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.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS ESSEX COUNTY CORRECTIONAL FACILITY AND ESSEX COUNTY SHERIFF'S DEPARTMENT

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Essex County Correctional Facility's alleged former practice of conducting visual searches of all arrestees, all of whom were housed in the general jail population regardless of the offense for which they were arrested, did not violate the Fourth Amendment.

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INTRODUCTION

Petitioner challenges the Essex County Correctional Facility's (ECCF) policy of "strip-searching" all newly admitted inmates upon their entry to jail—and its supposed "visual body-cavity search" of him—by appealing to anything except this Court's established Fourth Amendment jurisprudence.[1] Petitioner contends that because strip-searches (with or without visual body-cavity searches) involve such a significant invasion of privacy, they cannot be conducted on individuals arrested for non-felony offenses unless there is individualized suspicion that each arrestee is carrying contraband.

Petitioner's challenge finds no support in this Court's decisions. This Court's cases addressing constitutional claims against correctional facilities recognize that those institutions have an overriding security interest in protecting inmates and staff against which privacy interests must yield. Because of their uniquely difficult responsibilities, administrators properly receive tremendous deference on the appropriate means for achieving a correctional facility's

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[1] For purposes of this appeal, respondents ECCF and the Essex County Sheriff's Department (together "Essex") do not dispute that requiring inmates to remove their clothes and take a shower upon admission to jail may be termed a "strip search" if the Fourth Amendment were applicable. Accordingly, throughout its brief, Essex refers to that practice as a "strip search." Essex understands, like this Court, that such "strip searches" are distinct from "visual [body] cavity searches." *See Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979) (discussing strip searches upheld by district court and therefore not at issue). "[V]isual [body] cavity searches" may require inmates to "expose their body cavities for visual inspection," *id.*, or to manipulate their genitals for better detection of contraband, *id.* at 558 n.39.

goals. These fundamental tenets doom petitioner's Fourth Amendment challenge.

First, newly admitted inmates do not have a legitimate expectation of privacy against strip searches or visual body-cavity searches upon entry into jail. Founding era practices and this Court's decisions establish that any expectation of privacy against the non-investigatory searches alleged here is not objectively "legitimate" or "reasonable" in light of a correctional facility's paramount interest in ensuring the health and security of inmates and staff.

Second, if the Fourth Amendment applies, the searches alleged here need only be reasonably related to legitimate penological interests and are, therefore, constitutional. Likewise, under the "special needs" framework that governs searches conducted in correctional facilities to serve institutional (not law enforcement) purposes, the alleged searches are reasonable.

The Court should affirm the judgment.

COUNTERSTATEMENT OF THE CASE

A. Intake Procedures At ECCF

1. ECCF is the largest county jail in New Jersey. J.A. 70a. Located in Newark, ECCF has an average daily population of 1923 inmates and admits approximately 25,175 inmates annually. *Id.* ECCF houses prisoners under sentence, detainees held on behalf of the United States government, detainees from other jurisdictions, state-remanded prisoners, and individuals arrested on a range of charges. *Id.*

ECCF is one of the most dangerous jails in New Jersey. J.A. 338a. Located in a large urban area with a high crime rate, ECCF tends to house more indi-

viduals charged with violent crimes or drug-related offenses than other county jails. *Id.* ECCF houses approximately 1000 gang members daily. *Id.* at 70a.

Like all jails, ECCF faces the constant threat of weapons, drugs, and other contraband, which jeopardize the safety and health of inmates and staff. See J.A. 70a-71a, 380a-82a, 385a; *Hudson* v. *Palmer*, 468 U.S. 517, 527 (1984) ("attempts to introduce drugs and other contraband into [facility] premises … is one of the most perplexing problems of prisons"). "Jails are designed to be clean and clear of contraband at all times" in order to ensure the safety of inmates and jail staff. J.A. 382a, 385a. What constitutes "contraband"—and could therefore threaten safety, health, or institutional order—is limited only by the ingenuity of inmates. Joint Appendix at 378-79, *Florence* v. *Burlington*, Nos. 09-3603 *et al.* (3d Cir. filed Nov. 25, 2009) (hereafter "CA3 App."). Contraband is not only weapons and drugs, but includes items that can be bartered and seemingly innocuous items, *e.g.*, "pens, paper clips, [and] chewing gum." *Id.* at 377 (testimony from expert designated by petitioner); J.A. 323a; *accord Dodge* v. *Cnty. of Orange*, 282 F. Supp. 2d 41, 47 (S.D.N.Y. 2003) (opposing experts agree that "money, cigarettes, or even excess prison issue items" "can increase the level of violence and endanger the health, safety and well-being of inmates, staff, and civilians in a correctional facility").

At ECCF, contraband is "found on a daily basis." J.A. 70a-71a. It has been found on newly admitted inmates, inmates returning from court, and inmates arriving from other agencies. *Id.*; see *id.* at 350a. This contraband is typically "hidden on the person," including in one's clothing, mouth, shoe, hair, "underwear or in an orifice." *Id.* at 71a.

2. To combat the introduction of contraband, ECCF in practice follows specific intake procedures for all newly admitted detainees. J.A. 277a, 288a, 297a, 299a, 318a. All detainees are brought into a "pre-booking" area with the necessary arrest or confinement documentation. *Id.* at 265a, 294a, 324a. As they enter, inmates pass through a metal detector. *Id.*[2] Once in the pre-booking area, they are asked identifying questions, and personal belongings are bagged and catalogued. *Id.* at 294a. Inmates are then taken down the hall to the Sheriff's Department, where they are fingerprinted and photographed. *Id.* at 267a, 296a, 327a.

Afterward, they return to a waiting room or holding cell in the pre-booking area that can hold dozens of other inmates. J.A. 268a, 297a-98a, 328a. There, inmates are not segregated by the perceived seriousness or potential punishment of their offense. *Id.* at 297a-98a, 15a. As one class-member explained, "I was put in a holding cell with about 30 other arrestees, being a mix of persons with murder charges, gun charges and traffic violations, among other charges." Certification of Ryan Engstrom, ¶ 3 (D.N.J. filed Apr. 25, 2008) (Doc. 99). In the holding cell, guards observe the inmates, who remain in their street clothes, are not restrained, and may mill about and watch television. J.A. 297a-98a, 301a-02a, 327a-28a. Each inmate also is permitted a 10-minute phone call. *Id.* at 328a. Inmates are not patted down or otherwise searched in the waiting room. *Id.* at 301a-02a, 327a-28a. One guard summarized, "you wouldn't really know [if a person is carrying contraband], because

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[2] Since 2006, inmates must also sit in the Body Orifice Scanning System (BOSS) chair. J.A. 58a, 324a. It is, in essence, a more thorough metal detector. *Id.* at 58a, 334a. Neither device detects drugs or other non-metal contraband. *Id.* at 334a.

[the metal detector] wouldn't go off and he still has his [street] clothes on at this point." *Id.* at 298a.

From this waiting area, an inmate is called up to a series of "stations," where officers gather and enter medical and property information into the computer system and give the inmate a cell assignment. J.A. 268a, 299a-300a, 302a.

After completing this process, the inmate is directed to the shower area. J.A. 268a, 288a, 300a, 302a. It is semi-enclosed and set-off from the rest of the intake area. *Id.* at 287a. It contains five shower stalls (of which ECCF uses only three), each separated by a wall but no front curtain or door. *Id.* at 269a-70a, 287a, 325a-26a, 330a-31a. One inmate is escorted to a shower stall by an officer and instructed to remove all clothing and to take a shower. *Id.* at 272a, 284a-85a, 288a, 305a-06a. The inmate is further instructed to place all clothing into a gray bin and to use the cleaning supplies sitting on a stool in the shower stall. *Id.* at 271a, 284a-86a, 305a-07a, 325a; see also CA3 App. 391 (Essex formerly required inmates to use a delousing agent). Also on the stool are a uniform, towel, undergarments, soap, toothpaste, and other sundries. J.A. 286a. While the inmate showers, the officer searches the clothing in the gray bin for contraband, and sends the inmate's belongings to be held for the period of confinement. *Id.* at 286a, 305a-07a, 309a, 311a, 325a. After showering, the inmate dons an orange jumpsuit. *Id.* at 311a-12a. In the shower area, officers must monitor the inmates "to deter any problems that might happen or occur." *Id.* at 317a.

Petitioner's claims against Essex arise from his alleged experience with this intake procedure.

B. Procedural History

1. In 1998, petitioner was arrested and charged with obstruction of justice and use of a deadly weapon after fleeing police officers in an automobile. J.A. 25a-26a, 239a-42a; see also *Sykes* v. *United States*, 131 S. Ct. 2267, 2273 (2011) (holding that vehicle flight is categorically a violent felony because, *inter alia*, it "'presents a serious potential risk of physical injury to another'" and displays a "lack of concern for the safety of property and persons"). He pled guilty to the lesser crime of hindering prosecution and obstructing the administration of law, see J.A. 26a, 243a, and was sentenced to two years probation and a fine, *id.* at 26a, 244a. According to computer records, petitioner was also sentenced to two days in jail. *Id.* at 393a.

At some point, the State's probation office determined that petitioner had not fully paid the fine, and after petitioner failed to appear at an enforcement hearing, the Essex County court issued a bench warrant for his arrest in April 2003. J.A. 26a, 89a-90a. After the warrant issued, New Jersey's "statewide computerized information system," which gives officers access to "criminal history files for arrest, prosecutorial, and custody information," *id.* at 27a n.7, 148a, showed no change to the 2003 warrant, *id.* at 396a; see *id.* at 392a-93a.

During a traffic stop on March 3, 2005, a state trooper arrested petitioner based on the outstanding warrant. J.A. 391a; Pet. App. 3a, 51a. Despite petitioner's protest against the validity of the warrant and insistence that he had paid the fine, the trooper acting pursuant to the warrant took petitioner to the Burlington County Jail (BCJ). Pet. App. 3a, 51a.

As the lower courts recognized, the parties dispute the intake procedures petitioner underwent at BCJ.

Pet. App. 6a, 63a-65a. Petitioner alleges that during the intake process, BCJ officers "subjected [him] to a strip and visual body-cavity search." *Id.* at 3a, 51a-52a. He claims that an officer, who sat arms-length away, directed him to remove all his clothing and then open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. *Id.* The officer then instructed petitioner to shower. *Id.* Petitioner then was admitted to BCJ, where he stayed for six days. *Id.* Curiously, nothing in the record explains either the delay or any actions petitioner's wife or family made to expedite his transfer to ECCF or to effect his release.

On the sixth day, petitioner was transferred to ECCF. Pet. App. 3a, 52a. Petitioner testified that he spent 20-25 minutes in the above-described holding cell before showering at ECCF, Florence Dep. at 127 (D.N.J. filed Aug. 1, 2007) (Doc. 76), during which time he mingled with a dozen other inmates, *id.* at 123, and placed a telephone call, *id.* at 124.

