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No. 99-936

In the
SUPREME COURT OF THE UNITED STATES

Crystal M. Ferguson, *et al.*,

Petitioners,

v.

The City of Charleston, South Carolina, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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CONSTITUTIONAL AND STATUTORY PROVISIONS

MISCELLANEOUS

Respondents' attempt to bring the Search Policy within the scope of the limited special needs exception to the Fourth Amendment fails for three reasons. First, their claim that the Policy served needs beyond the normal needs of law enforcement is belied by their own admissions about the essential role law enforcement played. Second, Respondents understate the limits placed on law enforcement involvement in special needs cases and mischaracterize the evidence concerning the impact of the Policy. Finally, Respondents attempt to evade entirely the issue on which this Court granted certiorari by raising the argument that the searches here were consensual even though no evidence suggests that the Petitioners ("patients") granted consent to an investigatory search.

I. Respondents' Own Characterization of the Search Policy Highlights That Law Enforcement Was its Primary Purpose.

Respondents describe the Search Policy as "provid[ing] a three-step process for identifying and dealing with" pregnant women who use cocaine: testing; referral to drug treatment; and the use of the threat of arrest and criminal prosecution to "leverage" women into treatment. Brief of Respondents at 8 ("Resp. Br.").[1] Because, as Respondents note, "the first two steps paralleled the prior protocol," it was "the addition of [the] third step," the law enforcement component, that turned the "prior protocol" into the Search Policy. *Id.*

In fact, the threat of law enforcement intervention was not only what transformed the medical protocol into the Policy, but, as Respondents admit, it was the essential and indispensable step in the Policy; it was the step that,

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[1] Of course, as Respondents now admit, at the beginning of the Policy, there were only two steps: testing and arrest. Resp. Br. at 9 n.5. Women who tested positive, including four Petitioners, were not referred for treatment or given any opportunity to obtain treatment before their arrest. *See* Brief for Petitioners at 6 ("Pet. Br.").

in Respondents' words, "ma[d]e the Policy effective." *Id.*

Despite this admission, Respondents also suggest that reporting to the police was but an unintended consequence of the physicians' actions. *See* Resp. Br. at 28. Surely, law enforcement involvement cannot both be the key to the Policy and simply an unintended byproduct of it.[2]

Regardless of Respondents' contradictory assertions, the level of law enforcement involvement demonstrates that the intended purpose of the Policy was to fulfill the traditional functions of the police. Law enforcement helped create the Policy, drafted the central documents regarding how it would operate, and coordinated regularly with the hospital in order to arrest Petitioners. *See* Pet. Br. at 2-5. The operational guidelines written on Police Department letterhead in early October 1989, described in detail how patients with positive search results would be arrested by the police. *See* JX 1 (App. 49-52).[3] The guidelines instructed hospital personnel when to file a criminal complaint; described a positive drug search as "probable cause to arrest"; advised detectives to

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[2] Respondents go so far as to claim that substance abuse counselors initially "proposed" using the "leverage" of arrest to force women into treatment. Resp. Br. at 8. This is simply untrue. The idea to involve law enforcement came from Nurse Brown, the Solicitor and the police department. Pet. Br. at 2-4 (citing Brown Tr. 11/21/96 4:10-5:17 (JA 73-75); PX 28 at 1 (App. 72)). Respondents provide no citation for their assertion. *See* Resp. Br. at 8, 29. Their only citation referring to the substance abuse counselors is to testimony from the administrator of the county drug treatment program, stating that addicts rarely seek treatment voluntarily. *See* Resp. Br. at 8 (citing JA 738-40). A full reading of the administrator's testimony reveals that the Policy was proposed to him, and he merely indicated that he would cooperate. Johnson Tr. at 719-20 (JA 738).

[3] Citations to exhibits are to the Plaintiff Exhibit ("PX -"), Defendant Exhibit ("DX –"), or Joint Exhibit number ("JX -"); citations to testimony are to the witness's name and page of the trial transcript. When applicable, citations also indicate the page of the Joint Appendix ("JA") or Appendix to the Petition for Certiorari ("App.") on which the cited transcript or exhibit appears.

obtain "copies of all medical records pertinent to the criminal charges"; listed the criminal charges to be filed against the patients; and referred to the patients as "suspects." *See id.* at 50-51.

