
NOTE

A Reasonable Search for Constitutional Protection in *Serna v. Goodno*: Involuntary Civil Commitment and the Fourth Amendment

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INTRODUCTION

The Fourth Amendment prohibits the government from unreasonably searching citizens.¹ However, the U.S. Supreme Court has determined that in several special contexts, legitimate governmental interests render otherwise unreasonable searches permissible.² Legitimate governmental interests include maintaining discipline in schools, preserving national security, retaining order in detention facilities, and ensuring officer safety during arrests.³ When determining the reasonableness of a search, courts must balance these interests against the extent of the government's intrusion on an individual's rights.⁴

The Eighth Circuit recently reviewed a case in which the staff of a state mental hospital performed a visual body cavity search of a patient.⁵ The patient claimed that the staff's search violated his Fourth Amendment rights.⁶ This Note examines the Eighth Circuit's holding in *Serna v. Goodno* that the staff's visual body cavity search of Mr.

¹ U.S. CONST. amend. IV (articulating citizen's right to freedom from unreasonable searches); see *Bell v. Wolfish*, 441 U.S. 520, 558 (1979) (quoting *Carroll v. United States*, 267 U.S. 132, 147 (1925)) (declaring that Fourth Amendment prohibits only unreasonable searches); *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

² See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (stating that officials' searches of persons and their effects at national border do not require warrant, reasonable suspicion, or probable cause); *New Jersey v. T.L.O.*, 469 U.S. 325, 340-47 (1985) (holding warrantless search of student's purse constitutional because it was not excessively intrusive and school officials had reasonable suspicion that student had violated school rules); *Bell*, 441 U.S. at 558-60 (holding visual body cavity searches of pretrial detainees following contact visits did not violate Fourth Amendment); *Chimel v. California*, 395 U.S. 752, 763 (1963) (holding search of arrestee was reasonable to ensure officer safety and to preserve evidence).

³ See *Montoya de Hernandez*, 473 U.S. at 538; *T.L.O.*, 469 U.S. at 339; *Bell*, 441 U.S. at 546; *Chimel*, 395 U.S. at 763.

⁴ See *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983) (stating that permissibility of law enforcement practice depends on reasonableness of government intrusion); *Bell*, 441 U.S. at 559; *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (explaining reasonableness of law enforcement practice depends on balancing its intrusion on individual's Fourth Amendment rights against legitimate governmental interests); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968) (quoting *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 534-35 (1967)); Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 255 (2001) (discussing evolution of test to determine reasonableness of searches under Fourth Amendment).

⁵ See *Serna v. Goodno*, 567 F.3d 944, 946 (8th Cir. 2009) (stating that administrators of state mental hospital instituted facility-wide visual body cavity searches of all patients).

⁶ See *id.* (explaining that patient brought civil rights action against administrators and claimed search was unreasonable under Fourth Amendment).

Serna, the plaintiff, was reasonable.⁷ Part I considers the Fourth Amendment and Supreme Court case law interpreting the Constitution's prohibition on unreasonable searches.⁸ It explores the limitations of that right in certain special contexts.⁹ Part II discusses the Eighth Circuit's decision in *Serna v. Goodno*.¹⁰ Part III analyzes *Serna* under the *Bell v. Wolfish* framework and argues that the Eighth Circuit misconstrued the Supreme Court's balancing test.¹¹ Part III then argues that Supreme Court precedent protects involuntarily civilly committed persons and that courts should be especially protective of such persons' civil liberties.¹² If the Supreme Court reviews *Serna*, it should reverse the Eighth Circuit's decision.¹³ The Court should clearly establish a protective standard of reasonableness for government searches of involuntarily civilly committed individuals.¹⁴

I. BACKGROUND

The Fourth Amendment safeguards citizens from unreasonable government searches.¹⁵ It limits government officials' exercise of discretion and imposes a reasonableness standard on government searches.¹⁶ Courts typically apply a balancing test to determine whether a search was reasonable.¹⁷ However, the Supreme Court has

⁷ See *id.* at 955 (upholding search although Serna's case presented close question of constitutional law).

⁸ See *infra* Part I.A.

⁹ See *infra* Part I.B-C.

¹⁰ See *infra* Part II.

¹¹ See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *Serna*, 567 F.3d at 949; *Wood v. Hancock Cnty. Sheriff's Dep't*, 354 F.3d 57, 67 (1st Cir. 2003); *infra* Part III.A.

¹² See *infra* Part III.B-C.

¹³ See *infra* Part III.

¹⁴ See *infra* Part III.

¹⁵ See *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (stating that Constitution forbids unreasonable government searches); *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528 (1967).

¹⁶ See *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)) (stating that function of Fourth Amendment is to "impose a standard of reasonableness" on government officials' exercise of discretion and to protect individuals' privacy); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (stating that Fourth Amendment imposes limits on government search and seizure powers to prevent officials' oppressive intrusion on individuals' privacy and personal security); *Camara*, 387 U.S. at 528.

¹⁷ See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry*, 392 U.S. at 20-21 (quoting *Camara*, 387 U.S. at 534-35 (1967)); see, e.g., *United States v. Cofield*, 391 F.3d 334, 336 (1st Cir. 2004)

held that the test is adaptive to special contexts, such as pretrial detention and involuntary civil commitment.¹⁸

A. *The Right to Be Free from Unreasonable Searches*

The Fourth Amendment's basic purpose is to protect citizens from arbitrary government invasions of their privacy.¹⁹ The Due Process Clause of the Fourteenth Amendment renders the Fourth Amendment's protections enforceable against the states.²⁰ There are, however, circumstances in which legitimate government interests outweigh an individual's privacy interest.²¹

Prior to *Serna*, the Eighth Circuit had not considered the appropriate standard for evaluating the reasonableness of government searches of involuntarily civilly committed individuals.²² Neither has

(quoting *Bell*, 441 U.S. at 559) (applying balancing test); *N.G. v. Connecticut*, 382 F.3d 225, 231 (2d Cir. 2004) (explaining that balancing government interests against personal rights is overarching principle of reasonableness test under Fourth Amendment); *Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000) (employing *Bell* balancing test to determine whether police strip search of detained motorist was constitutionally reasonable).

¹⁸ See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2642-43 (2009) (describing Court's application of balancing test in setting involving school official's strip search of minor student); *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997) (employing balancing test to mandatory drug test of candidates for state office); *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985) (holding school official's search of student's property reasonable under Fourth Amendment balancing test); *Bell*, 441 U.S. at 558-60 (describing Court's application of Fourth Amendment test of reasonableness to visual body cavity searches that officials conducted on detainees awaiting trial); *Serna v. Goodno*, 567 F.3d 944, 955 (8th Cir. 2009) (applying balancing test to visual body cavity searches staff conducted in state mental hospital housing involuntarily civilly committed sexually dangerous persons).

¹⁹ See *Prouse*, 440 U.S. at 653-54 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)) (stating that function of Fourth Amendment is to impose standard of reasonableness on government officials' exercise of discretion and, thereby, protect individuals' privacy); *Camara*, 387 U.S. at 528; see also JOHN WESLEY HALL JR., SEARCH AND SEIZURE § 23:10, at 139 (3d ed. 2000) (stating that protection of citizens from arbitrary government interference is basic Fourth Amendment principle).

²⁰ See *T.L.O.*, 469 U.S. at 334 (quoting *Elkins v. United States*, 364 U.S. 206, 213 (1960)) (explaining that Constitution, through Fourteenth Amendment, prohibits state officers from engaging in unreasonable searches of citizens); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (declaring Fourth Amendment's right of privacy enforceable against states through Due Process Clause); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (stating that Fourth Amendment protects citizens against states through Due Process Clause).

²¹ See *T.L.O.*, 469 U.S. at 339-40; *Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984); *Bell*, 441 U.S. at 559-60.

²² *Serna*, 567 F.3d at 948; see also John W. Parry, *Case Law Developments*, 33

the Supreme Court addressed the proper standard.²³ Accordingly, the Eighth Circuit analogized incompetent persons to pretrial detainees and, thus, found its decision in *Andrews v. Neer* persuasive.²⁴ In *Andrews*, the Eighth Circuit evaluated an involuntarily committed individual's excessive force claim under the standard it uses to evaluate pretrial detainees' excessive force claims.²⁵ That standard asks whether the government's conduct was objectively reasonable as due process requires.²⁶ Due process prohibits government officials from punishing an individual until the judicial process establishes that person's guilt.²⁷ Official restrictions on detainees, therefore, cannot be punitive.²⁸ Instead, the restrictions must be incidental to legitimate government interests such as safety and efficiency.²⁹

In *Youngberg v. Romeo*, the Supreme Court considered whether an involuntarily committed man's conditions of confinement violated the Due Process Clause of the Fourteenth Amendment.³⁰ The Court applied the standard it uses to evaluate pretrial detainees' due process

MENTAL & PHYSICAL DISABILITY L. REP. 733, 787-88 (2009). See generally U.S. CONST. amend. IV (prohibiting unreasonable government searches).