After leaving the holding room for the shower area, petitioner alleges that he was subjected to a strip- and visual body-cavity search. Pet. App. 3a-4a, 52a. Again, the parties dispute the procedures petitioner underwent. *Id.* at 6a, 63a-66a. Petitioner asserts that ECCF conducted strip- and visual body-cavity searches of him pursuant to a written policy, while Essex maintains that he was only observed by officers while showering but not subject to a visual body-cavity search. *Id.* at 66a-67a. According to petitioner, ECCF officers instructed him and four other arrestees to enter separate shower stalls. *Id.* at 3a-4a, 52a. They were ordered to remove all their clothing and shower in front of two corrections officers. *Id.* Petitioner alleges that after his shower, officers conducted a visual body-cavity search by instructing him

to open his mouth, lift his genitals, turn around (so that he faced away from the officers), and squat and cough. *Id.* Petitioner then donned an orange uniform, visited the nurse, and joined the general jail population. *Id.* The next day the charges against him were dismissed, and he was released. *Id.* His total stay at ECCF was substantially less than 24 hours.

2. Petitioner sued BCJ and related individuals and entities, as well as Essex, under 42 U.S.C. § 1983, claiming that the intake procedures he underwent violated the Fourth Amendment. His governing complaint pleads a single "count" relevant here, which is styled "Unlawful Strip Body Search" and does not distinguish between strip- and visual body-cavity searches. CA3 App. 121; *id.* at 122 (¶ 48). He then sought certification for a class of arrestees "'charged with non-indictable offenses processed at [BCJ and ECCF and] who were directed by … officers to strip naked before those officers … without [the officers] first articulating a reasonable basis that those arrestees were concealing contraband, drugs or weapons.'" J.A. 18a. Petitioner alleged that BCJ and ECCF "'have instituted a written and/or de facto policy, custom, or practice of strip searching all individuals who enter the custody of their Correctional Facilities regardless of the nature of their charged crime'" and that this "'blanket strip search'" without reasonable suspicion violates the Fourth Amendment. *Id.* at 17a. The district court noted that, in addition to the strip-search claims upon which he sought certification, petitioner "alleges he was subject to the functional equivalent of a [visual] body cavity search at each jail" but "does not seek class certification on any claim relating to these allegations." *Id.* at 23a n.5. The district court certified petitioner's class of strip-searched arrestees. *Id.* at 43a.

Petitioner then sought summary judgment on "the issue of law regarding whether" BCJ's and ECCF's alleged "policy of strip searching non-indictable arrestees without reasonable suspicion" violated the Fourth Amendment. Pet. App. 49a. Respondents cross-moved for summary judgment, arguing, *inter alia*, that the searches were constitutional. *Id.* at 50a. The court granted petitioner's motion in part (denying only the request for an injunction) and denied respondents'. *Id.* at 50a, 100a.

The district court acknowledged that there were disputed facts concerning the details of BCJ's and ECCF's alleged search policies and the intake procedures petitioner underwent. See Pet. App. 64a-65a. But it concluded that "[w]hatever the case may be," *id.* at 65a, respondents' policies and procedures "'rose to the level of a strip search' under the Fourth Amendment," *id.* at 6a. The court reached this determination for Essex by relying principally on two ECCF policy documents. *Id.* at 57a. The first, "Order No. 89-17," provides that "upon arrival … all arrestees shall be strip searched and then required to shower." *Id.* It states that "a strip search is to consist of having an arrestee undress completely" while officers "'observe carefully.'" *Id.* Additionally, officers must examine the "arrestee's mouth … ears, nose, hair and scalp … fingers, hands, arms, and armpits; and all body openings and the inner thighs." *Id.* The second document, which superseded Order No. 89-17 in April 2005, states that officers must "'[c]onduct a thorough search of individual inmates'" and ensure that "all arrestees shower during intake." *Id.* (alteration in original). There was no dispute that any intake searches at ECCF were conducted to serve institutional interests, and not done for law enforcement

purposes. *Id.* at 85a; *accord id.* at 18a, 140a, 142a (§ B.6-8); J.A. 15a-16a, 50a.

In entering summary judgment against Essex, the court did not distinguish between petitioner's individual claim that the alleged visual body-cavity searches violated the Fourth Amendment and the class's claim that a strip-search alone violated the Fourth Amendment. Pet. App. 64a ("strip search involves squatting, bending one's buttocks, and ... lifting one's genitalia"); *id.* at 66a ("Essex officers carefully observed the ... [inmate's] body openings"); *id.* at 83a-85a.[3] Based on Essex's purported strip- and visual body-cavity search policies, the court granted summary judgment for petitioner and the class. *Id.* at 87a.

The court first determined that *Bell* v. *Wolfish*, 441 U.S. 520 (1979), is the controlling authority. It then held that both BCJ's and ECCF's "search procedures … do not pass constitutional muster under the *Bell* balancing test." Pet. App. 84a.

The court brushed aside respondents' penological interests justifying those policies. It rejected respondents' showing that the searches uncover gang activi-

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[3] Despite his petition-stage contention that the only theory relevant here is his class-wide strip-search claim, Reply Br. 7 (filed Mar. 9, 2011), petitioner (and his *amici*) repeatedly inject the alleged visual body-cavity searches into their submissions. *E.g.*, Pet'r Br. 6, 18, 30, 32. Indeed, petitioner consistently pressed his visual body-cavity search theory below, despite disavowing it as a class claim. *See*, *e.g.*, Pl.'s Summ. J. Br. 3, 7-8, 11-13, 17-18 (D.N.J. filed June 28, 2008) (Doc. 116-3); Appellee's Br. 2-3, 24, 28 (3d Cir. filed Jan. 11, 2010); Florence Decl. Supp. Class Certification, ¶ 3 (D.N.J. filed Aug. 1, 2007) (Doc. 73) ("Defendants had a custom and policy of strip and body-cavity searching every arrestee"). In any event, both of petitioner's theories fail.

ty and potential health problems because, in its view, such searches are not the least intrusive means for achieving these goals. Pet. App. 85a-86a.

It was equally dismissive of respondents' demonstration that the policies were justified by significant security interests in deterring contraband. Pet. App. 85a-86a. The court noted (at 85a) that Essex submitted an expert report by George M. Camp, whose studies this Court credited in *Turner* v. *Safley*, 482 U.S. 78, 92-93 (1987). Dr. Camp opined that conducting strip searches—including the type of visual body-cavity searches at issue in *Wolfish*, see J.A. 381a-82a, 386a—for all new arrivals is "an essential function in protecting the security and institutional integrity of jail," *id.* at 385a. In fact, non-indictable detainees "can be more dangerous and … more likely to bring in contraband." *Id.* at 380a. He also explained that "interaction and mingling between misdemeanants and felons" make it imperative that all inmates are searched, *id.* at 381a, and that if arrestees know that certain categories of offenders will not be searched, "[t]hese weak links [will be] discovered by the inmate population and exploited to the detriment of both prisoners and staff," *id.* at 382a. Despite this and other evidence—including concessions by the lone expert designated by petitioner, whom petitioner attempted to withdraw once he discovered that the expert's opinions supported respondents' policies—the district court faulted respondents for not submitting "supporting affidavits that detail evidence of a smuggling problem specific to their respective facilities." Pet. App. 87a. It did so despite acknowledging that *Wolfish* stated "that evidence of a smuggling problem is 'of little import' to the analysis." *Id.*

The district court nonetheless certified the following question for interlocutory appeal: whether "'a

blanket policy of strip searching all'" non-indictable arrestees "'upon admission to a county correctional facility'" violates the Fourth Amendment. Pet. App. 40a; see also *id.* at 40a n.4, 7a.

3. The Third Circuit accepted the certified question and reversed. Following *Wolfish*, the court assumed *arguendo* that "detainees maintain some Fourth Amendment rights against searches of their person upon entry to a detention facility." Pet. App. 19a. It then determined that *Wolfish*, not *Turner*, provided the standard of review. See Pet. App. 17a-18a & n.5. Applying *Wolfish*, the court concluded that, even as described by petitioner, "the scope, manner, and place of the searches are similar to or less intrusive than those in" *Wolfish*. *Id.* at 20a.

Turning to the other elements of the *Wolfish* test, the court of appeals concluded that "the Jails' security interests at the time of intake before arrestees enter the general population" outweigh "the privacy interests of the inmates." Pet. App. 28a. Recognizing that the facilities have an undeniable interest in limiting contraband and that *Wolfish* "explicitly rejected any distinction in security risk" between detainees and convicted inmates, *id.* at 21a-22a, the court rejected the argument that "jails have little interest in strip searching arrestees charged with non-indictable offenses," *id.* at 21a; see *id.* at 23a-24a ("'low security risk detainees'" would "take advantage of any gap in security") (citing *Block* v. *Rutherford*, 468 U.S. 576, 587 (1984)). The Third Circuit concluded that *Wolfish*, in which this Court upheld a policy requiring visual body-cavity searches for all detainees without regard to individual circumstances, was simply irreconcilable with petitioner's argument that "individualized suspicion" was required "for each inmate searched." *Id.* at 22a-23a & n.8. Finally, de-

spite declining to apply the *Turner* test, the Third Circuit relied on related principles, citing this Court's "repeated[ ] … emphasi[s] that courts must defer to the policy judgments of prison administrators." *Id.* at 26a (collecting cases); see *id.* at 27a-28a.

SUMMARY OF ARGUMENT

The Court can affirm the Third Circuit's judgment that Essex's intake searches are constitutional on several distinct grounds.

I. The Fourth Amendment does not apply to the intake searches of newly admitted inmates to correctional facilities. The Fourth Amendment only applies to expectations of privacy that are objectively "legitimate" or "reasonable" in light of the security interests of correctional facilities. The founding era practices demonstrate that inmates did not possess an expectation of privacy against strip searches, or even visual body-cavity searches, when entering correctional facilities.

Additionally, this Court's modern Fourth Amendment jurisprudence confirms that newly admitted inmates do not have a legitimate expectation of privacy against the intake searches alleged here. A"right of privacy in traditional Fourth Amendment terms is *fundamentally incompatible* with the close and continual surveillance of inmates … required to ensure institutional security and internal order." *Hudson*, 468 U.S. at 527-28 (emphasis added).

Inmates may be able to challenge conditions of confinement, including abusive or needless searches, under the Due Process Clause or state law. But the loss of privacy as an incident of confinement eliminates the legitimate expectation required to invoke the Fourth Amendment.

II. Even if the Fourth Amendment applied, the searches here are constitutional under the rational-basis standard of review adopted in *Turner*, 482 U.S. at 89-91. *Turner* governs here because the privacy right asserted here is incompatible with proper incarceration. Under that standard, the intake searches are constitutional because they are reasonably related to Essex's legitimate penological goals. Evidence (and common sense), including unrebutted expert opinion, establishes that the intake searches alleged here have a rational connection to Essex's legitimate interest in preventing the introduction of contraband, which can endanger the health and security of inmates and staff and disrupt institutional order. Moreover, any accommodation of the right petitioner asserts would have a harmful effect on ECCF.