Perhaps the most telling indication of the Policy's law enforcement purpose is the attention paid by hospital staff and law enforcement personnel to treating the urine collected from the patients as evidence of a crime. Thus, documents instructed hospital personnel to maintain a "chain of custody" in obtaining urine samples. *See* JX 2 at 2 (App. 54). The police department sent the director of the police crime lab to the hospital to provide training regarding the proper collection of urine. *See* Roberts Tr. 17:16-18:15 (JA 1052-53). As a police representative explained, "I invited our lab director because I was cognizant of the fact that any arrests could ultimately end up in a trial. And I was concerned that we at least consider that as a factor when we went through this process." Roberts Tr. 18:5-9 (JA 1053). These quintessentially law enforcement aspects of the Policy served law enforcement needs only.

Moreover, as initially implemented and applied to four Petitioners, the policy served no purpose other than to arrest alleged law-breakers. *See* Pet. Br. at 6. Petitioners Griffin, Singleton, Knight and Powell were all arrested without any offer of treatment after a single positive drug search under the Policy.[4] *See* Griffin Tr. 6:4-25, 8:1-19 (JA 546-48); Singleton Tr. 52:8-53:7, 60:1-62:5 (JA 1132-36); Knight Tr. 121-125 (JA 773-78); Powell Tr. 149-152 (JA 1011-15). Indeed, Solicitor Condon himself acknowledged that these Petitioners were subjected to the "normal criminal [] process." Condon Tr. 10:25-11:19, 78:1-15 (JA 342-43, 382-83). After Respondents altered the Policy in the winter of 1990 to use threatened arrest to "leverage" patients into mandatory treatment, they relied on a standard criminal

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[4] Thus, Respondents' repeated assertions that all women who were arrested had "failed to complete treatment or tested positive a second time," Resp. Br. at 10, 30, are incorrect.

justice model in an attempt to change the patients' behavior and therefore still were serving regular law enforcement needs.[5] *See infra* at 5.

Respondents attempt to downplay the Policy's dominant law enforcement purpose by arguing that the Policy served two other needs -- the "clinical need for urine drug tests" and the need to stop what they describe as an "epidemic" of drug use by pregnant women. *See* Resp. Br. at 4-5. Neither of these asserted needs was served by the Policy, and the second claimed "need," stopping drug use, is not "special," but rather is a normal law enforcement need.

First, the Policy was not created to help physicians manage individual patients' pregnancies. Simple drug tests, without any law enforcement involvement or chain of custody procedures, accomplish that goal. Further, the Policy's testing component duplicated efforts already undertaken before the Policy began. *See, e.g.*, Horger Tr. 9:5-10:4 (JA 630-31); Newman Tr. 211:17-212:8 (JA 846-47); PX 1 (JA 1282). Even worse, the Policy actually compromised the care pregnant women and their newborns received. As established at trial, and discussed extensively by *amici*, law enforcement involvement undermines the goal of safely managing the treatment of pregnant patients and their newborns. *See, e.g.*, Chasnoff Tr. 23:22-24:11 (JA 293-94); Jessup Tr. 39:15-21 (JA 700-01); *Brief Amicus Curiae of the American Medical Association* at 6-10. Thus, the need to manage patients' pregnancies appropriately cannot justify the detailed protocols created by Respondents for arresting women with positive search results.[6]

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[5] In fact, women referred for treatment were tracked by law enforcement authorities to determine whether they were complying with treatment requirements. Brown Tr. 11/21/96 85:13-20, 11/22/96 206:15-20 (JA 134, 178); Condon Tr. 20:16-24, 97:7-17 (JA 354, 391).

[6] Respondents' claim that the Policy was necessary to manage women's pregnancies rings particularly false given that several of the patients were searched *after* they gave birth, when management of their pregnancies could no longer be a reason for the search. *See, e.g.*, PX 278, CCP-D-

Second, putting aside the issue of whether there was any evidence, other than anecdotal, of an increase in cocaine use at the hospital,[7] the need to stop drug use is a normal law enforcement need that was served here with normal law enforcement tools. *See* White House, Office of National Drug Control Policy, *National Drug Control Strategy Report* 1-3 (1992) (summarizing 1989 report's finding that "user accountability" through law enforcement was the best approach for addressing drug use). Arguing that the need to stop cocaine use by pregnant women is not a law enforcement need because of the public health problems caused by such use, as do Respondents, Resp. Br. at 5, is like arguing that the need to stop the sale of drugs on the street is not a law enforcement need because of the public health problems caused by the drug trade. Neither argument holds water.[8] *See Mincey v. Arizona*, 434 U.S. 385, 394 (1978).

