No. 10-945

In the Supreme Court of the United States

ALBERT W. FLORENCE, PETITIONER

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a policy of conducting strip searches of all incoming detainees who will be placed in the general prison or jail population is consistent with the Fourth Amendment.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Fourth Amendment permits prison and jail officials to maintain a policy of conducting strip searches of all incoming detainees before they are placed in the general prison or jail population. The Federal Bureau of Prisons (BOP) operates 116 federal prison facilities, which, along with privately managed and contract facilities, house more than 216,000 pretrial detainees and convicted inmates. BOP policy requires all incoming pretrial detainees to be subject to visual body-cavity inspections before they may be placed in the general prison population; an inmate who is not subjected to such a search may not be placed in the general population. The United States

Marshals Service (USMS) operates cell blocks in each of the 94 federal district courthouses, as well as one in the District of Columbia Superior Court, in which it houses federal arrestees, pretrial detainees, and convicted inmates who are in transit between facilities. Although the USMS does not currently conduct visual body-cavity inspections of all arrestees upon intake, USMS policy allows such searches to be conducted in certain circumstances, including where warranted by the type and security level of the institution and its history of contraband. The United States thus has a significant interest in the Court's resolution of the question presented in this case.

STATEMENT

1. In March 2005, a New Jersey state trooper stopped a car in which petitioner was a passenger. Pet. App. 3a. A police records check revealed an outstanding warrant for petitioner's arrest. *Ibid.*; J.A. 89a-90a.[1] Petitioner told the state trooper that the warrant was invalid, but the trooper arrested him and brought him to the Burlington County jail for detention. Pet. App. 3a.

During the intake process at the Burlington County jail, officers reviewed petitioner's paperwork, inventoried his property, and fingerprinted him. J.A. 99a-108a. Petitioner then was required to remove his clothing in

[1] The warrant stemmed from an earlier incident in which petitioner fled the police during a traffic stop, was arrested and charged with obstruction of justice and possession of a deadly weapon, pleaded guilty to hindering prosecution and obstructing the administration of law, and was sentenced to two years of probation and ordered to pay a fine. J.A. 25a-26a, 242a-244a; Burlington Br. in Opp. 3 n.1. When petitioner failed to pay the fine and then failed to appear at a hearing to enforce the fine, the warrant issued. Pet. App. 3a; J.A. 26a, 89a-90a. Petitioner paid the fine before the arrest at issue in this case. J.A. 86a-88a.

front of a corrections officer, take a shower, and put on a jail jumpsuit. J.A. 10a-13a. Burlington County policy required that all incoming detainees who would be housed in the general jail population be subject to a visual observation after they disrobed but before they showered, to allow a corrections officer to examine the detainees for contraband, gang tattoos, injuries, or evidence of disease. Pet. App. 53a-57a, 115a-117a, 125a. The officers testified that petitioner (like all incoming detainees) was subject to this visual observation. J.A. 110a-119a, 161a-166a, 195a-196a, 218a-220a, 229a-231a; see also J.A 10a-13a. Petitioner contends that he was subject to a visual body-cavity inspection, a more thorough type of search where the naked subject typically is required to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. Pet. App. 4a, 52a; J.A. 251a-252a. It is undisputed that during the search, a corrections officer sat an arm's length away from petitioner and did not touch him. Pet. App. 3a.

Petitioner was housed with the general population at the Burlington County jail, where he remained for six days. Pet. App. 3a. The Essex County sheriff's department then moved petitioner to the Essex County jail. *Ibid.* Essex County policy provided that all incoming detainees were required to submit to visual body-cavity inspections. *Id.* at 5a n.2, 140a-142a. Petitioner testified that during the intake process at the Essex County jail, he and four other men were required to enter separate shower stalls, remove their clothing, and shower while being observed by two corrections officers. *Id.* at 3a-4a; J.A. 255a-257a. After the shower, petitioner contends that he was required to open his mouth, lift up his arms, turn around so he was facing away from the officers, lift up his genitals, squat, and cough. Pet. App. 4a; J.A.

256a. Essex County officers acknowledged that petitioner was subject to a visual observation, but disputed that petitioner was subject to a visual body-cavity inspection, J.A. 271a-272a, 291a-292a, and stated that, in any event, only three detainees could be in the shower area at one time and only one officer was assigned to the shower area, J.A. 283a-288a, 302a-304a. After the shower, petitioner put on a jail jumpsuit and joined the general jail population. Pet. App. 4a; J.A. 258a.

The next day, the charges against petitioner were dismissed, and he was released from the Essex County jail. Pet. App. 4a.

2. Petitioner sued the Burlington jail, the Essex jail, and several county officials and entities under 42 U.S.C. 1983. Pet. App. 4a; C.A. App. 118-128 (amended complaint). He raised a variety of constitutional claims, including a Fourth Amendment challenge to the jails' requirement that he remove his clothing in view of corrections officers and expose his body and body cavities as part of the intake process. Pet. App. 4a; C.A. App. 121-125. Petitioner contended that such searches may not be conducted on detainees who were arrested for non-indictable offenses, *i.e.*, offenses punishable by six months or less of imprisonment under New Jersey law, absent reasonable suspicion. Pet. App. 60a.[2] The district court certified a class of individuals arrested for

[2] New Jersey law does not classify offenses as felonies or misdemeanors. Instead, it distinguishes between "crimes"—which are offenses punishable by more than six months of imprisonment—and offenses that are punishable by six months or less of imprisonment. See N.J. Stat. Ann. §§ 2C:1-4, 2C:43-1 (West 2005); *id.* § 2C:43-6 (West Supp. 2011). For all "crimes," the defendant has a right to be charged by indictment. See N.J. Stat. Ann. § 2C:1-4(a) and (b) (West 2005); N.J. Court R. 3:7-2; *State* v. *Senno*, 398 A.2d 873, 877 (N.J. 1979); Pet. App. 53a n.3.

non-indictable offenses and held at the Burlington and Essex jails. J.A. 43a.[3]

The district court then granted summary judgment for petitioner, holding that "blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband [are] unconstitutional." Pet. App. 87a. Although the court acknowledged factual disputes about how intrusive the searches at the Essex and Burlington jails were, *id.* at 51a-66a, it concluded that it need not resolve those disputes because even a policy of conducting brief visual observations of unclothed detainees violates the Fourth Amendment in the absence of reasonable suspicion, *id.* at 64a-65a, 84a.