²³ *Serna*, 567 F.3d at 948; see also Parry, *supra* note 22, at 788. See generally U.S. CONST. amend. IV (prohibiting unreasonable government searches).

²⁴ See *Serna*, 567 F.3d at 948.

²⁵ See *Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001) (discussing similarity of concerns that housing pretrial detainees and holding involuntarily civilly committed persons raise); cf. *Hydick v. Hunter*, 500 F.3d 978, 997 (9th Cir. 2007) (holding constitutional standard applicable to excessive force claims of pretrial detainees also applies to excessive force claims of sexually violent predators in civil custody); *Brown v. Budz*, 398 F.3d 904, 910 (7th Cir. 2005) (finding that person awaiting civil commitment under sexually violent persons commitment act was comparable to pretrial detainee).

²⁶ See *Block v. Rutherford*, 468 U.S. 576, 583-84 (1984); *Bell*, 441 U.S. at 535; *Andrews*, 253 F.3d at 1060.

²⁷ See *Bell*, 441 U.S. at 536 (observing that persons government has lawfully committed to pretrial detention have not received adjudication of guilt); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67 (1963); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

²⁸ See *Bell*, 441 U.S. at 538-39; *Butler v. Fletcher*, 465 F.3d 340, 344 (8th Cir. 2006), *cert. denied*, 550 U.S. 917 (2007) (finding that pretrial detainees are not subject to punishment); *Andrews*, 253 F.3d at 1060-61; *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048 (8th Cir. 1989).

²⁹ See *Schall v. Martin*, 467 U.S. 253, 269 (1984); *Bell*, 441 U.S. at 538 (noting that court must decide whether restrictions amount to punishment or are incidental to legitimate governmental objective); *Johnson-El*, 878 F.2d at 1048 (stating that injuries detainees suffer must be incidental to safety, security, and efficiency interests).

³⁰ See *Youngberg v. Romeo*, 457 U.S. 307, 309 (1982); *Serna v. Goodno*, 567 F.3d 944, 949 (8th Cir. 2009).

challenges to their confinement conditions.³¹ Under that standard, confinement conditions do not violate detainees' due process rights if they are reasonably related to legitimate government objectives and are not punitive.³² The Court analogized civilly committed persons to pretrial detainees because the government can constitutionally restrict both groups' liberties.³³ The Court applied its standard to evaluate the involuntarily civilly committed individual's conditions of confinement.³⁴ The Court concluded that the Due Process Clause protected the involuntarily committed man's interests in reasonable care, safety, and nonrestrictive confinement conditions.³⁵

B. *Bell v. Wolfish*

The plain language of the Fourth Amendment prohibits government officials only from conducting unreasonable searches.³⁶ In *Bell v. Wolfish*, pretrial detainees challenged visual body cavity searches that prison officials conducted on them following their contact visits with outside persons.³⁷ The Court held that the searches were reasonable because the need for the searches outweighed the detainees' personal rights.³⁸ In reaching its conclusion, the Court considered the dangers from inmates smuggling contraband and the need to ensure security and order in the institution.³⁹ The Court also considered the need to deter smuggling, the officials' invasion of the inmates' privacy, and the availability of less intrusive search methods.⁴⁰

³¹ See *Youngberg*, 457 U.S. at 320-21.

³² See *id.* at 320; *Bell*, 441 U.S. at 538; *Hubbard v. Taylor*, 399 F.3d 150, 158-59 (3d Cir. 2005); David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 423 (2009).

³³ See *Youngberg*, 457 U.S. at 320-21; cf. *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (finding that it is legitimate nonpunitive governmental objective for state to take measures restricting freedom of dangerously mentally ill); *United States v. Salerno*, 481 U.S. 739, 747-49 (1987) (discussing pretrial detention under Bail Reform Act).

³⁴ See *Youngberg*, 457 U.S. at 320-21.

³⁵ See *id.* at 324.

³⁶ See U.S. CONST. amend. IV; *Carroll v. United States*, 267 U.S. 132, 147 (1925); see also *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (stating that Fourth Amendment provides guarantee only against unreasonable searches).

³⁷ *Bell*, 441 U.S. at 558 (noting that corrections officials conducted strip searches of inmates after every contact visit with persons outside institution).

³⁸ See *id.* at 558-60.

³⁹ See *id.* at 559, 561.

⁴⁰ *Id.* at 559.

The *Bell* test to determine a search's reasonableness thus requires courts to balance the government's need for the search against an individual's privacy interest.⁴¹ The Court explained that the manner, scope, location, and justification of a particular search are factors courts must weigh in determining its reasonableness.⁴²

C. Safford Unified School District v. Redding

The Supreme Court applied a similar balancing test in *Safford Unified School District v. Redding*.⁴³ In *Safford Unified*, school officials visually strip searched Savana Redding, a middle-school student whom the assistant principal, Kerry Wilson, suspected of distributing ibuprofen and naproxen.⁴⁴ The school officials visually strip-searched Redding in the school nurse's office.⁴⁵ Helen Romero, an assistant, and the school nurse, Peggy Schwallier, asked Redding to remove her jacket, socks, and shoes.⁴⁶ Romero and Schwallier then asked Redding to remove her pants and T-shirt and told her to pull out her bra and shake it out.⁴⁷ They also asked her to pull out the elastic on her underpants.⁴⁸ The search resulted in Redding exposing her breasts and pelvic area, but it did not result in Romero or Schwallier discovering any pills.⁴⁹ Redding's mother sued the school district for violating her daughter's Fourth Amendment rights.⁵⁰

To determine whether the search was reasonable, the Court evaluated the scope of the search in light of the circumstances justifying it.⁵¹ The Court weighed the need to eliminate drugs from the school and to protect students from harmful substances against the

⁴¹ *See id.*

⁴² *Id.* (describing Fourth Amendment test of reasonableness as lacking precise definition); *Way v. Cnty. of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006), *cert. denied*, 549 U.S. 1052 (2006).

⁴³ *See Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2642 (2009) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)) (stating test of reasonableness is whether scope of search was reasonably related to circumstances justifying it).

⁴⁴ *See Safford Unified*, 129 S. Ct. at 2641.

⁴⁵ *See id.* at 2638.

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.* at 2642 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)) (observing that search is not permissible if it is excessively intrusive when evaluated against age and sex of student and character of student's misconduct).

exposure the search required.⁵² The Court noted that the pills were common pain-relievers and that there was no indication that Redding was distributing large quantities of them.⁵³ The Court determined that such circumstances did not warrant the official's extreme intrusion on Redding's privacy.⁵⁴ The circumstances did not provide Wilson with any suspicion that students were in danger or that Redding used her underwear to hide pills.⁵⁵ The Court ultimately held that the search violated Redding's Fourth Amendment rights.⁵⁶

Relying on *New Jersey v. T.L.O.*, which held that school officials' warrantless searches of students were constitutional so long as the search was reasonable under the circumstances,⁵⁷ the Court recognized that the school setting lowered restrictions on school officials' ability to search students.⁵⁸ The Court emphasized, however, that a search requiring Redding to expose herself required the officials to possess more than a generalized possibility of success.⁵⁹ The Court determined that Redding's privacy interests outweighed the school's interest in student safety because the circumstances failed to justify such an invasive search.⁶⁰

D. *Skinner v. Oklahoma*

Both students and incarcerated individuals possess privacy interests that the government cannot violate.⁶¹ In *Skinner v. Oklahoma*, the Court evaluated the constitutionality of an Oklahoma statute enacted

⁵² See *id.* at 2642-43 (explaining assistant principal's motives for ordering search).

⁵³ See *id.* at 2642 (observing drugs that assistant principle was searching for posed limited threat).

⁵⁴ See *id.* (observing that several communities have decided school strip searches are so degrading that they are never reasonable).

⁵⁵ See *id.* at 2642-43.

⁵⁶ See *id.* at 2636-37 (explaining that search violated Constitution because there was no reason to suspect that drugs presented danger or that they were concealed in student's underwear).

⁵⁷ See *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985).

⁵⁸ See *Safford Unified*, 129 S. Ct. at 2639; *T.L.O.*, 469 U.S. at 339-40 (explaining need to balance child's expectation of privacy against school's interest in maintaining discipline).

⁵⁹ See *Safford Unified*, 129 S. Ct. at 2642.

⁶⁰ See *id.* at 2642-43.