Moreover, as explained in Petitioners' initial brief, *see* Pet. Br. at 30, using threatened arrest and prosecution to "leverage" individuals into treatment is a normal tool of law enforcement. Solicitor Condon testified that his office routinely used the "carrot and stick" approach, arrest followed by diversion into mandatory treatment, in an

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451, CCP-D-452 (Knight); PX 281, CCP-D-417, CCP-D-418 (Powell); PX 282, CCP-D-704, CCP-D-705 (Singleton).

[7] Respondents repeatedly refer to an "epidemic" of cocaine use at MUSC. *See, e.g.*, Resp. Br. at 5, 29. But the record provides no support for the conclusion that the hospital was experiencing an "epidemic." Instead, it demonstrates that Respondents possessed only anecdotal evidence that the number of pregnant hospital patients using cocaine was increasing. *See* Horger Tr. 4-8 (JA 624-25); Brown Tr. 79:24-80:7 (JA 263-64) (the only information on the number of women testing positive prior to Policy was an informal count maintained by Nurse Brown on an index card). Also, the South Carolina study repeatedly cited by Respondents as providing the impetus for the Policy was completed only in 1991 and thus could not have been relied upon when the Policy was drafted in 1989. DX 133 (Op. App. 73). Notably, the study showed that alcohol, not cocaine, was the drug whose use reached epidemic proportions. *Id.*

[8] Also, as described *infra* at 11-12, the Policy failed to serve this claimed need of stopping drug use.

attempt to rehabilitate non-violent first-time offenders. *See* Condon Tr. 23:4-24:4 (JA 357-58) (stating that the "carrot and stick" approach was part of the "norms and standards of the Solicitor's office" and was used for "general drug cases, simple possession, small property offenses"); *id.* at 14:4-7 (JA 347). Because Respondents relied on arrest and its threat as a "stick" to stop crime, the Policy they created operated within the traditional confines of the criminal justice system.

II. Respondents Understate the Limitations of the Special Needs Exception.

A. Respondents' Attempt to Hide Behind *New Jersey v. T.L.O.*'s Tolerance of Incidental Law Enforcement Involvement Fails.

Respondents seek to avoid the weight of this Court's precedent limiting the application of the special needs exception to a non-law enforcement context. Instead, they argue that the searches in this case are reasonable under this Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Resp. Br. at 24, 28. This argument fails for three reasons.

First, the law enforcement involvement in *T.L.O.*, unlike here, was merely incidental to the search at issue. In *T.L.O.*, this Court upheld a warrantless search of a student's purse by a school official. *See T.L.O.*, 469 U.S. at 347-48. The search was conducted because the school official suspected that the student had been smoking in the lavatory and had therefore violated a school rule. *See id.* at 328. When the official found marijuana in the student's purse, he turned over the results of the search to the police. Respondents argue that the facts of this case resemble those of *T.L.O.* and that, once the physicians had evidence of child abuse, it was appropriate for them to report the information to the police under the state reporting statute.[9] Resp. Br. at 28.

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[9] Respondents go so far as to characterize the Search Policy as a protocol required by South Carolina's mandatory child abuse reporting statute,

But the school official who searched the student's purse in *T.L.O.*, in contrast to the hospital personnel who searched the patients' urine, was not involved in a scheme concocted in conjunction with law enforcement authorities to enforce the criminal law. *See T.L.O.*, 469 U.S. at 341 n.7. In fact, this Court stressed that its decision in *T.L.O.* addressed "only searches carried out by school authorities acting alone and on their own authority" rather than "in conjunction with or at the behest of law enforcement agencies." *Id*. The Search Policy

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S.C. Code § 20-7-510. *See* Resp. Br. at 28. This is wrong for two reasons. First, implementation of the child abuse reporting statute must nonetheless be conducted pursuant to the warrant and probable cause requirements of the Fourth and Fourteenth Amendments. *See, e.g.*, *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999) (removal of child from school under New York's child abuse emergency removal statute violated Fourth Amendment); *see also* U.S. Const. art. VI, clause 2. Thus, Respondents' obligations under the child abuse reporting statute do not change the analysis under the special needs exception.

