have the potential to disclose evidence of child abuse which may then be addressed and treated appropriately. *Id.*

Petitioner cites *Justice v. City of Peachtree* for the proposition that the state's interest in searching for potential contraband on juveniles is no different that its interest in searching adults for the same reason. Pet. App. 21 (citing *Justice v. City of Peachtree*, 961 F.2d 188, 193 (11th Cir. 1992)). However, Petitioner ignores the fact that the *Justice* court made only a determination as to the constitutionality of searches conducted upon juveniles based on *reasonable suspicion* that those juveniles were harboring weapons or contraband. *Justice*, 961 F.2d at 193. That court held that such searches were reasonable, and it did not reach the issue of suspicionless searches of juveniles upon admission to secure detention facilities. *Id.* Thus, Petitioner's contention that the court of appeals decision somehow conflicts with the *Justice* decision does not hold up. Certainly a determination of the constitutionality of one type of search does not automatically invalidate a different type of search, one which the *Justice* court did not even consider.

Petitioner's argument that the Eighth Circuit decision created a split in the circuits does not withstand closer scrutiny. It is the unique relationship between the state

and the juveniles being admitted to secure detention facilities that sets the Eighth Circuit decision apart from the adult search cases cited by Petitioner. *Id.* 8a-9a. Furthermore, Petitioner's cited juvenile search case held that juvenile searches based upon reasonable suspicion are acceptable, but that case does not speak to Petitioner's issue and is neither controlling nor in conflict with the Eighth Circuit decision. See *Justice v. City of Peachtree*, 961 F.2d 188, 193 (11th Cir. 1992). Thus, the Eighth Circuit decision does not create a rift in the circuits, nor does it undermine established adult or juvenile search law in any way. To the contrary, the Eighth Circuit decision simply provides additional guidance in the area of juvenile searches upon admission to secure facilities and builds upon prior case law in the Second Circuit. Accordingly, the Court should deny Petitioner's request for a writ of certiorari as no split exists in the circuits, and the Eighth Circuit's analysis is correct.

CONCLUSION

It is undisputed that the JDC has changed its policy to bar the type of search to which Petitioner was submitted. Thus, regardless of the constitutionality of Petitioner's own search, the question presented by Petitioner – the propriety of the JDC's policy – is now moot. Because the purportedly unconstitutional policy is no longer in place, there is no live controversy for the Court to entertain, and the Article III requirement has not been met.

Even if the question presented to the Court were not moot, this case is not an appropriate vehicle to resolve

Petitioner's question. The case was disposed of at the summary judgment stage, leaving little in the way of a record for the Court to review. Furthermore, the court of appeals remanded the case to the district court for further proceedings as to the remaining class members' claims, making review at this time unnecessary. Accordingly, to decide the issue presented at this juncture without the benefit of a complete and concrete record would be premature.

Finally, the Eighth Circuit decision does not create a split in the circuits. Instead, the court of appeals followed the logic and reasoning employed by the Second Circuit in *N.G. v. Connecticut*, which is the only reported case in any court to have considered the propriety of visual searches of juveniles being admitted to secure detention facilities. See 382 F.3d 225 (2nd Cir. 2004). All of Petitioner's purported conflicts deal with searches of adults which are, admittedly, performed in a different context with different constitutional concerns, none of which conflict with the Eighth Circuit rationale. As such, the Eighth Circuit decision does not create a conflict with this Court, any court of appeals, or any lower court. Instead, the court of appeals correctly decided the constitutional issue as it applies to juveniles, building upon prior case law in another circuit.

In conclusion, this case is not a proper vehicle for review by the Court because the question presented is moot, the interlocutory nature of the case makes review at this time premature, there is no conflict in the circuits, and the court of appeals correctly decided the case. Accordingly, Minnehaha County respectfully requests that the

Court deny Petitioner's request for a writ of certiorari and decline to hear this case.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 23 day of FEBRUARY, 2007, send out from Omaha, NE 3 package(s) containing 3 copies of the BRIEF IN OPPOSITION in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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To be filed for:

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Subscribed and sworn to before me this 23 day of FEBRUARY, 2007.
I am duly authorized under the laws of the State of Nebraska
to administer oaths.

19055

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