The district court recognized that in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), this Court upheld a federal detention center's policy of conducting visual body-cavity inspections of detainees after contact visits with outsiders because "the need for the particular search" outweighed "the invasion of personal rights that the search entails." Pet. App. 68a (quoting *Wolfish*, 441 U.S. at 558-559). But the district court determined that the balance of interests in this case yielded a different result. *Id.* at 84a-87a.

3. The district court certified for interlocutory appeal the question "whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment." Pet. App. 46a; see *id.* at 35a-47a. The court of appeals reversed. *Id.* at 1a-32a.

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[3] Because the district court did not resolve the factual disputes about whether petitioner was subject to only a visual observation or also a visual body-cavity inspection at the jails, it certified the class only with respect to the former claim. See Pet. App. 5a n.1.

The court of appeals explained that the touchstone of the Fourth Amendment is reasonableness, a standard that requires "a balancing of the need for the particular search against the invasion of personal rights that the search entails." Pet. App. 8a (quoting *Wolfish*, 441 U.S. at 559). The court recognized that an individual's "privacy is greatly curtailed" when he is incarcerated in a correctional facility, where "'curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of institutional needs and objectives * * * [,] chief among which is internal security.'" *Ibid.* (quoting *Hudson* v. *Palmer*, 468 U.S. 517, 524 (1984)). The court acknowledged that a visual body-cavity inspection constitutes a "significant intrusion on an individual's privacy," but it also determined that the searches at issue were "similar to or less intrusive than those in" *Wolfish* and were conducted "in a similar manner and place as those in" *Wolfish*. *Id.* at 19a-20a (citation omitted).

Turning to the jails' justification for the searches, the court of appeals observed that "'[d]etention facilities are unique place[s] fraught with serious security dangers,'" Pet. App. 20a (quoting *Wolfish*, 441 U.S. at 559; second set of brackets in original), and that New Jersey jails, "like most correctional facilities, face serious problems caused by the presence of gangs," *ibid.* Noting that the "[p]revention of the entry of illegal weapons and drugs is vital to the protection of inmates and prison personnel alike," the court concluded that the jails' interest in preventing smuggling during intake is "as strong as the interest in preventing smuggling after the contact visits at issue in" *Wolfish*. *Id*. at 21a.

The court of appeals disagreed with petitioner's assertion that arrestees are unlikely to be smuggling con-

traband, explaining that "it is not always the case" that arrests are unanticipated and that detainees may "induce or recruit others to subject themselves to arrest * * * to smuggle weapons or other contraband into the facility," especially if certain classes of arrestees may not be strip-searched. Pet. App. 23a. It also rejected petitioner's contention that "jails have little interest in strip searching arrestees charged with non-indictable offenses," explaining that *Wolfish* "explicitly rejected any distinction in security risk based on the reason for the detention." *Id.* at 21a. Finally, the court rejected the suggestion that prison administrators could address smuggling through alternative means. The court emphasized that corrections officials must be afforded great deference in ensuring institutional security. *Id.* at 26a. It further noted that, in any event, the proposed alternatives, such as metal detectors, would not be as effective as the challenged searches in uncovering weapons, drugs, and other contraband. *Id.* at 27a-28a.[4]

Judge Pollak dissented. Pet. App. 29a-32a.

SUMMARY OF ARGUMENT

The Fourth Amendment permits prison and jail officials to conduct visual body-cavity inspections of all detainees who will join the general inmate population.

A. The Fourth Amendment protects individuals against unreasonable searches and seizures. Whether a search is reasonable depends on a balance of the individual's privacy interests and the government's justification for the search. In the prison and jail context, privacy rights are necessarily diminished, and corrections offi-

[4] Neither the district court nor the court of appeals addressed the validity of petitioner's arrest or the lawfulness of his detention. Those issues therefore are not before this Court. See Pet. App. 22a n.7.

cials are afforded wide latitude to ensure the safety and security of their facilities.

Consistent with those principles, this Court has upheld a federal detention facility's practice of conducting suspicionless visual body-cavity inspections of all inmates after contact visits with outsiders. *Bell* v. *Wolfish*, 441 U.S. 520 (1979). The Court explained that, without underestimating the degree to which the searches invaded inmates' privacy interests, the institution's compelling interest in preventing smuggling of weapons, drugs, and other contraband outweighed privacy concerns.

B. The same security objectives that justified the searches upheld in *Wolfish* justify the searches at issue in this case. As in *Wolfish*, the searches at issue consist of visual body-cavity inspections, conducted by trained corrections professionals, and respond to a real and substantial threat that contraband will be smuggled into detention facilities. As in *Wolfish*, the searches are grounded in the need to protect the safety of inmates and officers and maintain institutional security. Petitioner articulates no persuasive reason to believe that an arrestee's initial admission to the general prison or jail population poses a significantly lesser risk than the contact visits at issue in *Wolfish*. On the contrary, there is ample evidence to support the common-sense conclusion that arrestees will avail themselves of any opportunities to smuggle contraband into corrections facilities.

Although petitioner suggests a number of alternative means of addressing the problem, the existence of alternatives does not render the searches unreasonable. In any event, none of petitioner's proposed alternatives has proved as effective. To the extent that difficult judgment calls must be made about how to address the

smuggling problem, corrections officials with the necessary expertise should make those judgments.

C. Petitioner contends that visual body-cavity inspections should not be allowed at intake for "minor" offenders in the absence of individualized reasonable suspicion. Petitioner does not identify which offenses constitute "minor" offenses, and it would be wrong to assume that certain classes of offenders do not pose a smuggling threat. Moreover, exempting one class of offenders from visual body-cavity inspections would encourage others to enlist detainees in that class to smuggle contraband. It is no answer to suggest that the circumstances of the arrest may give rise to reasonable suspicion; jail personnel conducting intake often will lack sufficient information to evaluate the likelihood that the detainee may be carrying weapons or other contraband. Finally, petitioner's approach finds no support in federal policy or practice: Federal Bureau of Prisons policy requires that all incoming detainees undergo visual body-cavity searches before they may be placed in the general prison population, and United States Marshals Service policy authorizes those searches on an institution-wide basis when necessary to address smuggling concerns.