Second, Respondents can fully comply with the reporting statute without violating their patients' Fourth Amendment rights. The reporting statute does not require medical personnel to conduct investigatory searches of patients suspected of child abuse and to turn over incriminating confidential medical records to police without warrant or subpoena. Instead, the statute requires, and the Constitution allows, a reportof suspicion of child abuse to be made "orally" to either DSS or the police. S.C. Code Ann. § 20-7-510(D). Where such oral reports are made, the state is still put to the test of substantiating the accusation by conducting an investigation that may require it to obtain a search warrant. Here, though, Respondents circumvented the need for law enforcement to prove its case. Instead, hospital physicians gathered the evidence necessary for arrest, maintained it through a chain of custody, and furnished it directly to the police in the form of the patient's medical records.

Moreover, the hospital could have decided to report the patients to DSS, as the statute allows and as they were doing for all other drugs that posed risk of harm to the fetus. *See, e.g.*, Brown Tr. 159:8-14 (JA 152-53); Patrick Tr. 33:21-34:6 (JA 946-47); *see also* Roberts Tr. 15:22-16:7 (JA 1050-51). Their decision to report to the police instead reveals that the Policy's purpose was not simply to comply with the reporting statute but to join the Solicitor and the police in investigating illegal cocaine use and using the threat of arrest to "leverage" women into treatment.

here was designed by and with law enforcement authorities in order to target women who were allegedly violating the child abuse laws. The law enforcement purpose was integral, not incidental, to the Policy.[10]

The involvement of law enforcement authorities in the Policy was particularly pernicious given that Respondents conducted bodily searches of Petitioners. This Court has *never* upheld a warrantless and suspicionless[11] search *of an*

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[10] The level of law enforcement involvement in a search is critical to the Fourth Amendment analysis because law enforcement officials are in an "adversarial" relationship with citizens. Because the Search Policy was designed to use the threat of arrest as "leverage," the traditional "adversarial" relationship between law enforcement and citizens, *see T.L.O.*, 469 U.S. at 349 (Powell, J., concurring), existed here between the hospital and the patients.

[11] Citing the search criteria established by hospital personnel, Respondents claim that the searches conducted on Petitioners were based on suspicion of wrongdoing, Resp. Br. at 23 n.13, and appear to argue that this level of individualized suspicion excuses the Respondents' actions. This argument is wrong for two reasons.

First, search criteria such as "inadequate prenatal care," "late prenatal care," or "no prenatal care," *see* JX 2 (App. 53), could not have provided physicians with reasonable suspicion that a patient was using cocaine, such that the warrant requirement can be overlooked. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (defining reasonable suspicion in stop and frisk context as "whether a reasonably prudent man in the same circumstances would be warranted in the belief that his safety or that of others was in danger."). As a nationally recognized expert on prenatal care and drug use testified, poor women as a group have very little access to prenatal care. Chasnoff Tr. 16:19-20 (JA 286). Thus, a woman who satisfied these criteria was more likely to be poor than she was to be using cocaine.

Even the "medical" criteria in the Policy were more likely to indicate the existence of a health problem other than cocaine addiction. For example, placental abruption and premature labor can be evidence of "a wide range of problems, including tobacco use." Chasnoff Tr. 15:21-16:9 (JA 285-86); *see also Williams Obstetrics* at 748-49 (F. Gary Cunningham et al. eds., 20th ed. 1997) (while primary cause is unknown, other conditions associated with placental abruption include pregnancy-induced or chronic hypertension (the most commonly associated condition), prematurely ruptured membranes, and cigarette smoking);

individual's urine under the special needs exception where the search results were used as the basis for the individual's arrest or prosecution. *See Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995) (upholding searches of students' urine for drugs where only school officials had access to test results); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (upholding searches of customs employees for drugs where only employer had access to search results); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621 n.5, 626 n.7 (1989) (upholding searches of railroad employees' urine and blood for drugs where nothing in the record indicated that government would use test results for other than employment purposes); *see also Chandler v. Miller*, 520 U.S. 305, 318 (1997) (noting that statute at issue allowed the candidate to control dissemination of the urine search results); *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting) ("[u]ntil today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates"); *Acton*, 515 U.S. at 676 (O'Connor, J., dissenting) (intrusive bodily searches such as searches of urine must be based on individualized suspicion).

Second, Respondents completely fail to address Petitioners' argument that, as patients seeking medical care, they were entitled to the full force of the Fourth

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Obstetrics: Normal and Problem Pregnancies at 505-06 (Steven G. Gabbe et al. eds., 3d ed. 1996) (while primary etiology of placental abruption is unknown, maternal hypertension is most consistently identified factor; other causes include blunt trauma caused by battery or motor vehicle collision).