⁶¹ See *T.L.O.*, 469 U.S. at 339 (stating that school children do not lose right to privacy when they step onto school grounds); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that Court is dealing with legislation involving basic civil right and describing impact of power to sterilize); Jessica D. Gabel, *Probable Cause from Probable Bonds: A Genetic Tattle Tale Based on Familial DNA*, 21 HASTINGS WOMEN'S L.J. 3, 44 (2010).

in 1935 requiring the state to sterilize habitual criminals.⁶² Under the act, habitual criminals were convicts with two or more felonies on their record involving moral turpitude.⁶³ Skinner, an inmate, challenged the constitutionality of the Act under various theories.⁶⁴ The Court ultimately concluded that the Act failed to satisfy the Equal Protection Clause of the Fourteenth Amendment.⁶⁵

The Court held that the Act violated Skinner's basic right to procreation and, thus, required it to employ strict scrutiny in evaluating the law's constitutionality.⁶⁶ The *Skinner* Court focused on the Act's disparate treatment of embezzlement and theft.⁶⁷ The Court ultimately held that the Act failed to meet the requirements of the Equal Protection Clause of the Fourteenth Amendment.⁶⁸ *Skinner*, therefore, protects incarcerated individuals' right to privacy in their procreative capacities.⁶⁹

⁶² *Skinner*, 316 U.S. at 536 (describing Oklahoma's Habitual Criminal Sterilization Act); see OKLA. STAT. ANN. tit. 57, §§ 171-95 (West 2009), *invalidated by* *Skinner v. Oklahoma*, 316 U.S. 535 (1942); see also Gabel, *supra* note 61, at 44 (stating Court in *Skinner* held that state could not impose sterilization as punishment for crime).

⁶³ OKLA. STAT. ANN. tit. 57, § 173 (West 2009), *invalidated by* *Skinner v. Oklahoma*, 316 U.S. 535 (1942); see *Skinner*, 316 U.S. at 536-37 (describing Oklahoma's Habitual Criminal Sterilization Act); Jeremy M. Miller, *Dignity as a New Framework, Replacing the Right to Privacy*, 30 T. JEFFERSON L. REV. 1, 45-46 (2007).

⁶⁴ See *Skinner*, 316 U.S. at 537-38; Courtney Flack, *Chemical Castration: An Effective Treatment for the Sexually Motivated Pedophile or an Impotent Alternative to Traditional Incarceration?*, 7 J.L. SOC'Y 173, 192 (2005) (stating Court ignored Fourteenth Amendment Due Process Clause and Eighth Amendment cruel and unusual punishment concerns); Jason O. Runckel, Comment, *Abuse It and Lose It: A Look At California's Mandatory Chemical Castration Law*, 28 PAC. L.J. 547, 566 (1997) (explaining that Court decided *Skinner* on equal protection grounds).

⁶⁵ *Skinner*, 316 U.S. at 538; see Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1111 (1998) (discussing *Skinner*); see also Flack, *supra* note 64, at 192.

⁶⁶ See *Skinner*, 316 U.S. at 541 (declaring procreation is basic civil right); Flack, *supra* note 64, at 193; Runckel, *supra* note 64, at 566-67.

⁶⁷ See *Skinner*, 316 U.S. at 538-39; Nita A. Farahany, *Cruel and Unusual Punishments*, 86 WASH. U. L. REV. 859, 905-06 (2009); J.C. Oleson, Comment, *The Punitive Coma*, 90 CAL. L. REV. 829, 892 (2002).

⁶⁸ See *Skinner*, 316 U.S. at 538; Rao, *supra* note 65, at 1111; see also Flack, *supra* note 64, at 192.

⁶⁹ See *City of Mobile v. Bolden*, 446 U.S. 55, 113-14 n.9 (1980) (Marshall, J., dissenting) (stating that Court has recognized that personal decisions involving procreation fall under rubric of right to privacy); *Carey v. Population Servs. Int'l*, 438 U.S. 678, 684-85 (1977); Jessica Lin Lewis, *Predicting the Judicial Response to an Asserted Right to Reproductive Cloning*, 29 J. LEGAL MED. 523, 526 (2008) (stating that right to procreation is encompassed in right to privacy).

II. *SERNA V. GOODNO*

In *Serna v. Goodno*, the staff at a state mental hospital discovered a cell phone case in the facility's common area.⁷⁰ Staff members searched the common area, but did not find any phone.⁷¹ The staff then viewed a surveillance video of the area, but could not identify the individual who misplaced the case.⁷² Based on this information, facility administrators began to suspect a patient of harboring the cell phone.⁷³ Administrators claimed that they could not narrow their suspicion to specific patients and ordered facility-wide room and visual body cavity searches to find the phone.⁷⁴ The staff did not conduct the room searches before performing the visual body cavity searches.⁷⁵

At the time of the search, Luis Serna had been a patient at the facility for three years.⁷⁶ He had not possessed any contraband during that time.⁷⁷ The staff, however, had recently discovered other patients harboring cell phones, which administrators deemed to be a threat to patients and staff as well as past and prospective victims.⁷⁸ Pairs of male staff members conducted visual body cavity searches of approximately 150 male patients.⁷⁹ Pursuant to written and oral instructions, the teams asked patients to comply with the search, and then conducted each search individually in a private bathroom.⁸⁰ Following protocol, they required each patient to lift his genitals, turn, bend over, and spread his buttocks.⁸¹ The staff did not physically contact the patients during the searches.⁸² The searches failed to

⁷⁰ See *Serna v. Goodno*, 567 F.3d 944, 947 (8th Cir. 2009) (describing Moose Lake Treatment Center common area that was accessible to patients, staff, and visitors).

⁷¹ See *id.*

⁷² *Id.* (noting videotape showed patients that staff could identify but that staff could not ascertain whether one of those patients was source of cell phone case).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *id.* at 954-55 (noting administrators rush to institute facility-wide visual body cavity searches).

⁷⁶ *Id.* at 947.

⁷⁷ *Id.*

⁷⁸ *Id.*; see also *Senty-Haugen v. Goodno*, 462 F.3d 876, 882 (8th Cir. 2006) (stating that in January 2003, staff found cell phone in patient's room in violation of program regulations).

⁷⁹ See *Serna*, 567 F.3d at 947.

⁸⁰ *Id.*

⁸¹ *Id.* See generally *N.G. v. Connecticut*, 382 F.3d 225, 228 n.4 (2d Cir. 2004) (noting that visual body cavity searches usually entail officials visually inspecting naked body, including genitals and anus, without contact).

⁸² See *Serna*, 567 F.3d at 947.

uncover the phone.⁸³ Instead, staff members discovered the cell phone in a patient's room after receiving a tip from another patient.⁸⁴

Serna sued an administrator and the head of Minnesota's Department of Human Services claiming that the search violated his Fourth Amendment rights.⁸⁵ The district court held that the search was constitutionally reasonable and granted summary judgment for the defendants.⁸⁶ Serna appealed, and the Eighth Circuit affirmed the district court's judgment.⁸⁷

The Eighth Circuit dealt with an issue of first impression when it decided Serna's case.⁸⁸ The Supreme Court has not established a standard for assessing whether a particular search violated the Fourth Amendment rights of an involuntarily committed person.⁸⁹ In the absence of Supreme Court authority, the Eighth Circuit looked to its decision in *Andrews* and analogized involuntarily civilly committed individuals to pretrial detainees.⁹⁰ The government's involuntary civil confinement of individuals raises the same concerns as its detention of pretrial detainees.⁹¹ These concerns include individual safety, maintaining order, and increasing operational efficiency.⁹² The court

⁸³ *Id.* at 948.

⁸⁴ *Id.*

⁸⁵ *See id.* at 946.

⁸⁶ *Id.*

⁸⁷ *Id.* at 956.

⁸⁸ *See id.* at 948.

⁸⁹ *Id.*; *see also* Parry, *supra* note 22, at 788; *supra* Part I.A.

⁹⁰ *Serna*, 567 F.3d at 948; *see also* *Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001) (concluding court would evaluate involuntarily civilly committed individual's excessive force claim under same standard it applied to pretrial detainees' excessive force claims); *cf.* *Davis v. Rennie*, 264 F.3d 86, 108 (1st Cir. 2001) (agreeing with Eighth Circuit that courts should evaluate involuntarily civilly committed individual's excessive force claim under objective reasonableness standard).

⁹¹ *See Serna*, 567 F.3d at 948 (quoting *Andrews*, 253 F.3d at 1061); *cf.* *Revels v. Vincenz*, 382 F.3d 870, 874 (8th Cir. 2004) (explaining that government's confinement of involuntarily committed patient presents same concerns as government's confinement of prisoner); *Morgan v. Rabun*, 128 F.3d 694, 697 (8th Cir. 1997) (stating that government interests in running state hospital are similar to those of running prison).