Essex's intake searches also are constitutional under *Wolfish*'s "special needs" framework. Where searches serve "specials needs" of institutions—not law enforcement purposes—the Court determines the searches' constitutionality by "balancing … the need for the particular search against the invasion of personal rights." *Wolfish*, 441 U.S. at 559; see generally *Skinner* v. *Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619-20 (1989) (listing *Wolfish* among "special needs" cases). The Fourth Amendment's usual requirements of a warrant, probable cause, or individualized suspicion do not apply.

As in *Wolfish*, the searches here implicate correctional facilities' most critical "special needs." In *Wolfish*, because of the profound institutional interest in preventing contraband, this Court upheld strip- and visual body-cavity searches of all detainees at a jail after contact visits. Because the factors identified in *Wolfish* weigh as much or more in Essex's favor as

they did for the jail in *Wolfish*, the alleged searches are constitutional.

Petitioner's attempts to distinguish his challenge from that in *Wolfish* are unavailing. Petitioner mistakenly relies on "common sense" to try to challenge the evidence left unrebutted below. But *Wolfish*'s recognition that searches indistinguishable from those alleged here are useful, other jurisdictions' experiences with similar search policies, and expert opinions presented here establish that strip- and visual body-cavity searching all newly admitted inmates is the most effective way to limit contraband. The evidence also demonstrates that non-indictable arrestees are just as likely to introduce contraband as major offenders. This is consistent with this Court's rejection of attempts to distinguish the risks inmates pose based on the reason for their detention. See *Block*, 468 U.S. at 587; *Wolfish*, 441 U.S. at 546 n.28.

III. Finally, the Court can affirm the judgment for Essex on the independent ground that the intake searches of petitioner, an inmate transferred to Essex from another jail, satisfy both *Turner* and *Wolfish*. Whatever may be said about intake searches of arrestees, such searches of transferees are constitutional because of the unique danger these individuals pose to correctional facilities.

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT APPLY TO INTAKE SEARCHES OF NEWLY ADMITTED INMATES CONDUCTED FOR INSTITUTIONAL PURPOSES.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and sei-

zures." U.S. Const. amend. IV. But the Amendment only applies to an "expectation of privacy ... that 'society is prepared to recognize as "reasonable."'" *Hudson*, 468 U.S. at 525. That is, "[o]fficial conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Illinois* v. *Caballes*, 543 U.S. 405, 408 (2005) (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 123 (1984)); see also, *e.g.*, *California* v. *Greenwood*, 486 U.S. 35, 39-40 (1988); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 338 (1985). Whether an expectation of privacy is "justifiable" or "legitimate" is an objective inquiry. The Court has "refus[ed] to adopt a test of 'subjective expectation.'" *Hudson*, 468 U.S. at 525 n.7.

A. Newly Admitted Inmates Have No Legitimate Expectation Of Privacy Against Intake Searches That Serve Institutional Interests.

Founding era practices and this Court's application of the Fourth Amendment prove that newly admitted inmates to correctional facilities do not have a legitimate expectation of privacy against intake searches.

1. This Court has recognized that the origin and history of the Fourth Amendment are relevant to its applicability in a particular case, including whether there was "clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 652 (1995); see also, *e.g.*, *Virginia* v. *Moore*, 553 U.S. 164, 168 (2008) (looking to "common law … norms that the Fourth Amendment was meant to preserve").

Here, petitioner cannot claim a legitimate expectation of privacy under the Fourth Amendment because before and after the Amendment was adopted, it was

well-established that inmates entering prisons or jails enjoyed no claim of privacy against intake searches. During the founding era, "[o]nce the suspect was in custody … practice broadened the ambit of permissible search and seizure." 3 William J. Cuddihy, *Fourth Amendment: Origins and Original Meaning* 1516 (1990) (unpublished Ph.D. dissertation). Indeed, it was "a head-to-foot 'strip search' [that] uncovered General Benedict Arnold's treason" in 1780. *Id.* at 1517. This was consistent with historical practice because "[s]earches of persons in the colonies were at least as far-reaching as those in the mother country"—that is, "[a]nyone arrested could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well." 2 Cuddihy, *supra* at 847-48; see also *id.* at 849 (addressing imprisonment of Quakers who were "'stript naked'" and searched); *id.* at 850-51 (discussing "strip searches" of witches).

These practices persisted before and after the Fourth Amendment was adopted. See Scott Christianson, *With Liberty For Some: 500 Years of Imprisonment in America* 97 (1998) (discussing colonial prison where "as soon as a new inmate was admitted, he or she was bathed, provisioned, interrogated, and told the rules"); *id.* at 114 (addressing prison in 1820 where an arriving inmate "was stripped naked by other convicts … under the watchful eyes of a keeper. Then he was subjected to a thorough cleansing process known as the 'ceremony of ablution.'"). Even those who advocate that newly admitted inmates now should be accorded broad Fourth Amendment protections admit: "the history of strip search in America remained clear and consistent before and after the Fourth Amendment; *entry to American jails in the*

last five hundred years cost the arrestee any semblance of privacy." Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case For Reasonable Suspicion*, 81 B.U. L. Rev. 239, 248 (2001) (emphasis added).

These historical practices demonstrate that petitioner had no legitimate expectation of privacy against the alleged searches.

2. Even if historical practices do not "'clear[ly] answer'" whether the Fourth Amendment applies here, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 345 (2001), this Court's modern cases foreclose any claim that inmates have a reasonable expectation of privacy against intake searches conducted to serve institutional, not law enforcement, purposes.

Whether "an expectation of privacy is 'legitimate' or 'reasonable'" for inmates "necessarily entails a balancing" of "the interest of society in the security of its penal institutions and the interest of the prisoner in privacy." *Hudson*, 468 U.S. at 527; see *id.* at 524 ("imprisonment carries with it the conscription or loss of many significant rights"). This follows from the fact that "[w]hat expectations are legitimate varies, … with context." *Vernonia*, 515 U.S. at 654 (citation omitted). Those for whom the state has custodial responsibility necessarily have fewer reasonable expectations of privacy against searches. See, *e.g.*, *id.*; *Samson* v. *California*, 547 U.S. 843, 851-52 (2006); *Bd. of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822, 831 (2002); *Griffin* v. *Wisconsin*, 483 U.S. 868, 875 (1987).

The first side of that balance—the correctional facilities' security interest—is paramount. "A detention facility is a unique place fraught with serious security dangers." *Wolfish*, 441 U.S. at 559; see, *e.g.*, *id.* at

557; *Overton* v. *Bazzetta*, 539 U.S. 126, 129-30, 134 (2003) (violence and drugs); *Block*, 468 U.S. at 586-87 (low-level detainees implicate risks caused by contraband). Thus, the Court has recognized that the interest in "institutional security … is central to all other corrections goals." *Hudson*, 468 U.S. at 527 (internal quotation marks omitted).

Against this paramount security interest and other institutional interests in limiting contraband, an individual's expectation of privacy in jail is more limited than in any other context. "[I]t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Lanza* v. *New York*, 370 U.S. 139, 143 (1962). Thus, the Court thought it "at best a novel argument" to claim that "a public jail ... is a place where [a man] can claim constitutional immunity from search … of *his person*, his papers, or his effects." *Id.* (emphasis added). And *Wolfish* recognized that any privacy expectation that *may* exist in jail "necessarily would be of a diminished scope." 441 U.S. at 557.

More significantly, in *Hudson*, which as here involved non-investigatory searches, the Court "h[e]ld that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell." 468 U.S. at 526; see *id.* at 524-26. The Court explained, in categorical terms, that "[a] right of privacy in traditional Fourth Amendment terms is *fundamentally incompatible* with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Id.* at 527-28 (emphasis added). Rather, "it is accepted by our society that '[l]oss of freedom of choice and *privacy are inherent inci-*

dents of confinement." *Id.* at 528 (quoting *Wolfish*, 441 U.S. at 537) (emphasis added).[4]

In *Samson*, the Court recognized that *Hudson* held "prisoners have no reasonable expectation of privacy." 547 U.S. at 848; see *id.* at 850 n.2. The dissent agreed that "*Hudson* v. *Palmer* does stand for the proposition that '[a] right of privacy in traditional Fourth Amendment terms' is denied individuals who are incarcerated," finding this "is 'necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, ... chief among which is internal security." *Id.* at 862 (alteration in original) (Stevens, J., dissenting); see *id.* at 862-83 (recognizing additional "'institutional needs'").

Petitioner presents no argument why *Hudson*'s holding—echoed by *Samson*—that prisoners lack a legitimate expectation of privacy from non-investigatory searches does not apply equally to the intake searches here. See Pet'r Br. 18-21. Nor could he. *Hudson* stressed that "society would insist that the prisoner's expectation of privacy *always yield* to what must be considered the paramount interest in institutional security." 468 U.S. at 528 (emphasis added).

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[4] Confinement is the most significant aspect of the privacy analysis here. *Cf.* Pet'r Br. 19-20 (mistakenly comparing intake searches to "government's broad authority to impose punishment"). This Court made clear in *Wolfish* that there is no basis for distinguishing between convicts, pretrial detainees (like petitioner), those held for contempt, or even individuals in protective custody. *See* 441 U.S. at 524, 533-36; *see also Block*, 468 U.S. at 587; *Arruda* v. *Fair*, 710 F.2d 886, 887-88 (1st Cir. 1983) (Breyer, J.) (there is no distinction between "dangerous prisoners" and "persons who had not yet even been convicted of a crime").

Hudson's holdings dispose of petitioner's repeated suggestions (at 9, 31-32) that the mere fact that officers observe an inmate naked violates the Fourth Amendment. See *Johnson* v. *Phelan*, 69 F.3d 144, 146 (7th Cir. 1995) (Easterbrook, J.) (no legitimate expectation of privacy precludes guards from monitoring inmates in their cells, the shower, and the toilet because the "monitoring of naked prisoners is not only permissible ... but also sometimes mandatory"); *id.* at 154 (Posner, C.J., concurring in part and dissenting in part) ("the right of … jails to maintain visual surveillance of … prisoners even when naked cannot be doubted in light of the serious security problems in … jails today"). Given "frequent inmate-on-inmate assaults, some of which are of a sexual nature.... round-the-clock visual surveillance of the inmates is crucial and must cover inmates in all areas of the prison, including bathrooms and showers." *Timm* v. *Gunter*, 917 F.2d 1093, 1101-02 (8th Cir. 1990); see *Powell* v. *Barrett*, 541 F.3d 1298, 1313 n.6 (11th Cir. 2008) (en banc).

And, *Hudson* also requires the rejection of any claim that inmates possess a legitimate expectation of privacy against a visual body-cavity inspection upon intake. Granting inmates an expectation of privacy against the type of non-investigatory searches alleged here would be incompatible with the conditions of imprisonment, *Hudson*, 468 U.S. at 527, because it would permit inmates to retain a zone of privacy in which they can secrete small, but dangerous items that threaten institutional order and security.