Second, even if the searches here were based on some quantum of individualized suspicion, Respondents nevertheless violated the Fourth Amendment in failing to obtain a warrant based upon probable cause. This Court has approved warrantless law enforcement searches based solely on reasonable suspicion in very limited circumstances that are inapplicable here. *See, e.g.*, *Terry*, 392 U.S. at 30 (stop and frisk); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (roving border patrol).

Amendment's privacy protections, and point to no case in which the special needs exception was applied to citizens with undiminished expectations of privacy. Instead, Respondents claim that the searches here were minimally intrusive merely because the urine was obtained during a doctor's visit.[12] Resp. Br. at 32-35. Yet the measure of a search's intrusiveness depends not simply on the method of the search, but also on the nature of the privacy interest that the search compromises, *see, e.g.*, *Acton*, 515 U.S. at 654, *Von Raab*, 489 U.S. at 671, and the extent of the disclosure of search results, *see Chandler*, 520 U.S. at 318 (extent of disclosure is factor in determining intrusiveness). Because pregnant women have undiminished privacy expectations, and because hospital personnel disclosed their private medical information to the police, the searches conducted by Respondents were highly intrusive.

Third, Respondents have failed to demonstrate why the Fourth Amendment's usual requirements of warrant and probable cause were impracticable in this case. *See* Pet. Br. at 33. Law enforcement could have quickly obtained a search warrant when a child abuse or police investigation indicated that a particular patient may have been using drugs. *See Steagold v. United States*, 451 U.S. 204, 222 (1981) (noting "short time required to obtain a search warrant"); *Ramsey v. County of McCormick*, 412 S.E.2d 408 (S.C. 1991) (noting that magistrate is always on call). Hospital physicians would, of course, have remained free to perform warrantless urine tests that were necessary to manage the patients' pregnancies as long as they were not working with law enforcement authorities to arrest patients based on the results of such tests. If the hospital already had obtained a urine sample in the course of medical care, time would not be

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[12] Respondents make much of the fact that the searches in this case were conducted in a doctor's office. *See* Resp. Br. at 34. But the fact that Petitioners were searched in a hospital and not in a police station does not negate or mitigate the involvement of law enforcement authorities in designing and implementing the Search Policy. It is this involvement that takes the searches here outside the scope of the special needs exception.

of the essence because the target of the warrant would be the already-obtained urine.[13]

B. Respondents' Claims of Effectiveness Are Contradicted by the Record.

Playing fast and loose with the record, Respondents claim that the Search Policy was "successful." But the record contradicts their assertions and instead reveals that the Policy was ineffective in deterring cocaine use. Because of its ineffectiveness, the Search Policy is unreasonable even if the special needs balancing test is applied. *See, e.g.*, *Chandler*, 520 U.S. at 319-20 (discussing ineffectiveness of drug-testing scheme).

First, Respondents repeatedly assert, without citation, that "of the 253 patients who tested positive during the relevant time period, only thirty failed to complete treatment or tested positive a second time and consequently, were arrested." Resp. Br. at 10, 29-30.[14] In fact, there is no evidence in the record regarding what happened to the vast majority of patients who were subject to the Policy because the district court severely limited the introduction of evidence regarding non-plaintiffs. Thus, the record does not reveal how many times the non-plaintiff patients tested positive for cocaine, or whether they completed the mandatory treatment program or simply left the jurisdiction. What the record does reveal is that even if a patient had violated the Policy's requirements, Nurse Brown had great discretion in deciding whether the patient would be arrested. *See* Brown Tr. 81:17-82:5 (JA 265-66) (admitting that her request to the Solicitor's Office

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[13] Likewise, establishing some quantum of individualized suspicion was also practicable here. *Cf. Acton*, 515 U.S. at 675-76 (O'Connor, J., dissenting) (noting that "individualized suspicion requirement was often impractical in these cases because they involved situations in which even one undetected instance of wrongdoing could have injurious consequences for a great number of people").

[14] As noted above, the implication that all the women who were arrested failed treatment or tested positive a second time is incorrect. *See supra* at 3 & n.4.

for another chance for a white patient who was non-compliant with treatment was approved). The claim that the Policy had a ninety percent "success" rate is therefore complete speculation and not based on the facts of this case.