⁹² *Compare* *Bell v. Wolfish*, 441 U.S. 520, 540 (1979) (noting that government has interest in maintaining security and order in facility housing pretrial detainees), *with* *Andrews*, 253 F.3d at 1061 (discussing security concerns that holding civilly committed individuals raises for government officials), *and* *Morgan*, 128 F.3d at 697 (stating that administrators of state mental hospital are concerned with ensuring safety of patients and staff).

observed that authorities place both classes of individuals in detention because the government considers them dangerous.⁹³

The court also relied on the Supreme Court's holding in *Youngberg v. Romeo* to support its analogy of pretrial detainees and involuntarily civilly committed persons.⁹⁴ The similarities between the two groups led the court to apply the standard it uses to evaluate detainees' unreasonable search claims to Serna's case.⁹⁵ The standard that the Supreme Court articulated in *Bell* requires objective reasonableness.⁹⁶ Consequently, the Eighth Circuit evaluated Serna's claim under the *Bell* balancing test.⁹⁷

Applying the *Bell* test, the court evaluated the justification for the intrusion as well as the scope, manner, and location of the search.⁹⁸ The court found that although the scope of the search was broad, it was not any more invasive or humiliating than the search in *Bell*.⁹⁹ The court emphasized the privacy of the bathrooms where the staff conducted the visual body cavity searches.¹⁰⁰ No extraneous individuals witnessed the searches.¹⁰¹ Additionally, there was no evidence suggesting that the staff members executed the visual searches in an unprofessional manner.¹⁰² The court observed that less intrusive search methods, such as pat-down searches, were available.¹⁰³ The court reasoned, however, that *Bell* does not require officials to apply the least intrusive methods or to progress through increasingly invasive techniques.¹⁰⁴

⁹³ See *Serna*, 567 F.3d at 948; see also *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048 (8th Cir. 1989) (stating one reason government keeps pretrial detainees in custody is because they may be dangerous); *Hince v. O'Keefe*, 632 N.W.2d 577, 581 (Minn. 2001) (explaining that state commitment of individual as sexually dangerous person requires court finding of future dangerousness).

⁹⁴ See *Serna*, 567 F.3d at 949 (explaining that Court analogized civilly committed persons to pretrial detainees when evaluating liberty restrictions government may impose on them).

⁹⁵ See *id.* at 948-49.

⁹⁶ See *Bell*, 441 U.S. at 559; *Serna*, 567 F.3d at 949 (discussing *Bell* balancing test); *Way v. Cnty. of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006).

⁹⁷ *Serna*, 567 F.3d at 949-51.

⁹⁸ See *id.* at 952-53.

⁹⁹ *Id.* at 954.

¹⁰⁰ See *id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 449 n.40 (1979)) (stating that Court in *Bell* refused to implement less invasive means test).

The Eighth Circuit upheld the search even though Serna's case presented a close question of constitutional law and the outer boundary of the *Bell* test.¹⁰⁵ The court found that the government's security and treatment concerns were legitimate.¹⁰⁶ The court decided that the government's interests outweighed Serna's rights in view of the scope, manner, and location of the searches.¹⁰⁷

III. ANALYSIS

In *Bell*, the Supreme Court established a balancing test for determining the reasonableness of government searches of pretrial detainees.¹⁰⁸ The Eighth Circuit evaluated the search at issue in *Serna* under the *Bell* test to determine its reasonableness.¹⁰⁹ The Eighth Circuit misconstrued and misapplied the test when it determined that the circumstances of the search justified the staff's degrading intrusion on Serna's rights.¹¹⁰ In *Safford Unified*, the Supreme Court applied a similar balancing test, yet held the school official's visual strip search of a student to be unreasonable.¹¹¹ *Safford Unified* is analogous to *Serna* in that both cases present a context in which legitimate government interests limit individual rights.¹¹² Finally, the *Serna* decision places individuals with restricted rights at risk of losing all of their civil liberties at the discretion of government officials.¹¹³ If the

¹⁰⁵ *Id.* at 955.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (holding that searches were reasonable and affirming district court judgment).

¹⁰⁸ See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

¹⁰⁹ See *Serna*, 567 F.3d at 949 (discussing *Bell* test for reasonableness); *supra* Part II.

¹¹⁰ See *infra* Part III.A. See generally *Serna*, 567 F.3d at 955 (describing circumstances that rendered staff's visual body cavity search of Serna constitutionally reasonable).

¹¹¹ See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2642-43 (2009) (explaining that circumstances surrounding school officials' visual strip search of student did not justify extreme intrusiveness of search).

¹¹² See *id.* at 2639 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985)) (clarifying that governmental interests warrant standard of reasonableness that is less restrictive than probable cause for school officials to justify their searches of students); *Serna*, 567 F.3d at 949 (citing *Youngberg v. Romeo*, 457 U.S. 307, 320-21 (1982)) (explaining that government may subject civilly committed persons to rights restrictions that are reasonably related to legitimate government objectives); *infra* Part III.B.

¹¹³ See *infra* Part III.C.

Supreme Court reviews *Serna*, it should reverse the Eighth Circuit's holding.¹¹⁴

A. *Serna Misconstrued the Bell Test*

Visual body cavity searches are extremely degrading, and the staff members' discovery of a cell phone case did not warrant facility-wide visual body cavity searches.¹¹⁵ Staff members did not apply any of the less intrusive search methods available to them in attempting to locate the cell phone.¹¹⁶ The Eighth Circuit's statement that *Bell* does not require courts to evaluate the availability of less intrusive means is incorrect.¹¹⁷ The *Bell* Court assumed that the existence of less intrusive alternatives to visual body cavity searches was relevant to determining the reasonableness of the searches.¹¹⁸ Courts must evaluate the availability of less intrusive methods to assess officials' proffered justifications for a search fairly.¹¹⁹ Courts cannot evaluate the need for a particular search without considering the alternative methods

¹¹⁴ See *Serna*, 567 F.3d at 955 (holding that facility-wide visual body cavity searches did not infringe plaintiff's Fourth Amendment rights); *infra* Part III.A-C.

¹¹⁵ See *Bell v. Wolfish*, 441 U.S. 520, 558 & n.39 (1979) (describing visual body cavity search protocol and stating that visual body cavity searches give Court great pause); see, e.g., *Way v. Cnty. of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006) (stating that visual body cavity searches are frightening and humiliating invasions even when officials conduct them with consideration), *cert. denied*, 127 S. Ct. 665 (2006); *Roberts v. Rhode Island*, 239 F.3d 107, 110 (1st Cir. 2001) (explaining that visual body cavity searches are extreme intrusions on personal privacy and offensive to personal dignity); *Goff v. Nix*, 803 F.2d 358, 365 (8th Cir. 1986) (recognizing that visual body cavity searches are intrusive and unpleasant).

¹¹⁶ *Serna*, 567 F.3d at 954.

¹¹⁷ See *Bell*, 441 U.S. at 559 n.40; see, e.g., *Roberts*, 239 F.3d at 112 (discussing availability of less invasive search methods in determining reasonableness of body cavity search policy); *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986) (holding that government must show legitimate need to conduct body cavity search and demonstrate that less invasive alternatives would not meet that need); Tracy McMath, Comment, *Do Prison Inmates Retain Any Fourth Amendment Protection from Body Cavity Searches?*, 56 U. CIN. L. REV. 739, 749 (1987) (arguing that courts should consider availability of less restrictive means in determining reasonableness of body cavity searches).

¹¹⁸ *Bell*, 441 U.S. at 559 n.40 (evaluating and rejecting district court's proposed alternative of using metal detectors as ineffective in detecting nonmetallic contraband).

¹¹⁹ See Helmer, *supra* note 4, at 260-61 (discussing how Chief Justice Rehnquist addressed justification for initiating searches in *Bell*); David C. James, Note, *Constitutional Limitations on Body Searches in Prison*, 82 COLUM. L. REV. 1033, 1054 n.145 (1982); McMath, *supra* note 117, at 749 (stating that courts' consideration of less intrusive alternatives is important aspect of justification factor in *Bell* balancing test).

available.¹²⁰ Although the Court has rejected a least intrusive means test, it continues to consider the availability of less intrusive methods when evaluating a search's reasonableness.¹²¹ Further, the Eighth Circuit itself has identified the availability of less invasive methods as relevant to determining the reasonableness of strip or body cavity searches.¹²² Therefore, the Eighth Circuit's opinion is counter to Supreme Court precedent as well as its own case law.¹²³

The Court continues to weigh the availability of less intrusive methods in its reasonableness determinations.¹²⁴ Accordingly, the Eighth Circuit should have given greater weight in the balancing process to the less invasive search methods available to the staff.¹²⁵ Staff members did not conduct room searches, pat-down searches, or searches of only a few individuals.¹²⁶ The alternative methods would have been equally as effective, and the defendants did not even consider alternatives before conducting the most degrading searches

¹²⁰ See Helmer, *supra* note 4, at 260-61; James, *supra* note 119, at 1054 n.145; McMath, *supra* note 117, at 749.

¹²¹ See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 663 (1995) (refusing to base determination of reasonableness on school official's use of least intrusive search method, but considering less intrusive alternative and rejecting it as impracticable); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674-79 (1989) (discussing reasonableness of drug testing program); *Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983) (stating that Court's determination of reasonableness of inventory search does not necessarily turn on existence of less invasive means and rejecting alternatives as unfeasible).