ARGUMENT

PRISON AND JAIL OFFICIALS NEED NOT HAVE INDIVIDUALIZED SUSPICION TO JUSTIFY STRIP SEARCHES OF INCOMING DETAINEES WHO WILL BE PLACED IN THE GENERAL PRISON OR JAIL POPULATION

Prisons and jails are "unique place[s] fraught with serious security dangers," where the smuggling of weapons, drugs, and other contraband poses a serious threat to inmate and officer safety and institutional security.

Bell v. *Wolfish*, 441 U.S. 520, 559 (1979). Based on that threat, the Court in *Wolfish* upheld a practice of conducting visual body-cavity inspections of all detainees in a federal short-term detention facility who had contact visits with outsiders in order to discover and deter the smuggling of weapons, drugs, and other contraband.

This case concerns the constitutionality of similar searches of detainees upon their initial admission to the general population of a prison or jail. As the court of appeals correctly held, the searches at issue in this case are no more intrusive, and no less justified, than the searches at issue in *Wolfish*. In the face of ongoing security threats in prisons and jails, the Fourth Amendment does not impose an inflexible requirement of individualized suspicion. It instead affords corrections officials appropriate latitude to implement those policies and practices they deem necessary to preserve institutional security.

A. The Fourth Amendment Permits Corrections Officials To Conduct Reasonable Searches To Protect Inmates And Officers And To Maintain Institutional Security

1. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. As this Court often has explained, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006); see also, *e.g.*, *Kentucky* v. *King*, 131 S. Ct. 1849, 1856 (2011).

Whether a search is reasonable depends on a weighing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott* v. *Harris*, 550 U.S. 372, 383 (2007) (ci-

tation omitted); see, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977) (per curiam). Not every search must be justified by individualized suspicion. While "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," "the Fourth Amendment imposes no irreducible requirement of such suspicion." *Samson* v. *California*, 547 U.S. 843, 855 n.4 (2006) (internal quotation marks omitted).

2. Incarceration necessarily imposes limits on inmates' constitutional rights, including Fourth Amendment rights. While "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner* v. *Safley*, 482 U.S. 78, 84 (1987), this Court has recognized that "imprisonment carries with it the circumscription or loss of many significant rights," *Hudson* v. *Palmer*, 468 U.S. 517, 524 (1984). That "principle applies equally to pretrial detainees and convicted prisoners." *Wolfish*, 441 U.S. at 546. A detainee retains only those rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974). Internal security is "chief" among those objectives. *Hudson*, 468 U.S. at 424. This Court has thus recognized that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Wolfish*, 441 U.S. at 546.

In the Fourth Amendment context, the Court has made clear that "prisoners have no legitimate expectation of privacy" as against certain practices, such as random searches of their cells. *Hudson*, 468 U.S. at 530; see *id.* at 526-527 (explaining that "[t]he recognition of

privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions," including ensuring the safety of personnel, visitors, and inmates, and preventing the introduction of drugs, weapons, and other contraband into the prison). But the Court has also "assum[ed] * * * that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility." *Wolfish*, 441 U.S. at 558. An assessment of the reasonableness of inmate searches therefore must account for the unique nature of incarceration and the legitimate security needs of correctional facilities.

3. Applying those principles in *Bell* v. *Wolfish*, *supra*, this Court upheld a federal detention center's policy of conducting visual body-cavity inspections of all detainees after contact visits with persons from outside the facility. 441 U.S. at 558. The Metropolitan Correctional Center (MCC) housed a wide variety of detainees, including pretrial detainees, convicted inmates awaiting sentencing or transportation to prison, witnesses in protective custody, and individuals incarcerated for contempt. *Id.* at 524. MCC policy dictated that all detainees undergo visual body-cavity inspections after contact visits. *Id.* at 558. The policy's purpose was to "discover [and] also to deter the smuggling of weapons, drugs, and other contraband into the institution." *Ibid.* The policy did not require corrections officials to have any individualized suspicion before conducting the searches. *Id.* at 558, 560.[5]

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[5] That the MCC policy did not require any level of individualized suspicion was also made clear by the district court's opinion, see *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 146-148 (S.D.N.Y. 1977), aff'd in part and rev'd in part *sub nom. Wolfish* v. *Levi*, 573 F.2d 118

Assuming that the detainees at the MCC "retain[ed] some Fourth Amendment rights," the Court assessed whether the searches were reasonable. *Wolfish*, 441 U.S. at 558. Reasonableness, the Court explained, is assessed by "balancing * * * the need for the particular search against the invasion of personal rights that the search entails," while considering "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559.

Applying that approach, the Court upheld the challenged searches. The Court assumed that the searches constituted significant intrusions on inmates' privacy rights. *Wolfish*, 441 U.S. at 560. The Court determined, however, that the MCC had a paramount interest in maintaining inmate and officer safety and institutional security. It observed that "[a] detention facility is a unique place fraught with serious security dangers" and that "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.* at 559. The Court concluded that officials had a significant interest in conducting the challenged searches to respond to that threat, even though there had been only one confirmed instance of an inmate smuggling items by concealing them in a body cavity in the MCC's four-month history, *id.* at 526, 559, 560; see *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 147 (S.D.N.Y. 1977), aff'd in part and rev'd in part *sub nom. Wolfish* v. *Levi*, 573 F.2d 118 (2d Cir. 1978), rev'd *sub nom. Bell* v. *Wolf-*

(2d Cir. 1978), rev'd *sub nom. Bell* v. *Wolfish*, *supra*, as well as Justice Powell's dissent, which suggested that the Court should have required "at least some level of cause, such as a reasonable suspicion," *Wolfish*, 441 U.S. at 563. See also *Powell* v. *Barrett*, 541 F.3d 1298, 1307-1308 (11th Cir. 2008) (en banc).

ish, *supra*. The relatively low incidence of such smuggling, the Court concluded, "may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises." *Wolfish*, 441 U.S. at 559.