3. Petitioner acknowledges that a legitimate expectation of privacy is necessary to trigger the Fourth Amendment's protections, Pet'r Br. 18, but just assumes that the test is met here, *id.* at 18-21. That assumption is unfounded for the reasons just explained.

At most, petitioner's assumption that the Fourth Amendment applies rests on his assertion that *Hudson* and *Wolfish* "held that ordinary Fourth Amendment principles govern a claim that jail or prison officials engaged in an unreasonable search of a detainee." *Id.* at 18.

That assertion is demonstrably false.

Neither case holds that the Fourth Amendment applies in this setting, let alone that its "ordinary principles" do. See *infra* § II.B ("special needs" analysis). *Wolfish* assumed *arguendo* that pretrial detainees retained some Fourth Amendment rights. 441 U.S. at 558. *Hudson* went further, holding "that prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches *does not apply* in prison cells" where, as here, non-investigatory searches are at issue. 468 U.S. at 530 (emphasis added); *accord Samson*, 547 U.S. at 850 n.2 (*Hudson* "h[eld] [that] traditional Fourth Amendment analysis [was] inapplicable to the question whether a prisoner had a reasonable expectation of privacy").

B. Newly Admitted Inmates May Pursue Other Remedies For Improper Searches.

Petitioner and his *amici* suggest that the Fourth Amendment must govern intake searches at correctional institutions to remedy searches resulting from (allegedly) improper arrests, see Pet'r Br. 18, 30, or unlawfully delayed presentment to a magistrate, *id.* at 5, 19, and to guard against unduly degrading searches unconnected to institutional interests and that may be psychologically harmful to especially sensitive inmates, *id.* at 6, 18, 21-27; see, *e.g.*, Former N.J. Attnys. Gen. Br. 25-30; Sister Galvin et al. Br. 1-15; Psychiatrists Br. 9-11. They are mistaken.

First, the Fourth Amendment is not necessary or proper to protect against searches resulting from an allegedly wrongful arrest or untimely presentment to a magistrate. A plaintiff who prevails on a false arrest claim, for instance, could argue that any damages caused by the strip- or visual body-cavity searches (or detention generally) were proximately caused by the underlying wrongful arrest.

Second, a pretrial detainee may challenge searches inconsistent with "substantive due process." *Overton*, 539 U.S. at 128. If subjected to "'arbitrary and purposeless'" searches for "'the purpose of … punishment,'" *Block*, 468 U.S. at 584—not institutional interests—inmates may recover under the Due Process Clause, *Wolfish*, 441 U.S. at 535 & n.16; see *Daniels* v. *Williams*, 474 U.S. 327, 330-31 (1986).[5] Here, petitioner alleges that he was searched pursuant to policy, not singled out for an arbitrary or abusive search, and he does not allege that he was searched by female officers or subjected to any especially degrading conduct. Cf. Pet'r Br. 24; Sister Galvin Br. 8-9, 12 (describing searches involving guards of different gender who made lewd comments, as well as taunting during search).

Third, States or localities may "choose[] to protect individual privacy and dignity more than the Fourth Amendment requires," requiring, for instance, individualized suspicion or probable cause to search. *Moore*, 553 U.S. at 174; see *id.* at 180 (Ginsburg, J., concurring in the judgment); see also *Samson*, 547 U.S. at 856 (noting "California's prohibition on 'arbitrary, capricious or harassing' searches"). Although

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[5] Convicts may challenge abusive searches under the Eighth Amendment. *Hudson*, 468 U.S. at 530, 535-36; *Wolfish*, 441 U.S. at 535.

petitioner pleads no state-law claims, he argues that New Jersey and a minority of other States already provide such protections. Pet'r Br. 15-17 & nn.6-7. But see *infra*, 49-50 (petitioner mischaracterizes many such provisions). The availability of state law remedies does not depend on whether the Fourth Amendment applies. See *Moore*, 553 U.S. at 174.

Moreover, if States or localities believe the conditions of confinement associated with incarceration are inappropriate for particular categories of offenders, they can exempt such offenses from arrest. See *id.* at 180 (Ginsburg, J., concurring in the judgment). Legislators may agree, as petitioner's expert testified, that "we shouldn't be bringing certain people into custody." J.A. 344a-45a.

These state-law avenues all are superior to the constitutional rule petitioner seeks. The individualized-suspicion rule petitioner and his *amici* urge wrongly would permit the *federal* constitutionality of a search to hinge on the happenstance of whether a *State* classifies a particular offense as a felony. See Pet'r Br. 2-3, 7 n.2, 28-29; Former N.J. Attnys. Gen. Br. 18 (reasonable suspicion *per se* based on offense); NACDL Br. 3 (same). Their rule is particularly unwieldy because offenses that they contend *automatically* trigger reasonable suspicion would not even subject an individual to arrest in certain jurisdictions. Compare, *e.g.*, Pet'r Br. 10, 32 (drug offenses), with *e.g.*, *State* v. *Taylor*, No. 94853, 2011 WL 1167645, at *5 n.3 (Ohio Ct. App. 2011) ("in certain quantities, marijuana possession is a minor misdemeanor and therefore a non-arrestable offense in the city of Cleveland"), and Cal. Health & Safety Code § 11357(b).

II. THE INTAKE SEARCHES AT ISSUE SATISFY THE FOURTH AMENDMENT.

Even if the Fourth Amendment applies here, the intake searches at issue are constitutional. These searches readily satisfy the governing standard for review of constitutional challenges to penological conditions announced in *Turner* v. *Safely*. Even without *Turner*, these "special needs" searches are constitutional under *Wolfish*'s balancing test that the Third Circuit applied.

A. Intake Searches Of All Newly Admitted Inmates Are Constitutional Because They Are "Reasonably Related To Legitimate Penological Interests."

The standard of review announced in *Turner* controls here, and under that standard, the intake searches at issue are constitutional because they are "reasonably related to legitimate penological interests." 482 U.S. at 89.

1. *Turner* Provides The Standard Of Review.

a. The *Turner* standard governs review of petitioner's Fourth Amendment challenge. In *Turner*, which involved alleged infringements of inmates' First Amendment rights, the Court undertook the "task … to formulate a standard of review for prisoners' constitutional claims." *Id.* at 85. The Court stated that to the extent its prior "'prisoners' rights'" cases, *id.* at 87—including *Wolfish*, upon which it expressly relied—had left any question about the standard governing inmates' constitutional claims, the Court "resolve[d] it … : 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.

Turner's repeated reference to "prisoners' rights" and "constitutional claims" meant that the standard was to apply broadly. This Court subsequently "made quite clear that the standard of review … adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights" and "not just those in which the prisoner invokes the First Amendment." *Washington* v. *Harper*, 494 U.S. 210, 224 (1990).[6] A different standard applies only when the particular right need not "necessarily be compromised for the sake of proper prison administration." *Johnson* v. *California*, 543 U.S. 499, 510 (2005).

The *Turner* standard applies here because the right at issue—privacy under the Fourth Amendment—is entirely "'inconsistent with proper incarceration.'" *Johnson*, 543 U.S. at 510; *Overton*, 539 U.S. at 131 (same). As shown *supra*, 19-21, *Hudson* held that the Fourth Amendment right to privacy is "fundamentally incompatible" with incarceration and its loss is "'inherent'" to confinement. 468 U.S. at 527-28. Administering a correctional facility is "'at best an extraordinarily difficult undertaking'" that "would be literally impossible to accomplish" if inmates retained traditional privacy rights. *Id.* at 527.

b. Petitioner's attempts to avoid *Turner* are unavailing. First, he states—without more—that this Court "has not held that the Fourth Amendment's

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[6] The standard applies equally to jails and prisons. In *Turner*, the Court identified *Wolfish* and *Block*, which exclusively involved jails, and *Jones* v. *N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), which involved prisons and jails, as three of the four cases that informed its understanding of "prisoners' rights." 482 U.S. at 86-87; *see Block*, 468 U.S. at 584, 586 ("reasonably related" test); *cf. Wolfish*, 441 U.S. at 561 (assessing due process challenge to searches under "rationally related" test).

application to jails and prisons is subject to the more deferential analysis of *Turner*." Pet'r Br. 19. But he ignores the language in *Turner* itself and this Court's above-quoted unequivocal statements regarding *Turner*'s scope. See *Harper*, 494 U.S. at 224. Indeed, the appeals courts have largely found that *Turner* governs Fourth Amendment claims. See Essex Opp. 11 & n.3 (filed Feb. 23, 2011) (Second, Fifth, Sixth, Ninth, and Tenth Circuits); see also *Del Raine* v. *Williford*, 32 F.3d 1024, 1041 n.6 (7th Cir. 1994); *accord Jordan* v. *Gardner*, 986 F.2d 1521, 1534-35 (9th Cir. 1993) (en banc) (Reinhardt, J., concurring) (*Turner* "established the general standard for evaluating prisoners' constitutional claims, including fourth amendment claims.").[7]

Petitioner's subsequent emphasis that *Turner* "applies '*only* to rights that are "inconsistent with proper incarceration,"'" Pet'r Br. 19, fares no better. He ignores *Hudson*'s holding that the assertion of a privacy claim severely interferes with proper jail administration. *Supra*, 19-21, 26; compare *Johnson*, 543 U.S. at 510-11 ("Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system").

Second, petitioner contends that neither *Turner*'s nor any special needs standard should apply to intake searches because they "generally occur before a magi-

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[7] The court below stated that, absent express direction from this Court, it would not find that "*Turner* supplanted [*Wolfish*]." Pet. App. 18a n.5. Similarly, the Eleventh Circuit declined to address whether the *Turner* approach "superseded" or "overruled" that in *Wolfish*. *Powell*, 541 F.3d at 1302-03. But as noted *supra*, 25-26 & n.6, *Turner* cited *Wolfish*'s institutional deference principles in announcing the test. *Turner* thus applied and clarified *Wolfish*; it did not supersede, overrule, or supplant it.

strate judge assesses whether there is probable cause for arrest" and before the "government's broad authority to impose punishment" attaches. Pet'r Br. 19-20; see *id.* at 30; see also Nat'l Police Accountability Project Br. 2, 6. Neither standard relies on the government's authority to punish inmates. In *Wolfish*, for instance, the Court explained that a hypothetical "right to be free from punishment" would not warrant a higher standard of scrutiny. 441 U.S. at 534. *Turner*, too, rested on "the need to reconcile … the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration." *Harper*, 494 U.S. at 223-24.