¹²² See *Franklin v. Lockhart*, 883 F.2d 654, 657 (8th Cir. 1989) (upholding visual body cavity search because less intrusive alternatives would compromise security concerns); *McDonnell v. Hunter*, 809 F.2d 1302, 1308-09 (8th Cir. 1987); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985) (finding that neither officers nor jailers attempted less intrusive search, which would have allowed them to locate banned items without violating defendant's rights).

¹²³ See *Bell*, 441 U.S. at 559 n.40; *Franklin*, 883 F.2d at 657; *Jones*, 770 F.2d at 742.

¹²⁴ See, e.g., *Vernonia*, 515 U.S. at 663 (considering less intrusive alternative and rejecting it as impracticable); *Von Raab*, 489 U.S. at 674-79 (discussing reasonableness of drug testing program); *Lafayette*, 462 U.S. at 647-48 (evaluating less invasive means and rejecting it as unfeasible).

¹²⁵ See *Bell*, 441 U.S. at 559 n.40 (evaluating alternatives to having staff conduct body cavity searches on pretrial detainees following contact visits including constant monitoring of visits or abolishing visits completely); *cf.* *Turner v. Safley*, 482 U.S. 78, 90-91 (1987) (stating that courts may consider existence of easy alternatives that fully accommodate prisoners' rights as evidence that prison regulation is not reasonable); *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (declaring that court must consider presence or absence of reasonable alternatives to determine reasonableness of prison officials strip search of inmates).

¹²⁶ See *Serna v. Goodno*, 567 F.3d 944, 954-55 (8th Cir. 2009) (noting staff members did not conduct room searches prior to conducting visual body cavity searches).

possible.¹²⁷ In *Bell*, the Court took both the availability and potential effectiveness of alternative methods into consideration when evaluating the need for a particular search.¹²⁸

Another alternative the administrators could have employed was to search only those patients likely to be harboring the phone.¹²⁹ The administrators possessed information that placed individualized suspicion on patients other than Serna, but did not act on that knowledge.¹³⁰ This information included surveillance videotape showing identifiable patients in the common area at the time the staff found the cell phone case.¹³¹ The administrators also knew which patients had harbored contraband in the past.¹³² Although searching such patients first was one of the less intrusive search methods available, administrators did not instruct the staff to search only those patients.¹³³ Conversely, in *Bell*, the staff conducted searches on the detainees following contact visits that provided the basis for officials to suspect they had contraband.¹³⁴ They did not carry out facility-wide searches to detect contraband because a less invasive search method was available.¹³⁵ The detainees' recent contact with the outside world provided the officials in *Bell* with the reasonable suspicion justifying their search.¹³⁶ Following *Bell*, several courts have determined that

¹²⁷ See *id.*; see also *Bell*, 441 U.S. at 559 n.40 (evaluating alternatives to body cavity searches in effort to determine reasonableness of search); McMath, *supra* note 117, at 749.

¹²⁸ See *Bell*, 441 U.S. at 559 n.40.

¹²⁹ See *Serna*, 567 F.3d at 954 (observing that administrators possessed information that would allow them to determine which patients were more likely to have cell phone); cf. *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001) (holding that visual body cavity searches officials conducted on pre-arraignment detainees were unconstitutional because officials did not have reasonable suspicion that detainees were carrying contraband); *Levoy v. Mills*, 788 F.2d 1437, 1439 (10th Cir. 1986) (stating government must show legitimate need to conduct body cavity search and that less invasive alternatives would not meet that need).

¹³⁰ See *Serna*, 567 F.3d at 953-54 (explaining that administrators had information placing individualized suspicion on certain patients).

¹³¹ *Id.* at 947.

¹³² *Id.* at 954 (stating that administrators had information regarding patients with history of possessing contraband).

¹³³ See *id.* (explaining that administrators chose not to rely on information that placed suspicion on particular patients).

¹³⁴ See *Bell v. Wolfish*, 441 U.S. 520, 558 (1979) (discussing visual body cavity search that officials conducted on inmates at all Bureau of Prison facilities).

¹³⁵ See *id.* at 559 n.40 (finding that contact visits create need for body cavity searches).

¹³⁶ See *id.* at 558; Heidi P. Mallory, Note, *Fourth Amendment: The "Reasonableness" of Suspicionless Drug Testing of Railroad Employees*, 80 J. CRIM. L. & CRIMINOLOGY 1052, 1077 n.190 (1990); see also Brief of Appellant at 28, *Serna v. Goodno*, 567 F.3d

reasonable suspicion is required to justify visual body cavity searches.¹³⁷

Advocates for judicial deference to law enforcement decisions argue that no level of suspicion was necessary to justify the staff's visual body cavity search of Serna.¹³⁸ According to their argument, the Court in *Bell* did not articulate any level of suspicion necessary to justify such searches.¹³⁹ Further, even if some level of suspicion is required, such suspicion was present here.¹⁴⁰ There was reasonable suspicion to believe that Serna was hiding the cell phone.¹⁴¹ Staff had previously discovered patients in possession of cell phones, and a patient could secrete a cell phone in a body cavity.¹⁴²

944 (8th Cir. 2009) (No. 05-3441) (stating that fact that officials searched detainees after contact visits indicated that officials had reasonable basis to suspect detainees had contraband). See generally BLACK'S LAW DICTIONARY 696 (8th ed. 2004) (defining reasonable suspicion).

¹³⁷ See, e.g., *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001) (holding that visual body cavity searches officials conducted on pre-arraignment detainees were unconstitutional because officials did not have reasonable suspicion that detainees were carrying contraband); *Swain v. Spinney*, 117 F.3d 1, 6-8 (1st Cir. 1997) (holding visual body cavity searches warrant at least reasonable suspicion); cf. *Justice v. City of Peachtree*, 961 F.2d 188, 193 (11th Cir. 1992) (holding officers may conduct strip searches of juveniles in custody based on reasonable suspicion); *Stewart v. Lubbock Cnty., Tex.*, 767 F.2d 153, 156-57 (5th Cir. 1985) (holding that county policy of permitting strip searches without reasonable suspicion was unconstitutional), cert. denied, 475 U.S. 1066 (1986).

¹³⁸ See *Serna*, 567 F.3d at 950; Deborah L. MacGregor, Note, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 172 (2003) (arguing that Court's policy regarding body cavity searches in *Bell* did not require individualized justification). See generally *Bell*, 441 U.S. at 560 (holding that corrections staff can conduct visual body cavity searches on less than probable cause); *id.* at 563 (Powell, J., dissenting) (advocating that Court should require some level of suspicion to justify body cavity searches).

¹³⁹ See *James*, *supra* note 119, at 1051 (stating that *Bell* did not establish level of suspicion necessary to justify body searches); MacGregor, *supra* note 138, at 172. See generally *Bell*, 441 U.S. at 560 (allowing government to search inmates visually with less than probable cause).

¹⁴⁰ See Brief of Appellees at 33, *Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009) (No. 05-3441) (stating that staff members reasonably suspected individuals who were not in common area could have access to contraband cell phone); see also *Serna*, 567 F.3d at 953 (determining that administrators had general justification for search).

¹⁴¹ See Brief of Appellees, *supra* note 140, at 33; see also *Serna*, 567 F.3d at 947 (discussing administrators' suspicion of patient as source of cell phone); *id.* at 953 (describing administrators' specific evidence regarding contraband cell phones in facility); BLACK'S LAW DICTIONARY, *supra* note 136, at 696 (defining reasonable suspicion).

¹⁴² See Beth DeFalco, *Dogs Sniff Out Inmates' Illegal Cell Phones*, MSNBC (Sept. 17,

This argument necessarily fails because the Supreme Court has not disposed of a requirement for individualized suspicion when officers conduct searches of detainees or patients.¹⁴³ Under well-established Fourth Amendment jurisprudence, reasonable suspicion, at the least, must exist before the government may search an individual.¹⁴⁴ Moreover, there was no reason for the staff to suspect that Serna was harboring the cell phone.¹⁴⁵ Serna had no record of harboring contraband.¹⁴⁶ The record also did not indicate that Serna was in the common area when staff found the cell phone case.¹⁴⁷ Therefore, staff could not have reasonably suspected that Serna possessed the cell phone.¹⁴⁸

B. *Safford Unified School District v. Redding Affords Protections to Involuntarily Civilly Committed Persons*

Safford Unified is analogous to *Serna* in that both present special Fourth Amendment contexts in which an individual has limited constitutional protection.¹⁴⁹ *Safford Unified* involved schools and

2009), http://www.msnbc.msn.com/id/32893578/ns/technology_and_science-tech_and_gadgets/; Daniel Engber, *Shove It Up Your Ass! How Many Cell Phones Can Fit In One Rear End?*, SLATE (Sept. 7, 2006), <http://www.slate.com/id/2149180>; Hilary Hylton, *Trying to Keep Cell Phones Out of Prison*, TIME (Nov. 26, 2008), <http://www.time.com/time/nation/article/0,8599,1861553,00.html>; see also *Serna*, 567 F.3d at 954.