The Court rejected the argument that the availability of less intrusive alternatives rendered the searches unreasonable. The Court explained that "[g]overnmental action does not have to be the only alternative or even the best alternative for it to be reasonable," and, in any event, the primary proposed alternative—metal detectors—"would not be as effective as the visual inspection procedure" because it would not detect "[m]oney, drugs, and other nonmetallic contraband." *Wolfish*, 441 U.S. at 542 n.25, 559-560 n.40.

The Court in *Wolfish* emphasized that "wide-ranging deference" must be afforded to corrections officials. 441 U.S. at 547. The preservation of institutional security, the Court explained, is "[c]entral to all other corrections goals," and judgments about how to achieve that goal "are peculiarly within the province and professional expertise of corrections officials." *Id.* at 546, 548 (citation omitted).

4. Since *Wolfish*, this Court has repeatedly affirmed that courts should play a "very limited role * * * in the administration of detention facilities." *Block* v. *Rutherford*, 468 U.S. 576, 584 (1984). "[P]rison officials," and not the courts, "are to remain the primary arbiters of the problems that arise in prison management." *Shaw* v. *Murphy*, 532 U.S. 223, 230 (2001). Courts should "afford[] considerable deference to the determinations of prison administrators" as they "deal with the difficult

and delicate problems of prison management." *Thornburgh* v. *Abbott*, 490 U.S. 401, 407-408 (1989).

Consistent with the requirement of deference to prison administrators, this Court has clarified that constitutional challenges to prison and jail regulations generally are to be reviewed only for reasonableness. In *Turner* v. *Safley*, *supra*, the Court considered challenges to regulations limiting inmate-to-inmate correspondence and inmate marriages. 482 U.S. at 81. In assessing whether those regulations impermissibly interfered with First Amendment and privacy rights, the Court stated that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.[6]

Safley addressed whether the heightened scrutiny that would normally apply to limitations on certain constitutional rights is appropriate in the corrections context, rather than the appropriate analysis for reviewing a Fourth Amendment claim. Respondents nevertheless contend (Burlington Resp. Br. 26-29; Essex Resp. Br. 25-29) that *Safley* supplies the operative framework in this case. In the end, however, it makes little difference whether the Court analyzes the case under *Wolfish* or *Safley*. The fundamental question is the same under both inquiries: whether the challenged policies are reasonable ones, given the nature of incarceration and the substantial deference owed to the judgments of corrections officials on matters of institutional security.

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[6] This Court has since made clear that the *Safley* standard does not apply to all constitutional challenges to prison regulations. See *Johnson* v. *California*, 543 U.S. 499 (2005) (declining to apply the *Safley* standard to review a State's policy of racially segregating prisoners).

B. Compelling Interests In Maintaining Jail Safety And Security Justify The Searches In This Case

1. This case concerns the constitutionality of searches conducted as part of a standard intake process for admission of an arrestee to the general jail population. Contrary to petitioner's repeated contention (Br. i, 3, 27), this case does not raise the question whether officials may conduct strip searches of any "individual arrested for [any] minor offense no matter what the circumstances" or of "any person detained for any purpose." The court of appeals addressed only the question "whether it is constitutional for jails to strip search arrestees upon their admission to the general population," Pet. App. 1a, and it carefully limited its holding to the jail policies at issue, see *id.* at 28a. Accordingly, this case does not concern searches of individuals who are being held at a jail in a temporary status and who will be sequestered from the general jail population; searches of individuals who have been arrested but have not been brought to a prison or jail; or searches in institutions other than prisons and jails.

The searches at issue here are comparable in scope to those at issue in *Wolfish,* which involved visual inspection of body cavities as part of a required strip search. Compare *Wolfish*, 441 U.S. at 558 n.39, with Pet. App. 3a-4a, and J.A. 251a-252a, 256a-257a. The searches at issue here also are conducted "in a similar manner and place as those in *Bell* [v. *Wolfish*]—by correctional officers at a detention facility." Pet. App. 19a. They are a step in the standard intake process and last only a few minutes. *Id.* at 20a. Further, as in *Wolfish*, the detainee "is not touched by security personnel at any time." 441 U.S. at 558 n.39; see Pet. App. 3a-4a; J.A. 188a. The Burlington jail's policies require that the

searches be conducted by officers of the same sex, "in private," "in a location where the search cannot be observed by persons not conducting the search," "under sanitary conditions," and "in a professional and dignified manner with maxi[mu]m courtesy and respect for the inmate's person." Pet. App. 19a-20a, 125a, 126a, 129a. Similarly, searches in the Essex jail are conducted by officers of the same sex, in a private shower area, and according to detailed procedures. *Id.* at 140a-144a; J.A. 268a-269a, 286a.[7]

2. The intrusion on inmates' privacy interests is no greater than in *Wolfish*. Petitioner contends (Br. 37) that he had a greater expectation of privacy than the detainees in *Wolfish* because MCC inmates had no right to contact visits and therefore had no expectation they would avoid being searched after those visits. But the reasoning of *Wolfish* did not rest on the proposition that MCC detainees had diminished privacy rights because contact visits were a privilege. To the contrary, the Court in *Wolfish* assumed that the challenged searches constituted a significant intrusion on privacy interests, *Wolfish*, 441 U.S. at 560, and expressly declined to address the court of appeals' unchallenged holding that pretrial detainees have a constitutional right to contact visits, see *id.* at 559 n.40. Nor do the later cases peti-

[7] Petitioner suggests (Br. 26-27) that the searches at the Essex jail are conducted in an unreasonable manner because several inmates may be in the shower area at one time and because more than one guard may be conducting the searches. But the record in *Wolfish* also showed that multiple inmates were searched at once, and nothing in the Court's decision suggests that having two officers present, rather than one, makes a search abusive. See J.A. at 76-77, *Wolfish*, *supra* (No. 77-1829) (testimony that officials typically "search[ed] several people"—"[a]t least three"—"at the same time"); see also J.A. 302a-303a (one or two officers are in the Essex jail shower area at once).

tioner cites stand for that proposition; they simply affirm that corrections officials may implement regulations that impinge on inmates' freedom, including restrictions on visitation, in order to ensure the security of the detention facility. See *Overton* v. *Bazzetta*, 539 U.S. 126, 131-132 (2003); *Rutherford*, 468 U.S. at 589. Finally, to the extent petitioner seeks to distinguish *Wolfish* on the ground that the contact visits and the subsequent searches involved some element of consent, that was not a basis for the decision in *Wolfish*, and it does not explain why the intrusion on privacy interests is greater here than in *Wolfish*.