Second, contrary to Respondents' assertions, none of the Petitioners testified that the policy helped them "beat" their cocaine addiction. Resp. Br. at 10, 30. Instead, all Petitioners stated that the Policy harmed them psychologically, and some specifically indicated that their experiences with the policy have left them with a distrust of medical providers. Griffin Tr. 10:10-12 (JA 550); Knight 138:8-17; Powell Tr. 168:7-18 (JA 1028); Ferguson Tr. 194:8-20 (JA 470); Hale Tr. 40:19-23 (JA 588); Joseph Tr. 79:10-21; Pear Tr. 263:5-9, 260:8-261:4 (JA 962, 959-60); Singleton Tr. 73:10-13 (JA 1147); Nicholson Tr. 299:3-25 (JA 913-14); P. Williams Tr. 213:22-214:7 (JA 1206). Although several Petitioners stated that the substance abuse treatment they received was helpful, they viewed the Policy's law enforcement component as damaging, and there is no indication that these Petitioners would not have benefited from treatment that was not linked to arrest or its threat. Additionally, five Petitioners testified that they experienced a relapse in their addiction even after they received substance abuse treatment. Griffin Tr. 46 (JA 582-83); Ferguson Tr. 191:16-192:11 (JA 467-68); Singleton Tr. 111:11-19 (JA 1152-53); Nicholson Tr. 281-83 (JA 902-06); P. Williams Tr. 230:5-17, 246:20-22 (JA 1220-21, 1235). These results do not demonstrate effectiveness.

III. Respondents Have Not Established that the Patients Consented to the Searches At Issue Here.

Respondents have asked this Court to consider whether the patients provided a valid consent to the searches at issue in this case, Resp. Br. at i, a question which the court of appeals did not address[15] and which falls outside the scope of

[15] In dissent, Judge Blake noted that " [i]f the special needs exception had been held not to apply, a more thorough analysis of this issue would have

the question presented in the Petition for Certiorari and accepted for review by this Court.[16] "While it is true that a respondent may defend a judgment on alternative grounds, [this Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *see also West v. Gibson*, 527 U.S. 212, 223 (1999) (refusing Respondents' request to affirm decision below on alternative grounds outside the scope of the question presented and remanding issue for determination by Court of Appeals); *Ponte v. Real*, 471 U.S. 491, 500 & n.3 (1985) (declining to entertain argument on alternate grounds because "[i]t is a question best left to [the lower] court."). These considerations are particularly strong where the arguments were not fully briefed before the Court. *Cf. Bennett v. Spear*, 520 U.S. 154, 166-67 (1997) (appropriate to consider alternative ground because, *inter alia*, it was fully briefed and argued before the Court). Should the Court reach the alternative ground raised by Respondents, the record plainly shows that the patients did not consent to the searches to which they were subjected because the drug searches exceeded the scope of the patients' consent for medical treatment and the consent was not voluntary under Fourth Amendment standards.

The drug searches here went beyond the scope of the consent to medical treatment the patients executed. *See*

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been necessary." *Ferguson v. City of Charleston*, 186 F.3d 469, 489 (4th Cir. 1999) (Blake, J., dissenting) (App. 31).

[16] The court below noted that Respondents had "agreed throughout this litigation that MUSC is a state hospital and that MUSC employees are therefore government actors." *Ferguson*, 186 F.3d at 477. Despite this concession, Respondents now claim that MUSC and its staff are not state actors and therefore cannot be liable under the Fourth Amendment. Resp. Br. at 15 n.8. In support of their position, Respondents cite *United States v. Attson*, 900 F.2d 1427 (9th Cir.), *cert. denied*, 498 U.S. 961 (1990). Yet *Attson* did not concern the question of state action but rather whether a state actor's conduct constituted a search. The Respondents appear to have confused these two concepts.

Florida v. Jimeno, 500 U.S. 248, 251 (1991) (search based on consent cannot be broader than the express authorized scope of the consent); *id.* at 252 ("suspect may of course delimit as he chooses the scope of the search to which he consents."). Not only did the patients give their consent only to tests conducted for purposes of medical treatment, but their consent was conditioned on the express[17] and implied[18] promise of confidentiality in their physician-patient relationship. The "typical reasonable person," *see id.* at 251, would never have understood that in the context of a doctor's appointment, the confidentiality of which was explicitly and implicitly promised, her consent for medical treatment would constitute consent for a search by the police. Such is not the "kind of risk we necessarily assume" when we seek medical treatment. *Cf. Hoffa v. United States*, 385 U.S. 293, 303 (stating that accused assumed risk that person he was talking to would talk to police). Simply put, a written consent permitting hospital personnel to test urine for medical purposes does not constitute consent to use the urine for police investigations. *See Jimeno*, 500 U.S. at 251; *cf. Von Raab*, 489 U.S. at 666 ("Test results may not be used in a criminal prosecution of the employee without the employee's consent.").