Moreover, petitioner's argument rests on a faulty premise because presentment to a magistrate is only necessary if the arrest was warrantless; if the arrest was executed pursuant to an arrest warrant, then the requirement of a neutral magistrate has been fully satisfied. *Gerstein* v. *Pugh*, 420 U.S. 103, 116 n.18, 124-25 (1975). Here, petitioner was arrested pursuant to a validly issued warrant executed by a State court, see J.A. 89a-90a, notwithstanding his distracting contention that he satisfied the fine underlying it, Pet'r Br. 3, 20. None of the *county* respondents here have anything to do with New Jersey's records systems that gave rise to his 2005 arrest. The jails have precisely the same penological concerns regardless of whether a new inmate was arrested pursuant to warrant. The standard by which their methods of ensuring these goals are furthered should not depend on the vagaries of a state's computer systems.[8]

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[8] The class certified at petitioner's request is not based on a distinction between individuals presented to a magistrate versus

Petitioner's rule suffers from additional flaws. It fails to recognize that the touchstone for the applicable standard of review is "the fact of confinement," *Wolfish*, 441 U.S. at 546; see *Overton*, 539 U.S. at 131-32, which may be met without presentment to a magistrate, *Cnty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-57 (1991) (individual arrested without warrant may be held for at least 48 hours before presentment to a magistrate). Many individuals implicating the same institutional concerns are lawfully admitted to correctional facilities without presentment to a magistrate.

More fundamentally, petitioner's rule seeks to dictate through judicial decree the procedures for how correctional facilities deal with individuals based on the method of arrest—warrant versus warrantless, or whether presented to a magistrate. But this Court has consistently rejected such attempts to have courts manage correctional facilities. *Turner*, 482 U.S. at 89; *Wolfish*, 441 U.S. at 548.

For all these reasons, the *Turner* standard governs petitioner's Fourth Amendment challenge.

2. The Searches At Issue Satisfy *Turner*.

Under *Turner*, the searches at issue are constitutional because they are rationally related to Essex's important penological goals of securing the health, safety, and security of inmates and staff. *Turner* instructs that this Court will "accord substantial deference to the professional judgment of prison administrators," and will uphold searches that "bear a rational relation to legitimate penological interests." *Overton*, 539 U.S. at 132; see *Turner*, 482 U.S. at 89. The "burden" is not on the correctional facility "to

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those who have not. Nor has he distinguished between individuals arrested pursuant to a warrant and those who have not.

prove the validity" of a condition or restriction but on the inmate "to disprove it." *Overton*, 539 U.S. at 132.

Four factors are potentially relevant to determining the reasonableness of the condition or restriction. First, the Court assesses whether the search has a "'valid, rational connection'" to a "legitimate government interest." *Turner*, 482 U.S. at 89; see also *Overton*, 539 U.S. at 132. The "logical connection" cannot be "so remote as to render the policy arbitrary or irrational," and the objective "must be a legitimate and neutral one." *Turner*, 482 U.S. at 89-90. Second, the Court may assess "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, the Court examines the impact "an accommodation of the right" would have on guards, inmates, and the resources of a correctional facility. *Overton*, 539 U.S. at 132; *Turner*, 482 U.S. at 90. Fourth, the Court looks for "ready alternatives" to the regulation. *Turner*, 482 U.S. at 90. This last factor is not "a 'least restrictive alternative' test." *Id.* Rather, the Court assesses whether "an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 91.

Petitioner cannot carry his burden of disproving the existence of such interests; the intakes searches at issue readily satisfy this test.

a. First, there is an unquestionably valid, rational connection between these searches and Essex's legitimate interest in protecting inmates and staff. The Court repeatedly has reaffirmed that ensuring the health, safety, and security of inmates and jail staff are valid, neutral, and legitimate objectives. *E.g.*, *Overton*, 539 U.S. at 133; *Harper*, 494 U.S. at 225; *Hudson*, 468 U.S. at 528; *Wolfish*, 441 U.S. at 561. Furthermore, jails and prisons have an "obligation to

provide prisoners with medical treatment consistent not only with their own medical interests, but also with the needs of the institution," and administrators "have … an interest in ensuring the safety of prison staffs and administrative personnel," as well as "the duty to take reasonable measures for the prisoners' own safety." *Harper*, 494 U.S. at 225.

It is also indisputable that the introduction of contraband jeopardizes these legitimate objectives, and visual body-cavity and strip searches are a valid, rational means of eliminating this danger. "Jails are designed to be clean and clear of contraband at all times" in order to ensure the safety of inmates and jail staff. J.A. 382a, 385a. The introduction of any contraband can be disastrous. Of course, "[d]rug smuggling and drug use"—which involve just one form of contraband—"are intractable problems" for jails and prisons. *Overton*, 539 U.S. at 134; *Block*, 468 U.S. at 588-89. Moreover, even seemingly innocuous items can be fashioned into weapons or merchandise that can be bartered or used to disrupt the health or safety of inmates and staff. See, *e.g.*, CA3 App. 377-79; *supra*, 3.

Strip searching individuals upon intake into jails is a rational response to these problems because it is widely acknowledged that "[c]ontraband control begins at an inmate's intake." Gregory Gearhart, *Controlling Contraband*, 68 Corrections Today 6, 6 (2006). As petitioner's expert has explained, "[w]hen an inmate is admitted to a correctional facility through a process commonly referred to as 'intake,' there is a significant risk that contraband may be brought into the facility," and, thus, the "process of admitting a new inmate to a correctional facility requires a concerted effort to prevent the introduction of contraband into the facility." J.A. 350a. Essex's ex-

pert and others agree. *Id.* at 384a ("the admission process at a jail is far more dangerous than at a prison"); *id.* at 386a ("The admissions area is clearly a pathway through which prisoners and contraband travel into a jail."); *accord Bull* v. *City & Cnty. of S.F.*, 595 F.3d 964, 966-67 (9th Cir. 2010) (en banc). ECCF itself has found contraband "on newly admitted inmates." J.A. 71a.

And according to petitioner's expert and others, strip searching "every individual taken into custody …. would be the most effective way of keeping contraband out of the jail." J.A. 344a-45a; *accord Dodge*, 282 F. Supp. 2d at 49 ("All jail personnel who testified at this trial, including plaintiffs' expert … testified that, if they could, they would strip search every newly arrived inmate, regardless of what brought him or her to their facility, in order to minimize the risk of introduction of contraband."). In Essex's experience, "contraband is traditionally hidden on the person," in "their clothing," "hair," or "underwear." J.A. 71a. Thus, ECCF's intake procedure reasonably requires newly admitted inmates to remove and deposit their clothing into bins, which officers then search for contraband. *Id.* at 271a-72a, 284a-86a, 305a-07a, 325a; see also Pet. App. 142a (§ B.6-8, which describes procedures for searching clothing, wallets and other personal effects). In furtherance of Essex's legitimate health objectives,[9] new inmates then take showers, which officers monitor "to deter any problems that might happen or occur." J.A. 317a; see *Timm*, 917 F.2d at 1101-02 (monitoring jail showers protects against sexual assault); Human Rights

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[9] As petitioner's *amici* explains, proper hygiene for inmates—including a prompt "opportunity to shower" like petitioner had at Essex—is critical to preventing the spread of disease in jail. Med. Soc. NJ Br. 16.

Watch, *No Escape: Male Rape in U.S. Prison*, chs. IV n.208, V (2001).

The visual body-cavity searches that petitioner alleges he underwent at ECCF would also be rationally related to Essex's legitimate penological interests. In *Wolfish*, for instance, this Court credited correctional officials' testimony that "visual cavity searches were necessary" to discover certain contraband and to deter attempts to smuggle contraband. 441 U.S. at 558; see *id.* at 559 n.40. In Essex's experience, contraband is often found in an inmate's "mouth" or "in an orifice," and "detainees have become more ingenious as to where they hide contraband." J.A. 71a. Other jurisdictions report similar experiences. See generally *Wolfish*, 441 U.S. at 559 (justification for search policy can be found "in this record and in other cases" (citation omitted)).

For instance, the Ninth Circuit recognized that San Francisco's strip- and visual body-cavity searches led to the discovery of significant amounts of contraband "'hidden in body cavities,'" including "handcuff keys, syringes, crack pipes, heroin, crack-cocaine, rock cocaine, and marijuana." *Bull*, 595 F.3d at 969. Similarly, Judge Patel upheld strip- and visual body-cavity search policies that had uncovered dozens of instances of contraband, including that "concealed within body cavities." *Johannes* v. *Alameda Cnty. Sheriff's Dep't*, No. C04-458MHP, 2006 WL 2504400, at *4 (N.D. Cal. Aug. 29, 2006), *aff'd*, 270 F. App'x 605, 606 (9th Cir. 2008) (per curiam); see *id.* at *4-6 (crediting officer and expert testimony regarding the effectiveness and deterrent effect of strip searches).

Furthermore, petitioner's expert acknowledged that merely conducting brief visual observations of inmates while showering, rather than the types of "thorough" searches at issue in *Wolfish*, "exposes other

offenders to dangerous contraband." J.A. 371a-72a. Additionally, the unrebutted opinion of Essex's expert, Dr. Camp, establishes that "visual body searches are a most effective deterrent to preventing the introduction of contraband into a jail." *Id.* at 382a. He explained that "[i]f … inmate[s] know[] they will most certainly undergo a visual body search each time they enter the jail, the amount of contraband that actually enters the jail is reduced considerably." *Id.*; see *Wolfish*, 441 U.S. at 558.

This record amply demonstrates that a visual body-cavity search is a logical means to uncover hard-to-find contraband on an inmate's person. Cf. *Wolfish*, 441 U.S. at 559 (upholding policy notwithstanding "there ha[d] been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person").

Performing these searches on non-indictable, not just indictable, arrestees is equally rational. This Court has consistently held that there is no basis to distinguish between detainees based on the reason for their confinement. See *Block*, 468 U.S. at 587; *Wolfish*, 441 U.S. at 546 n.28. The assertions by petitioner and his *amici* that there is no "'opportunity'" for misdemeanor arrestees to obtain and secret contraband ignore this principle, the record, and the nature of jails generally. See, *e.g.*, Pet'r Br. 36-38; Former N.J. Attnys. Gen. Br. 22-25; ABA Br. 9; see also *Bull*, 595 F.3d at 998 (Thomas, J., dissenting) (claiming there is no opportunity to hide something). For instance, Dr. Camp explained that the "charge pending against the inmate simply is not reflective of the danger that the inmate poses to a jail, its staff or inmate population." J.A. 380a. Non-indictable arrestees "can be more dangerous" once "everyone knows" that

they will not be searched because they may be used to smuggle in contraband. *Id.*[10]

Moreover, "[p]re-arrival contact" during the intake process "provides opportunity for felons to give contraband to misdemeanants to avoid detection." J.A. 381a. Petitioner, for example, was exposed to many other offenders before being searched by ECCF, and another plaintiff acknowledged that he was held in the waiting room with 30-some inmates, including those arrested on violent charges. *Supra*, 4, 7; see also *Bull*, 595 F.3d at 979-80 (discussing arrestees' opportunities to smuggle). Requiring jails' search policies to distinguish between categories of arrestees is extremely burdensome, and moreover, it is "not unreasonable to assume" that felony-arrestees—knowing that they alone will be subjected to extensive search—would threaten misdemeanants to secrete their contraband through the search process and return it once they entered the general population. See *Block*, 468 U.S. at 587.