3. The governmental interests served by the Burlington and Essex jails' policies are as significant as in *Wolfish*. The jail policies here, like the MCC policy in *Wolfish*, were designed to prevent security risks posed by the smuggling of weapons, drugs, and other contraband into detention facilities. Compare *Wolfish*, 441 U.S. at 558-559, with Pet. App. 20a; J.A. 124a, 323a, 338a.[8]

This Court has recognized that detainees will take advantage of opportunities "to secrete and import [contraband]," and corrections officials need not wait for a series of security breaches before they take action to deal with that threat. *Wolfish*, 441 U.S. at 559; see *Safley*, 482 U.S. at 89 (prison administrators must have "the[] ability to anticipate security problems"). But there is, in any event, ample documentation of the smuggling problem at intake in the record in this and other

[8] Although respondents offered three security-related concerns that motivated their strip-search policy—detecting and deterring smuggling, identifying gang members, and preventing disease—the court of appeals found that the first involves "the greatest security threat" and is sufficient to justify the jails' policies. Pet. App. 20a-21a.

cases. Essex jail officials reported finding contraband on "newly admitted inmates, inmates returning from court," and "inmates [accepted] from other agencies," and they documented "fourteen investigations of inmates being processed into [that] facility with contraband on their persons in 2007." J.A. 70a-71a. They explained that "contraband is traditionally hidden on the person" during intake—"in a seam of their clothing or in their mouth, in a shoe or in their hair, in their underwear or in an orifice"—and that detainees have "become more ingenious as to where they hide contraband" because they know that "they will be searched upon arrival to a correctional facility." J.A. 71a; see Pet. App. 20a-21a.

Experience in other jurisdictions illustrates the scope of the problem. For example, in one San Francisco jail between April 2000 and April 2005, officials conducting visual body-cavity inspections of incoming arrestees discovered "significant amounts of contraband hidden in and on arrestees' bodies," including concealed weapons such as "a seven-inch folding knife, a double-bladed folding knife, a pair of 8-inch scissors, a jackknife, a double-edged dagger, a nail, and glass shards." *Bull* v. *City and County of S.F.*, 595 F.3d 964, 969 (9th Cir. 2010) (en banc). Officers also found a variety of other items in arrestees' body cavities, including "handcuff keys, syringes, crack pipes, heroin, crack-cocaine, rock cocaine, and marijuana." *Ibid.* One inmate died from drugs obtained within the prison; another inmate "set her clothes on fire with a lighter smuggled into the [jail]"; and another inmate "attempted suicide with razor-blades [he had] smuggled into the jail in his rectal cavity." *Id.* at 967.

These problems are not unique to large cities like San Francisco: news reports from across the country are replete with accounts of arrestees smuggling contraband such as drugs,[9] weapons,[10] and cellular phones[11] into prisons and jails.

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[9] See, *e.g.*, *Deputies: Man Accused of Hiding Cocaine in His Buttocks*, Naples Daily News (Fla.), Nov. 23, 2010, at A8, http://www.naplesnews.com/news/2010/nov/22/deputies-man-accused-hiding-crack-cocaine-his-butt (man arrested on drug charges found with golf-ball-sized bag of crack cocaine in his rectum); Tim Eberly, *Bootlegging Behind Bars: Inmates Use Extreme Measures to Smuggle Drugs, Alcohol into Jail*, Fresno Bee (Cal.), Mar. 2, 2006, at A1, 2006 WLNR 3612174 (woman booked into jail on a warrant "filled two condoms with methadone, tied them, hid them inside her vagina, and used electrical tape to keep them from falling out"); *Granite City Man Accused of Trying To Light Marijuana Cigarette in Jail*, Belleville News Democrat (Ill.), Apr. 18, 2007, at 8B, 2007 WLNR 7263994 (man smuggled marijuana into jail in his rectum, then tore an electrical box apart in an attempt to light a marijuana cigarette); *Kittanning Man Gets 4-8 Years in Jail for Heroin*, Leader Times (Kittanning, Pa.), June 4, 2009, at A3, 2009 WLNR 10717058 (man placed 20 bags of heroin in his rectum before being taken into jail); Sophia Voravong, *Smuggled Cocaine, Marijuana Discovered During Tippecanoe County Jail Book-In*, J. & Courier (Lafayette, Ind.), May 24, 2011, at B3, 2011 WLNR 10331170 (man arrested for marijuana possession found with a small white bag containing cocaine and marijuana in his rectum upon being booked into county jail).

[10] See, *e.g.*, Victor A. Patton, *Investigators Break Up Jail Smuggling Plans: Inmates Found with Contraband Inside their Body Cavities*, Merced Sun-Star (Cal.), Apr. 20, 2010, at A1, 2010 WL 11410027 (inmate hospitalized after trying to smuggle a knife into jail inside his body); Joseph P. Smith, *Jail: Sit and Get Searched*, Daily J. (Vineland, N.J.), July 10, 2010, at A1, 2010 WLNR 2331836 (officers reported that "some inmates cut pockets inside their mouths" in order to smuggle razor blades into the jail).

[11] See, *e.g.*, Thomasi McDonald, *State Says Inmate Hid Cell Phone in His Body*, News & Observer (Raleigh, N.C.), Sept. 22, 2010, at 2B, 2010 WLNR 18770105 (inmate hid red-and-silver "flip-style" cellular

The experience in the federal system is similar. During a recent four-year period in the District of Columbia Superior Court cell block, the United States Marshals Service (USMS) documented at least 30 instances of contraband found on or within the bodies of inmates upon arrival, including narcotics, drug paraphernalia, and a wide variety of weapons, including knives, razor blades, and box cutters. *Bame* v. *Dillard*, 637 F.3d 380, 383 (D.C. Cir. 2011). On one occasion, a female detainee in this cell block "lunged at" a Deputy U.S. Marshal and cut him with a three- to five-inch-long knife that she had "concealed * * * in her vagina." See Compl. attach. at 1, *United States* v. *Washington*, No. 1:10-cr-00169-JDB (D.D.C. Jan. 27, 2010).[12]

The government's interest in detecting and deterring smuggling of contraband at intake is as strong as the interest in preventing smuggling during contact visits.