¹⁴³ See *Bell*, 441 U.S. at 560 (holding corrections staff can conduct visual body cavity searches on less than probable cause); Helmer, *supra* note 4, at 262-64 (discussing circuit courts' application of reasonable suspicion standard following *Bell* decision); cf. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 624 (1989).

¹⁴⁴ See *Griffin v. Wisconsin*, 483 U.S. 868, 881 (1987) (observing that officer's reasonable suspicion of wrongdoing may justify their warrantless search based on special law enforcement needs); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (explaining that search of student requires school officials to have reasonable suspicion of student's wrongdoing); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (stating that police need reasonable suspicion of individual's wrongdoing to stop and detain individual for investigative purposes).

¹⁴⁵ See *Serna*, 567 F.3d at 947.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* (finding that videotape revealed identifiable patients, but that administrators could not determine who dropped cell phone case and could not narrow suspicion to particular patient).

¹⁴⁸ See *id.* at 947 (noting lack of evidence that Serna was in common area when staff found phone and that he had no record of harboring contraband); Brief of Appellant, *supra* note 136, at 37. See generally BLACK'S LAW DICTIONARY, *supra* note 136, at 696 (defining reasonable suspicion).

¹⁴⁹ See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2639 (2009) (citing *T.L.O.*, 469 U.S. at 341-42) (clarifying that governmental interests warrant reasonableness standard that is less restrictive than probable cause for school officials

minors, and *Serna* involved mental hospitals and patients.¹⁵⁰ The Supreme Court has found that both minors and mental health patients have lesser constitutional protections than other citizens when they are within the walls of their respective institutions.¹⁵¹ In both cases, courts must balance an individual's rights against the government's presumptively legitimate interests to determine whether the search violates the Fourth Amendment.¹⁵² *Safford Unified* illustrates circumstances under which an individual's rights trump those of the government, as they should have in *Serna*.¹⁵³

In *Safford Unified*, school officials visually strip searched a young girl.¹⁵⁴ The search was terrifying, upsetting, and degrading.¹⁵⁵ For the search to have been reasonable, the scope of the search had to be reasonably related to the circumstances justifying it.¹⁵⁶ However, the

to justify their searches of students); *Serna*, 567 F.3d at 949 (explaining that government may subject civilly committed persons to rights restrictions that are reasonably related to legitimate government objectives); see also *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (holding that state may restrict dangerously mentally ill person's rights).

¹⁵⁰ See *Safford Unified*, 129 S. Ct. at 2637 (articulating issue in case as being whether school officials' search of thirteen-year-old student violated her Fourth Amendment rights); *Serna*, 567 F.3d at 946 (describing claim patient at Moose Lake treatment facility brought against program administrators).

¹⁵¹ See *Hendricks*, 521 U.S. at 363 (upholding state restrictions of dangerously mentally ill); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (holding that school officials do not need warrant to search student under their authority); *Youngberg v. Romeo*, 457 U.S. 307, 319-20 (1982).

¹⁵² See *Safford Unified*, 129 S. Ct. at 2642 (citing *T.L.O.*, 469 U.S. at 341) (stating test of reasonableness is whether scope of search was reasonably related to circumstances justifying it); *Serna*, 567 F.3d at 949-50 (describing court's application of *Bell* test as requiring balance of need for search against *Serna*'s personal rights). See generally *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (describing test of reasonableness under Fourth Amendment).

¹⁵³ See *Safford Unified*, 129 S. Ct. at 2641-43 (describing scope, manner, and location of school officials' visual strip search of student and concluding that circumstances leading to search did not justify it); cf. *Stephens v. Kerrigan*, 122 F.3d 171, 176 (3d Cir. 1997) (concluding that employee's exercise of First Amendment rights outweighed government's interest in maintaining political patronage system); *United States v. Nelson*, 36 F.3d 758, 761 (8th Cir. 1994) (finding that endoscopy procedure to retrieve bag of heroin violated defendant's Fourth Amendment rights).

¹⁵⁴ See *Safford Unified*, 129 S. Ct. at 2637 (stating that school officials searched thirteen-year-old student's bra and underwear based on suspicion she was harboring drugs).

¹⁵⁵ *Id.* at 2641 (recounting student's description of school officials' visual strip search of her underwear as frightening, embarrassing, and humiliating).

¹⁵⁶ See *id.* at 2642 (citing *T.L.O.*, 469 U.S. at 341); *Westbrook v. City of Omaha*, 231 F. App'x 519, 522 (8th Cir. 2007); *Phaneuf v. Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006).

assistant principal's suspicion that Redding was distributing contraband drugs did not justify such an intrusive search.¹⁵⁷

The test the Court applied in *Safford Unified* parallels the one it articulated in *Bell*, which the Eighth Circuit applied in *Serna*.¹⁵⁸ The test requires courts to balance the need for the search against the intrusion on personal rights that result from it.¹⁵⁹ The administrative assistant and school nurse conducted the visual strip search of Redding in the nurse's office.¹⁶⁰ While neither woman touched Redding's body, they instructed her to pull out her underwear to expose her breasts and pelvic area.¹⁶¹ Similarly, two male staff members instructed Serna to undress, lift his genitals, and spread his buttocks.¹⁶² Neither search resulted in the discovery of contraband.¹⁶³ Neither group of officials had reason to believe the specific individuals had contraband on their bodies.¹⁶⁴ The private location of the searches did not lessen the humiliating and invasive nature of the searches.¹⁶⁵

¹⁵⁷ See *Safford Unified*, 129 S. Ct. at 2642; *supra* Part I.C.

¹⁵⁸ See *Serna v. Goodno*, 567 F.3d 944, 949-50 (8th Cir. 2009) (describing balancing test established in *Bell* to determine whether searches staff members conducted on pretrial detainees were reasonable and applying it to case at hand). Compare *Safford Unified*, 129 S. Ct. at 2642 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)) (stating test of reasonableness is whether scope of search was reasonably related to circumstances justifying it), with *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (stating that factors for determining reasonableness of search under Fourth Amendment include scope, manner, and location of search).

¹⁵⁹ *Safford Unified*, 129 S. Ct. at 2642; *Bell*, 441 U.S. at 559 (stating test requires courts to balance individual rights against necessity of particular search); 7 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE SERIES: CRIMINAL LAW & PROCEDURE § 5.17 (3d ed. 2009).

¹⁶⁰ *Safford Unified*, 129 S. Ct. at 2641 (noting both school officials conducting search of Redding were female).

¹⁶¹ *Id.* (describing visual strip search school officials conducted on student).

¹⁶² *Serna*, 567 F.3d at 949-50 (describing how officers conducted visual body cavity search of Serna).

¹⁶³ See *Safford Unified*, 129 S. Ct. at 2638 (observing that visual strip search school officials conducted on student did not result in discovery of any pills); *Serna*, 567 F.3d at 948 (observing that searches staff members conducted on patients did not reveal location of cell phone).

¹⁶⁴ See *Safford Unified*, 129 S. Ct. at 2642-43 (explaining that assistant principal had no reason to suspect that student was hiding painkillers in her underwear); *Serna*, 567 F.3d at 947 (noting no evidence that officials suspected Serna of harboring contraband).

¹⁶⁵ See *Safford Unified*, 129 S. Ct. at 2641-42 (describing manner in which school officials conducted search of student); *Serna*, 567 F.3d at 947, 954 (discussing nature of search); see also *Way v. Cnty. of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006) (stating that visual body cavity searches are frightening and humiliating invasions even when officials conduct them with consideration and in private), *cert. denied*, 127

The Supreme Court held that the school officials' search of Redding was unreasonable and should hold that the equally invasive and unwarranted staff members' search of Serna was unreasonable.¹⁶⁶

In *Safford Unified*, the assistant principal pointed to student and school safety to justify the search.¹⁶⁷ Nonetheless, the Court held that the search was unreasonable.¹⁶⁸ The Court reasoned that ibuprofen posed a limited threat and did not justify looking in Redding's underwear for pills.¹⁶⁹ Similarly, the administrators in *Serna* had no reason to suspect that Serna had secreted a cell phone in his body cavities.¹⁷⁰ In fact, the administrators had no basis to suspect Serna of possessing the cell phone at all.¹⁷¹ During his three years in custody prior to the search, Serna had never possessed contraband.¹⁷²

Proponents of judicial restraint argue that courts should defer to the expertise of facility administrators in determining what actions are necessary to maintain institutional security.¹⁷³ Courts are not expert

S. Ct. 665 (2006); *Roberts v. Rhode Island*, 239 F.3d 107, 110, 113 n.7 (1st Cir. 2001) (explaining that officials usually conduct body cavity searches in private and finding that such searches are offensive, extreme intrusions on personal privacy and human dignity).

¹⁶⁶ *Safford Unified*, 129 S. Ct. at 2637 (holding that school officials' strip search of Redding violated Constitution); see also *Serna*, 567 F.3d at 955 (holding search was not unreasonable). See generally U.S. CONST. amend. IV (prohibiting unreasonable government searches).