Petitioner's arguments regarding a purported lack of opportunity should be rejected for additional reasons. "Not everyone who is arrested is surprised," and "there are plenty of situations where arrestees would have had at least as much opportunity to conceal contraband as would inmates on a contact visit." *Powell*, 541 F.3d at 1313-14; see Pet. App. 23a-25a. Petitioner's expert has testified that "[a]ny time you have a ... planned reporting to a correctional environment, ... the person … can secret contraband on their

[10] Further, Essex must be able "to protect against potential suicides," and the level of offense gives ECCF no indication of who may commit suicide and who might have the contraband necessary to do so. J.A. 382a; *see Bull*, 595 F.3d at 966-67 (detainee "attempted suicide with razor-blades smuggled into the jail in his rectal cavity").

body." J.A. 344a. Additionally, petitioner is unduly dismissive of the likelihood that to serve their interests in injecting contraband into correctional facilities, gangs—which do not blanch at requiring their members to commit grievous acts as part of initiation rites—would instruct their members to undergo misdemeanor arrests to facilitate smuggling. See *Powell*, 541 F.3d at 1311; cf. *Block*, 468 U.S. at 588 (discussing recruiting of low-level detainees to facilitate smuggling). Finally, petitioner's and his *amici*'s "lack of opportunity" arguments are logically incoherent. They fail to explain why felon arrestees, whom they concede can be subjected to such searches, have any more (or less) opportunity to secrete contraband before admission.

b. The second potential factor—whether an alternative means of exercising the right exists—is not relevant in every case that *Turner* governs and should not be applied here. For instance, in *Harper*, the Court held that the second factor was irrelevant to analyzing whether providing antipsychotics to an inmate against his will deprived him of due process. 494 U.S. at 224-25. There, the inmate had no alternative way to assert the right to refuse the antipsychotics; it was the crux of his complaint. See *id.* The second factor makes little sense when the objective of a challenged policy is to deprive the inmate of a particular right. *Beard* v. *Banks*, 548 U.S. 521, 541 (2006) (Thomas, J., concurring in judgment). Thus, the Ninth Circuit has long held that the factor does not apply to strip- and visual body-cavity searches alleged to violate the Fourth Amendment. *Bull*, 595 F.3d at 973 n.9; *Michenfelder* v. *Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988). This Court should hold likewise.

Even if the second factor applies, inmates have alternative means of exercising whatever residual privacy right they may maintain. This factor turns on whether inmates have alternative means to exercise the deprived right in general. It was, therefore, sufficient that prisoners "retain[ed] the ability to participate in other Muslim religious ceremonies," despite having "no alternative means of attending Jumu'ah," a weekly Muslim service. *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 351-52 (1987); see also *Overton*, 539 U.S. at 135. Here, inmates cannot avoid the loss of privacy during the intake searches, but they can exercise a general right of privacy. For instance, Essex gives each inmate a jumpsuit, towels for after showers, and bed linens, all of which protect their bodily privacy while confined.

c. Third, the impact of accommodating the privacy right that petitioner advances weighs in favor of the reasonableness of the searches. Both experts in this case agree that failing to perform strip- or visual-body-cavity searches results in an increase in the amount of contraband that enters jails. See, *e.g.*, J.A. 345a, 385a. Petitioner's right to be free of these searches thus jeopardizes the health, safety, and welfare of inmates and jail staff.

There are other negative effects of accommodating petitioner's asserted right. As Dr. Camp explained, jail officials will increase the number of pat-down searches and cell shakedowns in an effort to weed out the influx of contraband. This in turn leads to "increased confrontations between inmate[s] and correctional staff that would be unnecessary if strip-searches on all arriving inmates were allowed." J.A. 386a. Moreover, accommodating petitioner's proposed rule would require a significant reallocation of jail resources. See *Overton*, 539 U.S. at 135. Jail officers not

familiar with distinguishing between types of crimes would need training, *e.g.*, J.A. 266a, and entire intake procedures may need to be altered so that officers have an opportunity to determine who may and who may not be searched without reasonable suspicion. See also *Bull*, 595 F.3d at 984-85, 987 (Kozinski, C.J., concurring) (discussing difficulty of administering classification system). By contrast, under respondents' approach, no correctional facility that does not currently perform intake strip- or visual body-cavity searches would be compelled to do so.

d. Fourth, petitioner cannot show an alternative that accommodates the right he seeks at *de minimis* cost to Essex's valid penological interests. Petitioner asserts without support that requiring reasonable suspicion before searching (strip or otherwise) incoming inmates will catch most of the contraband and that this should be used instead of a blanket policy. Pet'r Br. 28. This is not a cost-free alternative. Dr. Camp's expert opinion establishes that requiring reasonable suspicion before searching incoming inmates prevents jails from detecting contraband. J.A. 384a. Non-indictable arrestees could "secret[ ] contraband," which "causes significant security problems that jails, despite their best efforts, cannot solve unless they are permitted to conduct visual body searches on all arriving inmates." *Id.*

Nor are pat-downs, metal detectors, or other devices plausible alternatives to the searches at issue. Pet'r Br. 28, 31-32. As this Court has recognized, metal detectors "simply would not be as effective as the visual inspection procedure." *Wolfish*, 441 U.S. at 559 n.40. Such devices only detect metal objects, not numerous other types of contraband. *Id.*; J.A. 58a, 71a, 334a. The experts in this case agree that the searches at issue are more effective than the alterna-

tives suggested by petitioner. J.A. 344a-45a, 385a. None of these suggested alternatives will therefore have a "*de minimis*" impact on Essex's legitimate penological interests.

Because the searches at issue are reasonably related to ECCF's legitimate penological interests, the judgment should be affirmed.

B. Under *Wolfish*, Strip- and Visual Body-Cavity Searching All Newly Admitted Inmates Is Reasonable.

Even if the Court does not apply *Turner*, *Wolfish* also compels the conclusion that conducting strip- and visual body-cavity searches of all newly admitted inmates into a prison or jail is reasonable under the Fourth Amendment.

1. *Wolfish* Established A Special Needs Exception Applicable Here.

The Fourth Amendment does not always require probable cause or even individualized reasonable suspicion to conduct searches. Rather, "[no] measure of individualized suspicion[ ] is an indispensable component of reasonableness." *Nat'l Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 665 (1989). This Court repeatedly "ha[s] upheld suspicionless searches" when, as here, they serve an institution's "special needs" rather than law enforcement or investigatory purposes. *Vernonia*, 515 U.S. at 655-56 (collecting cases); see also *Bull*, 595 F.3d at 983 (Kozinski, J., concurring) (collecting cases). In the correctional context, *Wolfish* is in effect a specific application of the broader principles enunciated in *Turner*, even though *Wolfish* was decided first. But the analyses in the two cases dovetail, which is why ultimately the outcome is the same under both standards.

Wolfish held that strip- and visual body-cavity searches at correctional facilities present a "special needs" exception to the Fourth Amendment's usual requirements of probable cause or individualized suspicion. See *Skinner*, 489 U.S. at 619-20 (listing *Wolfish* among "special needs" decisions). In *Wolfish*, inmates alleged that, *inter alia*, the federal Metropolitan Correctional Center's policy of conducting strip- and visual body-cavity searches on every inmate following a contact visit with outsiders violated their Fourth Amendment rights. 441 U.S. at 555-58. This Court disagreed. *Id.* at 558-60. Recognizing the "unique[,] ... serious security dangers" facing jail administrators and the "wide-ranging deference" provided to them, *id.* at 547, 559, this Court "rejected the case-by-case approach to the 'reasonableness' inquiry in favor of an approach that determines the reasonableness of contested practices in a categorical fashion," *Hudson*, 468 U.S. at 538 (O'Connor, J., concurring); *accord Vernonia*, 515 U.S. at 664 n.3 (*Wolfish* "displays no stronger a preference for individualized suspicion than we do today."); *Wolfish*, 441 U.S. at 563 (Powell, J., dissenting) (criticizing the majority for not requiring "at least some level of cause, such as a reasonable suspicion").[11]

Under *Wolfish*, like other special needs cases, the Fourth Amendment analysis requires "balancing … the need for the particular search against the invasion of personal rights." *Wolfish*, 441 U.S. at 559; see, *e.g.*, *Vernonia*, 515 U.S. at 652-53 (drug-testing in schools); *Skinner*, 489 U.S. at 619-20 (drug-testing

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[11] Although initially petitioner mistakenly contends that *Wolfish* applied "ordinary Fourth Amendment principles," Pet'r Br. 18, he eventually concedes that *Wolfish* "rejected the lower courts' ruling that such searches always require individualized suspicion," *id.* at 36.

railroad workers); *Colorado* v. *Bertine*, 479 U.S. 367, 371-72 (1987) (inventory search of automobile).

This "special needs" framework governs here and justifies ECCF's policy. Although petitioner argues (at 20) that "'the Fourth Amendment's normal requirement of individualized suspicion'" should apply, he fails to show why the special needs framework does not fit. The alleged searches here serve quintessential special needs as they did in *Wolfish*. This Court already has recognized that correctional facilities must "take all necessary steps to ensure the safety" of staff, inmates and visitors, which require that such facilities "be ever alert to" the introduction of "contraband into the premises." *Hudson*, 468 U.S. at 526-27; see also *Samson*, 547 U.S. at 847; *Block*, 468 U.S. at 587-88.

2. The Searches At Issue Are Reasonable Under *Wolfish* And, Therefore, Constitutional.

The intake searches at issue are constitutional under the special needs framework because the interests at stake are essentially indistinguishable from those in *Wolfish*. The Court must consider four factors: (1) "the scope of the particular intrusion," (2) "the manner in which it is conducted," (3) "the place in which it is conducted," and (4) "the justification for initiating it." *Wolfish*, 441 U.S. at 559.

a. Each of these factors weighs as much in Essex's favor as each did for the jail in *Wolfish*, some even more so.

First, the scope of the particular intrusion supports the reasonableness of ECCF's intake searches. As the Third Circuit recognized, the strip-searches that are the subject of the class's claim are "less intrusive than the visual body-cavity searches" at issue in *Wol-*

fish. Pet. App. 19a. Unlike the searches in *Wolfish*, the classmembers claim that the Fourth Amendment was violated by merely "requir[ing] [them] to undress completely and submit to a visual observation of their naked bodies before taking a supervised shower." *Id.* These actions are thus akin to the strip searches upheld by the district court in *Wolfish* (rather than the visual body-cavity searches it found problematic and were before this Court). As lower courts have recognized, it "is [not] open to serious dispute that inmates of the same sex may be required to shower together and that guards of that sex may watch them while they are showering to prevent any misconduct," and, thus, it "necessarily follows that this type of visual strip search is not unconstitutional." *Powell*, 541 F.3d at 1313 n.6; *accord Phelan*, 69 F.3d at 146; *Timm*, 917 F.2d at 1101-02.