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phone in his rectum); Lindsay Wise, *Cell Phones Are the New File in a Cake*, Houston Chron., Mar. 17, 2011, at A1, 2011 WLNR 5312345 (official had "an X-ray of an inmate with [a cell phone] in his body cavity, and not only that, but with a charger"). Smuggled phones have been used by prisoners to commit a number of serious offenses, including escape, drug trafficking, and murder for hire. See Tricia Bishop, *Murder on Call*, Balt. Sun, Apr. 26, 2009, at 1A, 2009 WLNR 7913736; Tod W. Burke & Stephen S. Owen, *Cell Phones as Prison Contraband*, FBI Law Enforcement Bulletin, July 2010, at 10; Lisa Trigg, *19 Indicted in Roundup of Alleged Drug Ring: Authorities Say Terre Haute Operation Run out of State Prison in New Castle*, Tribune-Star (Terre Haute, Ind.), Apr. 15, 2010, at C1-C2, 2010 WLNR 7904579.

[12] Petitioner mistakenly suggests (Pet. 14) that the federal view is that visual body-cavity inspections are not required to stop the flow of contraband into prisons and jails. The report petitioner cites does not represent federal policy or experience; rather, it provides one author's conclusion based on his review of the state of the law as of 2007. See William C. Collins, *Jails and the Constitution: An Overview* copyright page (2d ed. 2007).

Petitioner (Br. 28, 36, 38) offers no persuasive reason for distinguishing between the two. See *Powell* v. *Barrett*, 541 F.3d 1298, 1313 (11th Cir. 2009) (en banc) ("[A]n inmate's initial entry into a detention facility" comes "after one big and prolonged contact visit with the outside world."). Although a detainee may have more time to formulate a plan for smuggling in the case of a contact visit as opposed to an arrest, he has less opportunity to obtain contraband (because his visitors must go through security screening) or hide items in his body cavities (because he is being monitored by guards). See *Wolfish*, 441 U.S. at 577-578 (Marshall, J., dissenting); *Levi*, 439 F. Supp. at 140, 147.[13] Moreover, "[n]ot everyone who is arrested is surprised, seized, and slapped into handcuffs without a moment's notice"; "[s]ome people surrender when they are notified that a warrant for them is outstanding," "[t]hose who do not turn themselves in often have notice that officers are coming to arrest them," and even those "who are pulled over and arrested may have time to hide items on their person before the officer reaches the car door." *Powell*, 541 F.3d at 1313-1314. Individuals who self-report may have particular opportunity to smuggle contraband, but smuggling is by no means limited to that group. See pp. 18-21, *supra.*

4. Petitioner repeatedly suggests (Br. 9, 28, 31-32, 39) that the challenged searches are unconstitutional because there are less intrusive alternatives available. That is wrong for two reasons. First, the Fourth Amendment does not require jail officials to use the

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[13] Contrary to petitioner's suggestion (Br. 38), the United States did not argue otherwise in *Wolfish*. Rather, the government explained that while corrections generally monitored contact visits, there was no "individualized monitoring" of each inmate. Gov't Br. at 75-76 & n.57, *Wolfish*, *supra* (No. 77-1829).

least restrictive means to resolve the problem of smuggling at intake. The Fourth Amendment prohibits searches that are unreasonable, and "[g]overnmental action does not have to be the only alternative or even the best alternative for it to be reasonable." *Wolfish*, 441 U.S. at 542 n.25, 558-559 & n.40.

Second, petitioner's proposed alternatives are not equally effective in detecting contraband. Contraband hidden in body cavities and small items hidden on an arrestee's person would not be discovered during a pat-down search. A metal detector would not detect "[m]oney, drugs, and other nonmetallic contraband." *Wolfish*, 441 U.S. at 559-560 n.40; see J.A. 71a. Nor would the "Body Orifice Scanning System" (BOSS chair) detect drugs or non-metallic weapons on an arrestee's person or hidden in a body cavity. See J.A. 333a-334a; see also Pet. App. 27a. And the various laws criminalizing possession of contraband in prison and jails (Pet. Br. 39) plainly have not by themselves been sufficient to stop smuggling. See pp. 18-21, *supra*.

5. To the extent there is any question about the need for the searches at issue, prison administrators' judgments on these matters merit "wide-ranging deference" by the courts. *Wolfish*, 441 U.S. at 547. A court may "disagree[] with the judgment of [corrections] officials about the extent of the security interests affected and the means required to further those interests," but it should not "substitut[e] [its] judgment for that of the expert prison administrators" unless their judgment has "been shown to be irrational or unreasonable." *Id.* at 554, 559 n.40. This Court should decline petitioner's invitation to second-guess the judgments of the corrections officials at issue here.

C. Petitioner's Proposed Rule Is Unworkable And Unsupported By Federal Policy Or Practice

1. Petitioner's proposed rule (Br. 2, 10-12), which would draw a constitutional line between persons who have been arrested for "minor" offenses and those who have been arrested for more "serious" offenses, is neither workable nor consistent with federal policy or practice.

Petitioner offers no definition of a "minor" offense, and he never explains how corrections officials and courts should determine which offenses are "minor" and which are not. In the courts below, petitioner argued that it would violate the Fourth Amendment to conduct suspicionless strip searches of individuals arrested for non-indictable offenses (offenses punishable by six months of imprisonment or less). Pet. App. 4a, 21a-25a, 49a, 60a, 65a, 87a. In his brief to this Court, petitioner refers in passing to "a minor offense" as "a 'non-indictable' offense" under state law, Br. 3, but he does not urge the Court to adopt that definition, or, indeed, any other.[14] He further allows that offenses involving drugs or violence may present different questions. Pet. Br. 10, 17 n.8. Accordingly, it is not at all clear whether a "minor" offense, in petitioner's view, means a non-indictable offense, a misdemeanor, an offense that does not involve drugs or violence, or something else.