¹⁶⁷ *Safford Unified*, 129 S. Ct. at 2642-43 (stating assistant principal's motive was to eliminate drugs from school and protect students from danger).

¹⁶⁸ *Id.* at 2643 (noting that degree of principal's suspicion did not match degree of intrusion of school officials' search of student).

¹⁶⁹ *Id.* at 2642-43 (explaining that drugs were common pain relievers and that principal had no reason to suspect student had passed out large amounts of them).

¹⁷⁰ See *Serna*, 567 F.3d at 947, 954 (noting that there was no suggestion officials suspected Serna of harboring contraband and that body cavity was not place people typically look for cell phones).

¹⁷¹ See *id.* at 947 (recognizing that staff had never found Serna in possession of drugs or weapons).

¹⁷² *Id.*

¹⁷³ See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (giving corrections officials deference in their adoption and execution of practices that they deem necessary to maintain order and security); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (establishing that corrections officers have expertise to determine what actions are needed to maintain institutional security and that courts should defer to their judgment); see also *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982); *Franklin v. Lockhart*, 883 F.2d 654, 657 (8th Cir. 1989) (quoting *Goff v. Nix*, 803 F.2d 358, 362 (8th Cir. 1986)) (providing wide deference to prison officials on matters of institutional security); cf. *Morgan v. Rabun*, 128 F.3d 694, 697 (8th Cir. 1997) (explaining that government interests in running safe state hospital are similar to those of running prison).

facility administrators and, thus, are not institutionally equipped to second-guess administrators' security determinations.¹⁷⁴ The administrators in *Serna* deemed the possible presence of a cell phone to be a grave security threat.¹⁷⁵ Given that a patient had previously used a pay phone within the facility to acquire child pornography, the administrators' concerns justified the search.¹⁷⁶ Other security concerns included patients transmitting images of facility personnel or buildings through phone cameras and contacting past or future victims.¹⁷⁷ Hospital administrators concluded that these threats justified facility-wide visual body cavity searches.¹⁷⁸ The Eighth Circuit rightly deferred to the administrators' judgment under the multifactor *Bell* balancing test.¹⁷⁹

This argument necessarily fails because the Fourth Amendment places limits on officials despite the high degree of deference courts must afford their professional judgment.¹⁸⁰ Judges are constitutionally bound to protect and uphold the Constitution.¹⁸¹ Even the *Serna* court recognized that judicial deference to a government official's

¹⁷⁴ See *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 126-28 (1977); *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974); *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

¹⁷⁵ See *Serna*, 567 F.3d at 953.

¹⁷⁶ See *id.* (giving examples of patients' use of phones to commit crimes); *United States v. Mentzos*, 462 F.3d 830, 836-37 (8th Cir. 2006) (describing patients' use of pay phone in Moose Lake Treatment Center to access victim).

¹⁷⁷ See *Serna*, 567 F.3d at 953; see, e.g., Matthew Garland & Greg Doland, *Corrections Officials Face Challenge Trying to Limit Prisoners' Communications*, BALT. SUN, Feb. 27, 2008, at 1B (discussing inmates' use of cell phones to commit crimes); Vic Lee, *Smuggled Cell Phones Pose Prison Problems*, ABC (Nov. 17, 2009), http://abclocal.go.com/kgo/story?section=news/assignment_7&id=7124324 (describing how prisoners use phones to plan escapes and order gang hits).

¹⁷⁸ See *Serna*, 567 F.3d at 953-54 (noting no indication that staff conducted less-invasive room searches prior to visual body cavity searches).

¹⁷⁹ See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *Serna*, 567 F.3d at 956; see, e.g., *Block v. Rutherford*, 468 U.S. 576, 588-91 (1984) (noting limited scope of review under *Bell* and stating that determination of protocol for room searches was matter left to institutional officials' discretion).

¹⁸⁰ See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (stating that efficiency alone is insufficient justification for government disregard of Fourth Amendment); *United States v. Chadwick*, 433 U.S. 1, 6-11 (1977) (discussing history of Fourth Amendment and limitations it places on government intrusions). See generally U.S. CONST. amend. IV (articulating citizen's right to freedom from unreasonable searches).

¹⁸¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803) (explaining judiciary's sworn duty to uphold and interpret U.S. Constitution); cf. THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that judges must regard Constitution as fundamental law). See generally U.S. CONST. art. III, § 1 (vesting judicial power of United States in one Supreme Court).

professional judgment is limited.¹⁸² The Supreme Court has held that institutions may not disregard residents' constitutional rights in order to operate at maximum efficiency.¹⁸³ By implementing facility-wide body cavity searches before employing any other less intrusive method, the administrators in *Serna* disregarded the residents' rights in favor of efficiency.¹⁸⁴ The Eighth Circuit erred in upholding the administrators' decision as constitutionally reasonable.¹⁸⁵ Courts must zealously defend constitutional rights to minimize occasions for abuse of administrative authority in institutional contexts.¹⁸⁶ If states wish to operate psychiatric and penal institutions, they must do so in accordance with the Constitution.¹⁸⁷

C. *The Constitution Safeguards Civil Liberties in Limited-Rights Contexts*

The rights of pretrial detainees and involuntarily civilly committed persons are subject to restrictions and limitations.¹⁸⁸ Courts should

¹⁸² See *Serna*, 567 F.3d at 956.

¹⁸³ See *Mincey*, 437 U.S. at 393; cf. *NAACP v. Button*, 371 U.S. 415, 438 (1963) (holding that penal interests cannot justify disregarding First Amendment); Cheryl Dunn Giles, Note, *Turner v. Safley and Its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219, 219-22 (explaining demise of hands-off doctrine that gave wide deference to officials in administering correctional institutions).

¹⁸⁴ See *Serna*, 567 F.3d at 954; *supra* Part II. See generally U.S. CONST. amend. IV (articulating citizen's right to freedom from unreasonable searches).

¹⁸⁵ See *Serna*, 567 F.3d at 955-56; *supra* Part II; cf. *Mincey*, 437 U.S. at 393 (explaining that government may not sacrifice person's privacy in name of maximum simplicity in enforcing criminal law).

¹⁸⁶ See, e.g., *Hydrick v. Hunter*, 500 F.3d 978, 992-93 (9th Cir. 2007) (explaining that involuntarily civilly committed individuals in state psychiatric hospital submitted complaint alleging that officials subjected them to public strip searches and forced medication); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320 (E.D. Cal. 1995) (explaining that government treats mentally disordered prisoners punitively without consideration for their mental illness because staff lack appropriate training in recognizing and handling such inmates); *Harrelson v. City of Millbrook*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (describing situation in which jail staff allegedly denied paraplegic inmate use of his wheelchair).

¹⁸⁷ See *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974) (explaining how courts have repeatedly intervened to ensure that conditions of confinement do not violate inmates' constitutional rights); *Holt v. Sarver*, 309 F. Supp. 362, 384 (E.D. Ark. 1970) (declaring that state must run penal system consistent with Constitution), *aff'd*, 442 F.2d 304 (8th Cir. 1971); cf. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (declaring that states have constitutional duty to provide reasonable care to institutionalized individuals).

¹⁸⁸ See *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (finding that state may restrict rights of dangerously mentally ill); *Bell v. Wolfish*, 441 U.S. 520, 558 (1979)

carefully monitor these restrictions and limitations to ensure that such individuals retain their civil liberties to the maximum extent permitted under the law.¹⁸⁹ Most institutional restrictions and regulations fall under the administrators' expertise in deciding what is necessary to maintain institutional security.¹⁹⁰ Institutional security, however, is an inadequate justification for depriving individuals of their fundamental rights.¹⁹¹

The government may restrict involuntarily civilly committed individuals' rights, just as they may restrict convicts' rights.¹⁹² However, such restrictions are not limitless.¹⁹³ In *Skinner*, the Court upheld a convict's fundamental right to procreation.¹⁹⁴ This right

(stating that pretrial detainees' retain some rights after state commits them to corrections facility); *Price v. Johnston*, 334 U.S. 266, 285 (1948) (asserting that lawful incarceration results in government justifiably limiting inmates' rights); *Peckham v. Wis. Dep't of Corr.*, 141 F.3d 694, 697 (7th Cir. 1998) (noting that rights of confined individuals are very limited).

¹⁸⁹ See *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905) (declaring that it is courts' duty to invalidate laws that impose unconstitutional restrictions); *Campbell v. Beto*, 460 F.2d 765, 767-68 (5th Cir. 1975) (citing *Cruz v. Beto*, 405 U.S. 319, 321 (1975)) (stating that Constitution requires courts to assure that conditions of incarceration do not overstep constitutional bounds); cf. *Wyatt*, 503 F.2d at 1315 (explaining that courts have repeatedly intervened to ensure that government does not violate constitutional rights of those it confines).