Petitioner's individual claim regarding alleged visual body-cavity searches (at 5-6, 10, 26-27, 32) fares no better. That claim implicates a search no more intrusive than those *Wolfish* upheld. See 441 U.S. at 577 (Marshall, J., dissenting) (searches required men to "raise their genitals," "bend over, spread the buttocks, and display the anal cavity for inspection," and women to "assume a suitable posture for vaginal inspection"); see also *Bull*, 595 F.3d at 968-69 & n.4, 975.[12]

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[12] Petitioner and *amici* assert that these types of searches may be especially traumatic for certain individuals. Pet'r Br. 23-24; Former N.J. Attnys. Gen. Br. 28-29; Psychiatrists Br. 9-11. While any such unique effects are unfortunate, petitioner has no similar allegation of extreme emotional or psychological harm here. Nor does this case involve aggravating circumstances. *See supra*, 7-8. At bottom, petitioner's and his *amici*'s claims about the alleged potential for psychological harm associated with the alleged searches here—indistinguishable from those in *Wol-*

Despite the parallels between this case and *Wolfish*, petitioner contends that the scope of intrusion here "produce[s] a different result" because the inmates in *Wolfish* had "no constitutional right to engage in contact visits," and thus their choice to exercise a "privilege" rather than a "right" resulted in a lessened expectation of privacy. Pet'r Br. 37. Petitioner's proposed distinction rests on a faulty premise. *Wolfish* upheld the searches on the express understanding that "the Court of Appeals, in a ruling that [was] not challenged in this Court …, held that pretrial detainees have a constitutional right to contact visits." 441 U.S. 560 n.40. There is no basis to distinguish the intrusiveness of the searches at issue, regardless of what later cases may have said. See Pet'r Br. 37.

Second, the manner in which the searches allegedly were conducted is not meaningfully different from those in *Wolfish*. In both cases, searches were carried out "by correctional officers at a detention facility." Pet. App. 19a. Here, new inmates are shown to an individual shower stall, where they remove their clothing, hand it to a guard, and shower. Officers only monitor showering inmates as necessary to "deter any problems." J.A. 317a. Even according to petitioner's allegations, the visual body-cavity searches occur when the inmate showers, and he is quickly instructed to don a uniform.

Petitioner's attempt to distinguish this case from *Wolfish* on this second factor is unavailing. He contends that his experience was particularly "'humiliating and degrading'" because he was required to "appear naked in front of multiple officers and several

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fish—are an effort to overrule *Wolfish* without assuming the heavy burden necessary for this Court to reject *stare decisis*.

other arrestees." Pet'r Br. 26-27. Setting aside the factual dispute regarding how the intake searches at ECCF occurred, the *Wolfish* plaintiffs made identical allegations about the lack of privacy. See 441 U.S. at 577 (Marshall, J., dissenting) ("[T]his humiliating spectacle is frequently conducted in the presence of other inmates."). The presence of other individuals did not "render[ ] ... [the policy] unreasonable," Pet'r Br. 26, in *Wolfish* and does not do so here. After all, *Wolfish* made clear that the "[l]oss of freedom of choice and privacy are inherent incidents of confinement." 441 U.S. at 537; *accord Hudson*, 468 U.S. at 528.

Third, the "place" where the alleged searches were conducted mirrors that in *Wolfish*. The searches occurred in a detention facility, which raises "unique" security interests. *Wolfish*, 441 U.S. at 559. Moreover, "[a] detainee simply does not posses the full range of freedoms of an unincarcerated individual." *Id.* at 546.

Finally, the justification for the searches supports the reasonableness of ECCF's policy for the same reasons it did in *Wolfish*. A detention facility is "a unique place fraught with serious security dangers," 441 U.S. at 559, and petitioner rightly concedes that "smuggling into jails is a significant problem." Pet'r Br. 31 (citing *Wolfish*, 441 U.S. at 559). The same considerations identified *supra* § II.B.2 in showing that the searches are rationally related to a legitimate penological interest in preventing contraband likewise demonstrate that the intake searches are reasonable. Petitioner cannot escape the fact that "[e]nsuring security and order at the institution is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both." *Wolfish*, 441 U.S. at 561.

b. Petitioner attacks on Essex's justifications for its intake policy are meritless.

First, petitioner makes the incredible assertions that ECCF's intake searches cannot "deter smuggling," because ECCF's policy forbids suspicionless searches, and ECCF's searches are not "calibrated to uncover contraband, absent reasonable suspicion." Pet'r Br. 27-28. The only basis for arguing that ECCF's policy forbids the searches here is the assertion that ECCF "adopted [this] policy after the events of this case." *Id.* at 28. But the issue is whether the alleged searches are objectively justifiable under the Fourth Amendment, see, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 812 (1996), not how Essex may have changed its search policies afterward.

As for petitioner's claim that ECCF's searches are not designed to uncover contraband, he both misunderstands the Fourth Amendment analysis and takes undue liberty with the record. Again, why the searches were conducted "is irrelevant." *Brigham City* v. *Stuart*, 547 U.S. 398, 404 (2006); *accord Whren*, 517 U.S. at 812. All that matters is whether "'the circumstances, viewed *objectively*, justify the action.'" *Brigham City*, 547 U.S. at 404 (alteration omitted). Moreover, according to the ECCF's policies and practices that the lower courts relied upon, the strip searches unquestionably were intended to uncover contraband. Officers instructed inmates to remove their clothing under close observation and place the clothing in a bin, which was then thoroughly searched for contraband. Pet. App. 141a-42a; J.A. 286a, 305a-07a, 309a, 311a, 325a. If Mr. Florence underwent a visual body-cavity search pursuant to Essex's written-policy, as petitioner contends, that

search also served the purpose of uncovering contraband. See, e.g., J.A. 338a, 323a; Pet. App. 141a-42a.[13]

Second, petitioner erroneously claims that the Court can "assume" that it will be "rare" that non-indictable arrestees will get arrested in order to smuggle in contraband, see Pet'r Br. 28-31, and pretends—contrary to the record—that individuals subjecting themselves to intentional arrests present the only opportunity for new inmates to import contraband following arrest, *id.* at 37-39.

These arguments fly in the face of the unrebutted showings, *inter alia*, that contraband is recovered on admission, that misdemeanants present no lesser risk, that intermingling between inmates before intake searches heightens the risks, that misdemeanants would be recruited to smuggle if not subject to search, and that searching all new inmates is necessary effectively to stop the flow of contraband. *E.g.*, *supra*, 3, 11, 31-36; J.A. 380a-81a, 344a-45a (unrefuted opinions of Essex's expert Dr. Camp and petitioner's own expert). These unopposed showings establish that ECCF faces an opportunity for smuggling not materially distinct from *Wolfish*. This Court should reject petitioner's attempt to mount the challenge he forfeited in the district court.

Additionally, this attack falters because this Court has—consistent with the evidence in this case—

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[13] Unless the Court agrees that, as respondents maintain, the strip- and body-cavity searches are both constitutionally permissible, a remand is necessary to resolve the factual disputes between the parties concerning whether petitioner was subjected to a visual body-cavity search, as well as the scope of any such search. *Compare supra*, 3-5, *with id.* at 7-8; *see also, e.g.*, J.A. 265a, 273a, 281a, 284a, 291a-92a, 306a-14a, 318a (Essex officers' testimony suggesting that a visual body-cavity search was not conducted).

rejected the notion that the security risk presented by inmates can be based on the reason for their detention. *Wolfish*, 441 U.S. at 546 n.28 ("There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates."); see also *Block*, 468 U.S. at 587; *accord Powell*, 541 F.3d at 1309-12; *Kennedy* v. *L.A. Police Dep't*, 901 F.2d 702, 713-14 (9th Cir. 1990) ("a crime's classification as a felony or a misdemeanor alone cannot reasonably forecast an arrestee's stealthful proclivities"), *overruled on other grounds by Act Up!/Portland* v. *Bagley*, 971 F.2d 298 (9th Cir. 1992); *Shain* v. *Ellison*, 273 F.3d 56, 70 (2d Cir. 2001) (Katzmann, J., concurring); *Arruda*, 710 F.2d at 887-88 (Breyer, J.); BOP, Program Statement 5800.12, § 501 (1998) (stating that "[d]etention facilities receive many inmates directly from the community with often little or no background information …, extreme caution must be exhibited and all inmates must be processed as if they are maximum custody inmates").

Third, relying on the federal government's search policies, as well as various states' laws governing searches, petitioner argues that suspicionless intake searches of inmates arrested for minor offenses do not serve institutional needs and thus individualized suspicion is required. Pet'r Br. 27, 28-29. The sources he cites do not support the standard he promotes.

Petitioner, for example, falsely claims that "[e]very relevant division of the U.S. Department of Justice concurs" with his view that suspicionless searches of minor offenders are unnecessary and instead individualized suspicion is required. Pet'r Br. 14; see *id.* at 29. Even if this Court could ignore the likelihood that whatever policies the federal government adopted reflected the circuits' constitutional rulings prior to the Eleventh Circuit *en banc* decision in *Powell*, see Pet.

for Cert. 13-16, neither the Marshals Service (USMS) nor the Bureau of Prisons (BOP), for instance, takes the categorical position outlined by petitioner.

While suggesting that USMS always requires individualized reasonable suspicion to conduct strip- and visual body-cavity searches, see Pet'r Br. 14, petitioner later quotes without discussion USMS's policy that, in fact, permits strip- and visual body-cavity searches based on no more than the "'[t]ype and security level of institution in which the prisoner is detained'" or a "'[h]istory of discovery of contraband … *either* on the prisoner individually *or in the institution* in which prisoners are detained,'" *id.* at 33 n.12 (quoting USMS Service Directive § 9.1(E)(3) (2010)) (emphasis added). This is the antithesis of a policy requiring individualized suspicion to search inmates arrested for minor offenses.

Indeed, petitioner fails to acknowledge that in defending its visual body-cavity searches of misdemeanor arrestees on qualified immunity grounds, USMS quoted the very language noted above and stated that its "policy itself, like *Bell* [v. *Wolfish*], specifically permitted a categorical analysis of the need to conduct a strip search." Br. for Appellant at *31, *Bame* v. *Dillard*, 637 F.3d 380 (D.C. Cir. 2011) (No. 09-5330), *available at* 2010 WL 5675793; see *Bame*, 637 F.3d at 386 (granting summary judgment based on qualified immunity and noting that "nothing in *Bell* requires individualized, reasonable suspicion before strip searching a person entering a detention facility").

Additionally, contrary to petitioner's claims (at 14), BOP's regulations permit "a visual search [*i.e.*, visual body-cavity search] where there is a 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) (emphasis added); see BOP, Pro-

gram Statement 5521.05, § 6(b)(1) (1997) (discussing regulation); *Powell*, 541 F.3d 1308-09 (same, and concluding that a "'good opportunity'" exists "when an inmate is processed into the facility for the first time"). Furthermore, any inmate not subjected to a visual body-cavity search "must be housed in an area separate from all other inmates." BOP, Program Statement 7331.04, § 9(b) (2003).