2. Petitioner is incorrect in claiming (Br. 31) that individuals arrested for "minor" offenses, however de-

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[14] Petitioner also points out (Br. 34) that New Jersey has a system for classifying persons for purposes of determining housing in detention facilities, but that system simply states that classification depends on a number of factors, and it does not purport to identify more and less serious offenses. See N.J. Admin. Code § 10A:31-22.2 (LexisNexis Feb. 22, 2011).

fined, "are not a remotely material source" of the smuggling problem. Individuals arrested for non-violent, non-drug offenses often have attempted to smuggle contraband into prisons and jails.[15] San Francisco jail officials found contraband during visual body-cavity inspections of "arrestees charged with a range of offenses, including non-violent offenses such as public drunkenness, public nuisance, and violation of a court order." *Bull*, 595 F.3d at 969. Weapons and drugs were uncov-

[15] See, *e.g.*, Diana Bowley, *Inmate Smuggles Joint into Jail*, Bangor Daily News (Me.), Sept. 27, 2006, at B3, 2006 WLNR 16750634 (inmate who self-reported to serve sentence for refusing to submit to arrest smuggled a marijuana cigarette into jail in his rectum); *Man Tried Smuggling Drugs Into Jail by Hiding Them in Rectum, Deputies Say*, Hernando Today (Tampa, Fla.), Mar. 22, 2011, at A2, 2011 WLNR 5655306 (man arrested on probation violation found with methadone, oxycodone, and Xanax in a bag in his rectum); Nicole Marshall, *Third Tulsa Jail Inmate in as Many Weeks Dies*, Tulsa World, Apr. 2, 2010, at A10, 2010 WLNR 6949794 (woman arrested for driving with a suspended license died shortly after her arrival at jail due to a drug overdose from pills she had concealed in a body cavity); Lou Michel, *Gun and Cash Found in Traffic Stop*, Buffalo News, Nov. 7, 2009, at D5, 2009 WLNR 22333928 (crack pipe found in body cavity of man pulled over for failure to wear a seatbelt); Dee Riggs, *Cheeky Inmate Overpacked for Jail Stay, Astonished Cops Say*, Wenatchee World (Wash.), June 3, 2010, at A1, 2010 WL 11410027 (man booked into a county jail on misdemeanor disorderly conduct charge was found with a cigarette lighter, rolling papers, a golf-ball-sized bag of tobacco, a bottle of tattoo ink, eight tattoo needles, an inch-long smoking pipe, and a bag of marijuana all concealed in his rectum); Allan Turner, *Flab Covered the Gun of Jailed Suspect,* Houston Chron., Aug. 7, 2009, at B1, 2009 WLNR 15318536 (man arrested for selling bootlegged CDs was found concealing a nine-millimeter handgun between rolls of fat); Justine Wettschreck, *Conviction Upheld, Petition Denied in Drug Case*, Daily Globe (Worthington, Minn.), Aug. 28, 2010, at A3, 2010 WLNR 17160326 (man passed a plastic bag containing 1.8 grams of methamphetamine in police facility bathroom after being pulled over for traffic violations).

ered during searches in a local cell block that "was used primarily to house not convicts but persons awaiting their appearance in court." *Bame*, 637 F.3d at 387. The Essex jail reported a "great * * * presence of contraband amongst those individuals that have minor offenses." J.A. 348a. "[G]ang members commit misdemeanors as well as felonies," and they are typically "more violent, dangerous, and manipulative than other inmates, regardless of the nature of the charges against them." *Powell*, 541 F.3d at 1311 (citation omitted). Weapons and other contraband are no less threatening in the hands of arrested misdemeanants than in the hands of arrested felons. See, *e.g.*, *Clements* v. *Logan*, 454 U.S. 1304, 1305 (1981) (Rehnquist, J., Circuit Justice) (search policy adopted after "the shooting of a deputy by a misdemeanant who had not been strip-searched").

Even on petitioner's own theory, a holding that persons arrested for "non-indictable" offenses may not be strip searched in the absence of reasonable suspicion would be underinclusive, because it would exempt a number of drug-related and violent offenses. See Pet. Br. 10, 17 n.8. The same would be true of a distinction between misdemeanors and felonies. Any number of drug-related and violent offenses have been classified as misdemeanors, including drug possession,[16] assault and battery,[17] and domestic violence offenses.[18] And either

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[16] *E.g.*, 21 U.S.C. 844(a).

[17] *E.g.*, Md. Code Ann., Crim. Law § 3-203 (LexisNexis Supp. 2010); Mass. Ann. Laws, ch. 265, § 13A (LexisNexis 2010); *id.* ch. 274, § 1; W. Va. Code Ann. § 61-2-9(c) (Supp. 2010).

[18] *E.g.*, Ala. Code § 13A-6-132); (LexisNexis 2005); Ind. Code Ann. § 35-42-2-1.3 (LexisNexis 2009); Kan. Stat. Ann. § 21-3412a (Supp. 2010); Tenn. Code Ann. § 39-13-111 (2010).

distinction would lead to inconsistences among the States, which may classify similar crimes differently.

Moreover, a rule that only persons arrested for certain "serious" offenses may be searched would invite "incarcerated persons * * * to induce or recruit others to subject themselves to arrest on [minor] offenses to smuggle weapons or other contraband into the facility." Pet. App. 23a-24a; see J.A. 382a ("Jail security is only as good as its weakest link.") (report of George M. Camp). This Court acknowledged precisely this risk in upholding a blanket ban on pretrial detainees' contact visits, explaining that if "low security risk detainees" were exempted, they "would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits." *Rutherford*, 468 U.S. at 587. Experience confirms this common-sense conclusion.[19]

3. Limiting searches of incoming inmates to those who have been charged with certain "serious" offenses (at least in the absence of other indications that the inmate may be carrying contraband) also poses administrative difficulties. That is not to say all line-drawing is impossible: the Burlington jail's policy distinguishes between individuals arrested for indictable and non-

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[19] See, *e.g.*, Gregory Gearhart, *Controlling Contraband*, Corrections Today, Oct. 2006, at 24 (officials in Tucson prison received tips that misdemeanants were purposely getting arrested to smuggle drugs inside to friends); Susan Herendeen, *Taped Jailhouse Call Locks Case: Trial Offered Look at Nazi Gang, Drugs and Alliances*, Modesto Bee (Cal.), May 11, 2009, at B2 (Nazi prison gang obtained drugs "from offenders who hide substances in body cavities before they turn themselves in"); Jonathan D. Silver, *Inmate Death Spotlights Prison Drug Trade*, Pittsburgh Post-Gazette, Feb. 28, 2000, at A1 (police commander's account of "people who will get themselves arrested for disorderly conduct" and then "swallow[ing] drugs deliberately before they've gone in").