In fact, none of the evidence proffered by Respondents to establish consent -- the hospital consent to medical treatment

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[17] Defendant Shirley Brown testified that MUSC's Patient Handbook, stating "medical records and all communication pertaining to your care are also treated as confidential," *see* PX 105 (App. 75), was shown to all patients who came to MUSC. Brown Tr. 11/21/96 at 20:16-21:3; 27:10-14 (JA 91-94).

[18] The explicit limitation on the scope of the patients' consent is informed by the promise of confidentiality implicit in the physician-patient relationship. *See* Hippocratic Oath (quoted in Albert R. Jonsen et al., *Clinical Ethics* 166 (4th ed. 1998)); *McCormick v. England*, 494 S.E.2d 431, 435 (S.C. 1997) (because disclosures for purposes of medical treatment are "not totally voluntary," in exchange "it is expected that the physician will keep such information confidential.").

forms,[19] the Solicitor's letters,[20] the "To Our Patients" letter,[21] and a public service announcement[22] which aired

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[19] Most of the plaintiffs signed one of the general hospital consent forms. However, even MUSC's General Counsel Joe Good admitted that he was concerned that the consent forms were inadequate. Good Tr. 202:6-9 (JA 513); *see also* PX 28 (App. 72-74) (Letter from MUSC General Counsel Joseph Good to Pat Hudson, Senior Assistant Attorney General (Dec. 19, 1989)) ("I would prefer to have the mother sign an informed consent for drug screen and for the same procedure to be used on her children."). Furthermore, Sandra Powell did not sign a consent form after the Policy was initiated, and so it cannot be claimed that she consented to having her drug test results disclosed to the police on that basis. Powell Tr. 174:21 - 175:4 (JA 1034); DX 95-B.

[20] The Solicitor's Letter was given to patients *after* testing positive for drugs, so it had no bearing on the already-given consent. *See* PX 231(b) (Hale); PX 274, 00-88 (Ferguson); Ferguson Tr. 182 (JA 456) (same); DX 175 (Joseph); PX 283, 00-2830 (JA 1887) (Williams); PX 230(b) (Pear); Pear Tr. 254 (JA 956-57) (same); PX 279, MUSC 3581 (JA 1726) (Nicholson). Furthermore, the Solicitor's Letter does not inform patients that they will be arrested if they test positive for drugs, only that they will be required to attend substance abuse and prenatal appointments. *Id.* Finally, Patients Griffin, Powell, Knight and Singleton were never shown the Solicitor's Letter, probably because it was not yet in use. PX 14 (JA 1285) (Letter from Francis J. Cornely Asst. Solicitor to Nurse Brown indicating that letter not available as of October 24, 1989).

[21] Like the Solicitor's Letter, the "To Our Patients" letter was given *after* a positive drug test. Moreover, not only is there no evidence of when this document came into use, Brown Tr. 35:13-18 (JA 102) (Policy in Plaintiffs' Exhibit 25 not applied "in its fullest extent because all of the letters and videotapes, etc., were not available at that time"), the document itself failed to disclose that urine drug screens were being conducted for law enforcement purposes or that confidential medical information would be revealed to the police. *See* JX 10 (JA 1269) (stating that MUSC will "take action" and "ask for help" if patients continue to use drugs or fail to follow treatment, and describing policy as one of "providing warning, counseling and treatment for pregnant women using illegal drugs," not one of reporting and arresting the women).

[22] The Public Service Announcement ("PSA"), created by the Solicitor's Office and aired on local television stations sometime after March 1990, Condon Tr. 27:19-24, encouraged women to call and speak to counselors at the hospital, and ensured them that if they did so, and stayed with a

after the Policy was instituted -- told the patients that the hospital would turn their medical records over to law enforcement agents if they revealed evidence of drug use. *See, e.g.*, Griffin Tr. 27-29 (JA 567-70); Powell Tr. 149, 151-52 (JA 1011-12, 1013-15); Knight Tr. 121-22, 139 (JA 773-75, 783); Singleton Tr. 52, 71 (JA 1132-33, 1145-46); P. Williams Tr. 238 (JA 1226). Indeed, Respondents deliberately deceived and misled at least one patient by telling her that her urine was being tested to determine if she was dehydrated. Nicholson Tr. 278:8-24, 280:6-16 (JA 899-900, 902).