Petitioner's invocation of state law also fails to support his plea for individualized suspicion in the face of the jails' institutional interests. See Pet'r Br. 15 & n.6. The overwhelming majority of states do not require probable cause or individualized suspicion to conduct strip- and visual body-cavity searches. As to the 17 state provisions petitioner references, *nine* seemingly would not apply to the circumstances presented here.[14] Moreover, contrary to petitioner's arguments, New Jersey did not unequivocally prohibit the searches alleged here. The parties disputed below whether state law was violated. See Appellants' Br.

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[14] Four states permit visual searches at intake prior to joining the general jail population. *See* Ohio Rev. Code Ann. § 2933.32(A)(2), (B); Va. Code Ann. § 19.2-59.1(G); Kan. Stat. Ann. § 22-2524(b); *Bull* v. *City & County of San Francisco*, No. C 03-01840 CRB, slip. op. at 20-23 (N.D. Cal. Sept. 22, 2005) (regarding Cal. Penal Code § 4030). Several more exempt persons detained or remanded pursuant to a court order and thus may not apply to searches of detainees, like petitioner, arrested pursuant to a bench warrant. *See* Conn. Gen. Stat. § 54-33*l*(g); 725 Ill. Comp. Stat. 5/103-1(j); 26-239-1 Me. Code R. §§ I, V; *see also* Va. Code Ann. § 19.2-59.1(E). In Tennessee, once an arrestee is transferred to jail custody, the regulations give additional discretion to jail administrators and require consideration of institutional factors in assessing the reasonableness of the search. Tenn. Code Ann. § 41-4-140(a)(1)-(2); Tenn. Corr. Inst. R. 1400-1-.07(1)-(5). And Kentucky provides that reasonable suspicion arises when, as here, an inmate is "transport[ed]" from one institution to another. 501 Ky. Admin. Regs. 3:120 § 3(1)(b)(4).

at *17, *Florence*, 621 F.3d 296 (3d Cir. 2010) (No. 09-3661), 2009 WL 6842032 (arguing compliance). Moreover, petitioner concedes that New Jersey authorizes strip searches of arrestees "who have a history of violence or a prior criminal conviction," Pet. for Cert. 20, but fails to mention that he was arrested and charged with a violent felony before ultimately pleading guilty to a lesser offense, *supra*, 6; *Sykes*, 131 S. Ct. at 2273. Additionally, petitioner and his *amici* neglect to mention that the state law provision upon which he relies, N.J. Stat. Ann. § 2A:161A-1(b), is subordinate to "any procedures of the State's penal institutions," *id.* § 2A:161A-9, which include ECCF and its written policies about which petitioner complains. See *State* v. *Hughes*, 553 A.2d 349, 353 (N.J. Super. Ct. App. Div. 1989) (jails are "not only … county institution[s] but [are] also part of the State's overall complex of correctional facilities"); Pet. App. 92a (similar).

Fourth, petitioner highlights the district court's odd statement that "respondents produced no evidence 'that detail[s] evidence of a smuggling problem specific to their respective facilities.'" Pet'r Br. 29 (alteration in original). As even the district court recognized, Pet. App. 87a, *Wolfish* does not impose such a requirement. Moreover, it is indisputable that contraband smuggling is a problem for all jails, *supra*, 3, 31, *and* Essex submitted a memorandum stating that "contraband [is] found on a daily basis" at ECCF, including on "newly admitted inmates." J.A. 70a-71a. There is no basis to deny that contraband smuggling presents a serious risk for Essex and justifies the search policies.

Fifth, petitioner suggests that "numerous alternatives exist" to the intake searches at ECCF and that this undermines ECCF's justifications for its policy.

Pet'r Br. 31-34. *Wolfish* rejected this line of argument, explaining that "[g]overnmental action does not have to be the only alternative or even the best alternative to be reasonable, to say nothing of constitutional." 441 U.S. at 542 n.25; see *id.* at 551 n.32. The Court has since repeatedly rejected a less intrusive means requirement. *E.g.*, *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2632 (2010); *Hudson*, 468 U.S. 527-28; *Block*, 468 U.S. at 590 n.10. Regardless, petitioner's claims fail because, as *Wolfish* recognized, "assuming that the existence of less intrusive alternatives is relevant ... , [they] would not be as effective." 441 U.S. at 559 n.40; see J.A. 71a, 386a; *supra*, 36-37. Petitioner's argument thus improperly invites the Court to inquire "how best to operate a detention facility" rather than to apply "constitutional requirements." *Wolfish*, 441 U.S. at 539.

Finally, petitioner asserts that "if respondents were correct that suspicionless strip searches are necessary to deter the smuggling of contraband into jails, there would be evidence of that fact from other facilities around the country in which that practice has been banned for decades." Pet'r Br. 39. Again, petitioner ignores the record. Dr. Camp—unrebutted—explained that the searches alleged here "provide an essential deterrent to inmates who are considering whether to try to smuggle contraband into a correctional facility." J.A. 382a, 385a. Furthermore, it would be extraordinarily difficult to demonstrate precisely how contraband entered a facility once inside or the extent to which a particular policy has deterred smuggling, and this Court has never required such showings in crediting the interest in deterrence. See *Wolfish*, 441 U.S. at 559; *Block*, 468 U.S. at 587-89. To the extent that petitioner suggests that conducting strip searches is an "exaggerated … re-

sponse" to the problem, he has "not met [his] heavy burden" of showing this to be the case. *Wolfish*, 441 U.S. at 561.

Ultimately, petitioner fails to offer any meaningful way to distinguish *Wolfish*. Accordingly, the Court should affirm the Third Circuit because the privacy intrusion occasioned by the intake searches at issue is outweighed by jails' institutional interests. *Id.* at 558.

III. IN ALL EVENTS, ESSEX IS ENTITLED TO SUMMARY JUDGMENT BECAUSE SUBJECTING TRANSFEREES TO THE SEARCHES SATISFIES *TURNER* AND *WOLFISH*.

Summary judgment for Essex can be affirmed on the independent ground that strip- and visual body-cavity searches of inmates, like petitioner, transferred from other correctional facilities satisfy *Turner* and *Wolfish*. Transferees have greater opportunity to smuggle contraband than individuals confined immediately after arrest and greater need to secrete the contraband.

Prior to his transfer to ECCF, petitioner was confined at BCJ for six days and intermingled with other inmates in the jail. Pet. App. 3a, 51a-52a. Petitioner alleges that following his transfer to ECCF, he was strip-searched and subjected to a visual body-cavity search.

Assuming the Fourth Amendment applies, searching petitioner upon his transfer to ECCF was constitutional. Whatever the merits of petitioner's and his *amici*'s suggestions about the implausibility of newly arrested individuals secreting contraband prior to search, see, *e.g.*, Pet'r Br. 29, 38-39; NACDL Br. 2, 9; Former N.J. Attnys. Gen. Br. 22-25, the argument

has no force in the post-transfer setting. This is because detainees have access to contraband in transferor institutions, see, *e.g.*, *Wolfish*, 441 U.S. at 559, and their lack of privacy while confined makes it imperative to conceal such contraband on and in their persons. As another court recently explained, "'[a] detainee who has been incarcerated in another facility has potentially been exposed to contraband, especially if the facility has lenient procedures with respect to court appearances, contact visits, medical programs, and work programs.'" *Jackson* v. *Herrington*, No. 4:05-cv-186, 2008 WL 1897729, at *3 (W.D. Ky. Apr. 28, 2008), *aff'd*, 393 F. App'x 348 (6th Cir. 2010) (per curiam), *cert. denied*, 131 S. Ct. 1479 (2011).

Additionally, the risk that a detainee will obtain and secrete contraband is heightened by the nature of confinement. For instance, petitioner's *amicus* correctly recognizes: "Even detainees charged with minor offenses may become enmeshed in smuggling schemes as a result of interactions with other prisoners once inside the facility." ABA Br. 16. Given the violence endemic to many jails, an individual who may not have been predisposed to carry, let alone secrete, a weapon prior to arrest may obtain one for self-defense at the transferor facility and secrete it for transfer. Similarly, because drug addiction is prevalent, individuals may obtain and secrete drugs for personal use after days spent in one jail before transfer to another. Detainees also may obtain and secrete contraband because prohibited items can be used to barter for protection or other favors from fellow inmates. See, *e.g.*, Todd R. Clear et al., *American Corrections* 294-95 (9th ed. 2011); Joycelyn M. Pollock, *The Social World of the Prisoner in Prisons: Today and Tomorrow* 218, 237 (Joycelyn M. Pollock ed., 1997). For all these reasons, "the risk of contraband

traveling from one prison to another is real, and presents a significant threat to prison security." *Watsy* v. *Ames*, 842 F.2d 334 (6th Cir. 1988) (table), *available at* 1988 WL 24978, at *4 n.1 (upholding policy that subjected transferees to "'visual inspection of the entrance to the vagina and the rectal cavity'").

Accordingly, strip-searches and visual body-cavity searches of transferees are both reasonably related to legitimate penological objectives and reasonable under the circumstances. See *Turner*, 482 U.S. at 89-91; *Wolfish*, 441 U.S. at 559. Indeed, two circuits upon which petitioner relies (at 33 n.12) for the proposition that strip-searches of all new arrestees violate the Fourth Amendment hold that it is constitutional to conduct strip- and visual body-cavity searches of all transferees. See *Jackson*, 393 F. App'x at 355; *Peckham* v. *Wis. Dep't of Corr.*, 141 F.3d 694, 695 (7th Cir. 1998); *Watsy*, 1988 WL 24978, at *4 n.1.

The Ninth Circuit held similar searches were constitutional even before its en banc decision in *Bull*. *Nunez* v. *Duncan*, 591 F.3d 1217, 1227-28 (9th Cir. 2010) (visual body-cavity searches upon inmates' return from work detail); *Johannes*, 270 F. App'x at 606 (visual body-cavity searches after transfer to jail from hospital and courthouse). So too have the First Circuit (per then-Judge Breyer) and Southern District of New York (per then-Judge Sotomayor). *Arruda*, 710 F.2d at 887-88 (upholding visual cavity searches when inmates return from libraries, infirmaries, or worksites, even those located on correctional facility grounds); *Shabazz* v. *Pico*, 994 F. Supp. 460, 473 (S.D.N.Y. 1998) (upholding policy requiring visual body-cavity searches before inmates' transfer to other facilities), *aff'd*, 205 F.3d 1324 (2d Cir. 2000) (per curiam) (table).

Consistent with these decisions, BOP suggests that transfer alone provides a legitimate basis for such searches. "[A] visual inspection of all body surfaces and body cavities" is appropriate when an inmate is "leaving the institution" or "re-ent[ering] into an institution." 28 C.F.R. § 552.11(c). BOP guidance commands: "A thorough visual search shall be conducted by R&D staff on the inmate and his/her clothing prior to relinquishing custody of the inmate." BOP, Program Statement 5800.12, § 312. "Staff must exercise *extreme caution when processing inmates for transfer* …." *Id.* (emphasis added); see *id.* § 305.

Because ECCF allegedly strip-searched and visually searched petitioner's body cavities only after he had been transferred from BCJ, the judgment for Essex should be affirmed irrespective of how this Court resolves the other issues presented.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully Submitted,

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