indictable offenses, see Pet. App. 53a, and federal policy distinguishes between persons arrested for felonies and those arrested for misdemeanors or civil contempt offenses, see pp. 29-30, *infra*. But a constitutional rule that turns on the seriousness of the detainee's offense will inevitably require difficult judgments. In this very case, the district court had considerable difficulty determining whether petitioner should be classified as an indictable or non-indictable offender, because although his most recent arrest was for civil contempt, it was related to a prior incident where petitioner was arrested for obstruction of justice and possession of a deadly weapon. J.A. 25a-28a. The court concluded that "[u]ltimately, the record is not absolutely clear regarding whether [petitioner] was indictable or non-indictable" but that "[o]n balance, * * * it suggests the latter." J.A. 28a. There is no reason to think it will be any easier for corrections officers to distinguish between, for example, violent and non-violent offenses. See J.A. 266a, 272a-273a (testimony that officers do not know basis for arrests or how offenses were classified under state law); see also *Bull*, 595 F.3d at 984-987 (Kozinski, C.J., concurring). The uncertainty resulting from petitioner's approach is particularly inappropriate in light of the potential liability corrections officials face if they guess wrong about what searches are authorized.

4. It is no answer to suggest (Pet. Br. 10, 32) that the circumstances of the arrest themselves could support a finding of reasonable suspicion. Even when jail personnel conducting intake searches know the offense for which the inmate has been arrested, they are not likely to have sufficient information about the circumstances of the arrest. See, *e.g.*, J.A. 383a, 385a (jail staff "rarely receive information about a newly arriving in-

mate that would permit [them] to apply the factors articulated by the courts in determining whether a reasonable suspicion exists") (report of George M. Camp). In some circumstances, jail personnel may need to process many arrestees at once and may have little information about any individual arrestee. See *Bame*, 637 F.3d at 382-383 (individuals arrested in course of mass protest who refused to identify themselves to law enforcement). In the face of limited information, corrections officials may reasonably decide that the best way to preserve institutional security is to ensure that all incoming detainees entering the general population are not concealing weapons or other contraband.

5. Petitioner is mistaken in contending (Br. 2, 14-15, 34) that the federal government concurs in his view that visual body-cavity inspections of "minor" offenders entering the general prison or jail population are unreasonable unless supported by individualized suspicion.

Federal Bureau of Prisons (BOP) regulations permit prison officials to conduct visual body-cavity inspections where "there is reasonable belief that contraband may be concealed on the person, or a good opportunity for concealment has occurred." 28 C.F.R. 552.11(c)(1). The regulations provide that such inspections are authorized, for example, upon the inmate's "leaving the institution" or "re-entry into an institution after contact with the public (after a community trip, court transfer, or after a 'contact' visit in a visiting room)." *Ibid.* In accord with the regulations, BOP policy "requir[es]" that visual body-cavity inspections be conducted when an inmate is "process[ed] * * * into an institution." U.S. Dep't of Justice, BOP, *Program Statement No. 5521.05, Searches of Housing Units, Inmates, and Inmate Work Areas* § 6(b)(1), at 3 (June 30, 1997), http://www.bop.gov/

policy/progstat/5521_005.pdf. There is an exception for individuals arrested for misdemeanors or civil contempt offenses; they are not subject to visual body-cavity inspections unless there is reasonable suspicion that they are concealing contraband or they consent to such a search in writing. U.S. Dep't of Justice, BOP, *Program Statement No. 5140.38, Civil Contempt of Court Commitments* § 11, at 5 (July 1, 2004), http://www.bop.gov/policy/progstat/5140_038.pdf; U.S. Dep't of Justice, BOP, *Program Statement No. 7331.04, Pretrial Inmates* § 9(b), at 6 (Jan. 31, 2003), http://www.bop.gov/policy/progstat/7331_004.pdf. But if a person detained for a misdemeanor or civil contempt offense does not undergo a visual body-cavity inspection, he "must be housed in an area separate from all other inmates" rather than being placed in the general prison population. *Program Statement No. 7331.04*, *supra*, § 9(b), at 6. Accordingly, BOP policy requires that all pre-trial detainees undergo visual body-cavity inspections before they are placed in the general prison population.[20]

USMS policy authorizes visual body-cavity inspections when "there is reasonable suspicion that the prisoner (a) may be carrying contraband and/or weapons, or (b) considered to be a security, escape, and/or suicide risk." *USMS Directives: Body Searches* § 9.1(E)(3)(a) (June 1, 2010), http://www.usmarshals.gov/foia/Directives-Policy/prisoner_ops/pod_policy.htm. But significantly, USMS policy provides that "reasonable suspicion" may be based not on circumstances specific to the individual prisoner, but on the "[t]ype and

[20] Although petitioner (Br. 33) suggests isolating "minor" offenders as an alternative to categorical strip search policies, he does not appear to contend that isolation is a feasible alternative in all or most jail facilities.

security level of [the] institution in which the prisoner is detained" and the "[h]istory of discovery of contraband and/or weapons * * * in the institution in which prisoners are detained." *Id.* § 9.1(E)(3)(a)(5)-(6). Further, USMS policy permits visual body-cavity inspections to be undertaken "as necessary" when a facility is "accepting a prisoner[] from a detention facility, institution, or other inside or outside source * * * due to the prisoner's contact with individual(s) inside or outside the facility and the need for a thorough search for contraband and/or weapons." *Id.* § 9.1(E)(3)(g). Pursuant to that guidance, some United States Marshals in the past implemented policies permitting officers to conduct visual body-cavity inspections of all arrestees entering certain, particularly dangerous cell blocks, although they discontinued the policies out of concern for potential liability, given the uncertain state of the law. See, *e.g.*, *Bame*, 637 F.3d at 382-383.

Different jurisdictions may ultimately choose to adopt different policies. But the Fourth Amendment does not forbid corrections officials from making different judgments about what steps are necessary to respond to security threats in prisons and jails, cf. *Wolfish*, 441 U.S. at 554, and it does not forbid the searches at issue here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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