Thus, the patients' consent was limited to consent to medical treatment, information about which they were told would be kept confidential. The searches of the patients for evidence of a crime cannot be excused based on such explicitly limited consent. Where consent is obtained "by stealth, or through social acquaintance, or in the guise of a business call," the search must be limited to the scope of the consent; otherwise it is no longer consensual but is "against [the] will" of the person searched and therefore violates the Fourth Amendment. *Gouled v. United States*, 255 U.S. 298, 305-06 (1921) (search went beyond scope of consent when man obtained entry into a suspect's home by falsely representing that he intended only to pay a social visit, then proceeded to ransack the suspect's private papers and seize some of them); *id.* at 304-05.[23] This Court's jurisprudence

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drug treatment program they would be *protected* from arrest. DX 148. It neither mentioned the urine drug screens at all nor informed the public that *medical providers* were involved in the criminal process. *Id.*; Tr. Vol. 7 at 1318 (admission by defendants' counsel). Furthermore, only two patients, Petitioners Ferguson and Joseph, reported seeing the PSA. Ferguson Tr. 201 (JA 477-78). Ms. Ferguson testified that she thought she would be *helped* if she went to the hospital, not *arrested*, and neither plaintiff knew that their medical providers would disclose information about their drug use to the police. Ferguson Tr. 207:6-19 (JA 481); Joseph Tr. at 124-25 (JA 753-55).

[23] As the Ninth Circuit held in *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990), "access gained by a government agent . . . violates the fourth amendment's bar against unreasonable searches and seizures if

discussing disclosure of information to informants bolsters Petitioners' case because each of those cases involved searches that did not go beyond explicit limitations placed on the scope of consent. *See Lewis v. United States*, 385 U.S. 206, 209-10 (1966) (in discussing *Gouled*, highlighting the importance of remaining within the scope of consent); *Hoffa*, 385 U.S. at 303; *On Lee v. United States*, 343 U.S. 747 (1952); *see also United States v. Miller*, 425 U.S. 435 (1976); *Securities & Exchange Comm'n v. O'Brien*, 467 U.S. 735 (1984).

Furthermore, where consent to a search is procured through duress or coercion, it is invalid. *See Bumpers v. North Carolina*, 391 U.S. 543, 550 (1968); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973) ("In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.").[24] Here, six of the patients were admitted to the hospital while in labor or experiencing pre-term contractions; Ms. Singleton was admitted immediately after delivering her

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such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation" and when the government agent "misrepresent[s] the scope, nature or purpose" of his or her investigation. *Id.* Even where an officer or undercover agent "conceal[s] his or her identity to obtain an invitation to enter a suspect's home," "the undercover entry must be limited to the purposes contemplated by the suspect." *Id.* (citing *Lewis v. United States*, 385 U.S. 206, 210-11 (1966)); *see also Attson*, 900 F.2d at 1429 (noting district court's finding that defendant "did *not* consent to the taking of blood *for police use*" when he signed the general hospital consent form, but only consented to its use for "medical purposes") (emphasis in original).

[24] The holding for which Respondents cite *Schneckloth* and *Ohio v. Robinette*, 519 U.S. 33, 40 (1996), *see* Resp. Br. at 38-40, is not relevant here. In those cases, the Court merely held that knowledge *of a right to refuse* consent is not a prerequisite of a voluntary consent, although it is one of many factors that can be considered in determining "voluntariness." *Schneckloth*, 412 U.S. at 234; *see also Robinette*, 519 U.S. at 40. These cases did not involve the *scope* of a consent to a search.

child in an ambulance. *Ferguson v. City of Charleston*, 186 F.3d 469, 489 (4th Cir. 1999) (Blake, J., dissenting) (App. 24-26). As Judge Blake noted in dissenting from the judgment below, Respondents have not carried their burden of establishing "whether consent can be voluntary, in a constitutional sense, when given by an indigent, uninsured woman in labor, who is dependent on medical care provided by the state's public hospital." *Ferguson*, 186 F.3d at 489 (Blake, J., dissenting) (App. 31). Even if the patients had known that signing the consent to medical treatment would expose them to chemical surveillance and criminal prosecution, the emergency medical context in which their consent was obtained was inherently coercive.[25] Thus, their signature on a standard hospital consent form did not suspend the warrant and probable cause requirements of the Fourth Amendment.

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[25] Even in non-emergency situations, the South Carolina Supreme Court has recognized that a patient's disclosures to her physician for the purpose of diagnosis and treatment "are not totally voluntary." *McCormick*, 494 S.E.2d at 435.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: August 25, 2000.