¹⁹⁰ See, e.g., *Block v. Rutherford*, 468 U.S. 576, 589-91 (1984) (applying deferential review of officers' shakedown searches of pretrial detainees); *Bell*, 441 U.S. at 547-50 (explaining that courts should give prison administrators deference in adopting policies to maintain institutional security); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (establishing that corrections officers have expertise to determine what actions are needed to maintain institutional security, such as limiting inmate visitation).

¹⁹¹ See *Turner v. Safley*, 482 U.S. 78, 97-100 (1987) (evaluating marriage restriction and finding it unconstitutional); *Lee v. Washington*, 390 U.S. 333, 333-34 (1968) (holding that statute requiring racial segregation in prisons violated Fourteenth Amendment); *Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983) (holding administrators' security interests alone did not justify prisoners' loss of fundamental rights).

¹⁹² See *Hendricks*, 521 U.S. at 363 (finding that it is legitimate nonpunitive governmental objective for state to take measures restricting freedom of dangerously mentally ill); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 129 (1977) (noting that Court has recognized need for restrictions on prisoners' rights); *Wolf v. McDonnell*, 418 U.S. 539, 556 (1974) (stating that government may restrict prisoners' rights).

¹⁹³ See, e.g., *Turner*, 482 U.S. at 89 (stating that prison regulations must be reasonably related to legitimate penological interests); *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (holding that governments' interests must be legitimate to justify restricting civilly committed individuals' rights); *Jones*, 433 U.S. at 130 (finding that officials' restrictions of inmates' rights were reasonable and legitimately related to prison operational concerns).

¹⁹⁴ See *Skinner v. Oklahoma*, 316 U.S. 535, 541-43 (1942); *In re Romero*, 790 P.2d

implicates the same interest in bodily privacy and integrity as do visual body cavity searches.¹⁹⁵ Both harm the subjects' human dignity and autonomy.¹⁹⁶ The power to sterilize and the power to conduct invasive, degrading searches both forever deprive individuals of their basic liberties.¹⁹⁷ In *Skinner*, the Court worried about the disparate impact of Oklahoma's law between those who committed larceny and those who committed embezzlement.¹⁹⁸ In *Serna*, the Eighth Circuit should have worried about the disparate impact of its searches on patients with records of harboring contraband and those without such records.¹⁹⁹ Under *Skinner*, the Eighth Circuit should have afforded more weight to *Serna's* basic civil rights.²⁰⁰ *Serna's* basic civil rights implicate the Constitution's fundamental concern for individual rights.²⁰¹ Many provisions of the Constitution evince concern for

819, 821 (Colo. 1991) (citing *Skinner*, 316 U.S. at 541); Judith F. Daar, *The Prospect of Human Cloning*, 33 SETON HALL L. REV. 511, 544 (2003); Amber Stine, Note, *The Implications of the Due Process Clause on the Future of Human Embryonic Gene Therapy*, 45 ARIZ. L. REV. 507, 512-13 (2003).

¹⁹⁵ Cf. *Bell*, 441 U.S. at 558-60 (describing body cavity searches as gross invasions of inmates' privacy rights); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding that right of privacy encompasses individual's decision to bear children); John Dwight Ingram, *Prison Guards and Inmates of Opposite Genders: Equal Employment Opportunity Versus Right of Privacy*, 7 DUKE J. GENDER L. & POL'Y 3, 4 (2000) (observing that inmates argue that body cavity searches violate their privacy).

¹⁹⁶ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (explaining that decision to bear child is central to personal dignity and autonomy); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (recognizing that body cavity searches severely intrude on citizen's dignity); Wilson Ray Huhn, *In Defense of the Roosevelt Court*, 2 FLA. AGRIC. & MECHANICAL U. L. REV. 1, 30 (2007) (arguing that *Skinner* laid foundation for rights of personal privacy).

¹⁹⁷ See *Skinner*, 316 U.S. at 541; see also *Bell*, 441 U.S. at 558-60 (explaining that detainees lose their right to privacy due to body cavity searches); Mary Ann Farkas & Katherine R. L. Rand, *Female Correctional Officers and Prisoner Privacy*, 80 MARQ. L. REV. 995, 1013 (1997).

¹⁹⁸ *Skinner*, 316 U.S. at 538-39; Farahany, *supra* note 67, at 905-06; Oleson, *supra* note 67, at 892.

¹⁹⁹ See *Serna v. Goodno*, 567 F.3d 944, 954 (8th Cir. 2009) (stating that administrators possessed information that would allow them to determine which patients were more likely to have cell phone); cf. *Skinner*, 316 U.S. at 538-39 (explaining disparate impact of Oklahoma's legislation). See generally *supra* Part II (describing body cavity search staff members conducted on *Serna*).

²⁰⁰ See *Skinner*, 316 U.S. at 541-43; *Serna*, 567 F.3d at 953-56 (balancing government's need to search against *Serna's* rights and finding government's interests outweighed *Serna's* privacy interests); see also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (stating that when government is impinging on constitutional rights, only most pressing circumstances can justify government's action).

²⁰¹ See *Hurtado v. California*, 110 U.S. 516, 532 (1884); *United States v. Comstock*,

individual autonomy and privacy.²⁰² The Court should reverse *Serna* and protect involuntarily civilly committed individuals' autonomy and privacy.²⁰³

CONCLUSION

The search that staff members conducted in *Serna* was unreasonable under the *Bell* framework.²⁰⁴ The Eighth Circuit incorrectly disposed of the availability of less invasive methods when it stated that the court in *Bell* rejected a less invasive means test.²⁰⁵ Alternative, less invasive search methods were available for staff to locate the cell phone.²⁰⁶

Furthermore, *Safford Unified* demonstrates that the presence of a cell phone did not justify an invasive and humiliating body cavity search.²⁰⁷ The threat that the contraband posed in both cases was

507 F. Supp. 2d 522, 531 (E.D.N.C. 2007), *aff'd*, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009); LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 7-10 (2001) (describing principles underlying Constitution and portraying importance of separation of powers and checks and balances to maintenance of individual rights).

²⁰² See e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (describing right to private and personal life as part of "right to liberty under the Due Process Clause"); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (stating that roots to right of privacy are found in First, Fourth, Fifth, and Ninth Amendments); *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) (discussing First and Fourteenth Amendments' protections of individual autonomy).

²⁰³ See *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905) (declaring it is courts' duty to invalidate laws that impose unconstitutional restrictions); *Campbell v. Beto*, 460 F.2d 765, 767-68 (5th Cir. 1975) (citing *Cruz v. Beto*, 405 U.S. 319, 321 (1975)) (stating that Constitution requires courts to ensure that inmates' conditions of incarceration do not overstep constitutional bounds); cf. *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974) (explaining how courts have repeatedly intervened to ensure that conditions of confinement do not violate inmates' constitutional rights).

²⁰⁴ See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *Serna*, 567 F.3d at 947 (describing body cavity search staff members conducted on *Serna*); *supra* Parts I.B, III.A.

²⁰⁵ *Serna*, 567 F.3d at 955 (stating officials are not required to apply least intrusive search methods); see *supra* Part III.A.

²⁰⁶ See *Serna*, 567 F.3d at 954; *supra* Parts II, III.A.

²⁰⁷ See *supra* Part III.B (describing circumstances in *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009), and their similarity to those in *Serna*, 567 F.3d at 944-56).

limited.²⁰⁸ Given the factual and legal similarities of the cases, the Court should rely on *Safford Unified* in reversing the Eighth Circuit.²⁰⁹

Serna also places individuals with limited rights at risk of increasingly severe and arbitrary government restrictions on their liberty and their privacy.²¹⁰ The Eighth Circuit should have recognized *Serna*'s fundamental right to personal autonomy and privacy.²¹¹ The broad deference the Eighth Circuit gives facility administrators' professional judgments results in awarding government officials alarmingly extensive discretion.²¹² Therefore, the Supreme Court should overturn *Serna v. Goodno*.²¹³

²⁰⁸ See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2642 (2009) (stating pills were common pain relievers); *Serna*, 567 F.3d at 951 (observing cell phone could pose indirect danger in state mental hospital); *supra* Parts I.C, II, III.B.

²⁰⁹ Compare *Safford Unified*, 129 S. Ct. at 2640-43 (describing school officials' search of Redding and test used to determine if search violated her Fourth Amendment rights), with *Serna*, 567 F.3d at 946-51 (describing staff members' search of *Serna* and test used to evaluate reasonableness of search). See generally *supra* Part III.B (describing circumstances in *Safford Unified* and their similarity to those in *Serna*).

²¹⁰ See *supra* Part III.C (describing serious risk that unchecked discretion of corrections officials poses); see, e.g., SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 252 (1998) (explaining that during early years, U.S. courts gave complete deference to prison administrators' professional judgment).

²¹¹ See *supra* Part III.C.

²¹² See *Serna*, 567 F.3d at 953; *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985); *supra* Part II.

²¹³ See *supra* Part III.