No. 20-__

IN THE

Supreme Court of the United States

CRAIG EUGENE SMITH,

Petitioner,

v.

JAMES MCKINNEY; KELLY HOLDER; LESLIE WAGERS; NIKI WHITACRE; JONATHAN JANSSEN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that a prisoner has a liberty interest—protected by the Due Process Clause of the Fourteenth Amendment—in avoiding conditions of confinement that impose on the prisoner "atypical and significant" hardships in relation to the ordinary incidents of prison life. *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005).

The question presented is:

Whether a court determining if a prisoner has suffered an "atypical and significant" hardship must consider factors such as the duration of and justification for the particular conditions imposed (as several courts of appeals have held), or whether it can confine its analysis to a comparison of the conditions of other prison populations (as the court below held, joining several other courts of appeals).

PARTIES TO THE PROCEEDING

Petitioner is Craig Eugene Smith, appellant below.

Respondents are James McKinney, former Warden of the Fort Dodge Correctional Facility; Kelly Holder, Captain and Prison Rape Elimination Act Investigator at the Fort Dodge Correctional Facility; Leslie Wagers, correctional staff at the Fort Dodge Correctional Facility; Niki Whitacre, Administrative Law Judge for the Fort Dodge Correctional Facility; and Jonathan Janssen, correctional staff at the Fort Dodge Correctional Facility.

STATEMENT OF RELATED PROCEEDINGS

Craig Smith v. State of Iowa, No. PCLA 006326 (Iowa Dist. Ct. – Lee Cty. (North)) (ruling on application for post-conviction relief entered Aug. 31, 2016).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 954 F.3d 1075 and reprinted in the Appendix to the Petition ("App.") at 1a-18a. The decision of the district court entering summary judgment for respondent is unpublished but reported at 2018 WL 10483966 and is reprinted at App. 19a-29a.

JURISDICTION

The court of appeals issued its decision on March 31, 2020. App. 1a. The court denied rehearing on May 26, 2020. App. 30a. On March 19, 2020, this Court extended the deadline to file a petition for certiorari to 150 days from the date of rehearing denial. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This Court has long held that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). Prisoners may be incarcerated, but they are still protected from deprivations—without due process of law—of certain fundamental liberty interests. Those liberty interests can arise from the Constitution itself by virtue of guarantees inherent in the word "liberty," or they may arise from an expectation or interest created by state laws or policies. As this Court explained in *Wilkinson v.*

Austin, 545 U.S. 209 (2005), "the touchstone of the inquiry into the existence of a protected, state-created liberty interest" is whether the conditions of confinement to which a prisoner is subjected "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 223 (quotation omitted).

The courts of appeals, however, are intractably divided on how to determine whether conditions of confinement are "atypical and significant" and thus implicate a prisoner's protected liberty interest. Some courts adopt a strict comparative approach, comparing the prisoner's conditions of confinement with those of other prisoners within the prison system (though even these courts disagree about which prisoners are the relevant population for purposes of this comparison). If the prisoner's conditions are no worse than the conditions of the comparator group, then no liberty interest is implicated.

Other courts apply a less rigid, multi-factor balancing test. These courts consider, among other factors, the penological justification for and duration of the prisoner's particular conditions of confinement in assessing whether the conditions are "atypical and significant." Indefinite conditions that are imposed for no legitimate penological reason are more likely to be "atypical and significant" such that a protected liberty interest is implicated.

That is precisely what petitioner Craig Eugene Smith endured. Petitioner was accused of violating prison rules, but his disciplinary report was ultimately expunged and a state court concluded that there was not even "some evidence" to support the

allegations against him. And yet, petitioner was placed in disciplinary detention for one year and transferred *indefinitely* from a medium security facility to a maximum security facility. As a consequence of that transfer, petitioner lost his employment, wages, inmate tier status, security points, and security classification.

In evaluating whether these conditions implicate a protected liberty interest, the Eighth Circuit did not consider their indefinite nature or the fact that they were imposed on petitioner without any penological or disciplinary justification to support them. Instead, the Eighth Circuit, relying on its prior precedent, adopted the strict comparative approach and concluded that petitioner had not suffered an atypical or significant hardship and had not been deprived of any protected liberty interest.

The decision below not only deepens the existing split among the courts of appeals, but also is inconsistent with this Court's precedents, which have made clear that the duration of and reasons for a set of conditions are relevant factors in determining whether a prisoner has suffered atypical and significant hardship. The petition should be granted and the decision below reversed.

STATEMENT OF THE CASE

A. Legal Background

The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV. The Court considered that requirement in the prison disciplinary context in *Wolff v. McDonnell*, 418 U.S.

539 (1974). In that case, Nebraska prisoners challenged the decision of prison officials to revoke—as part of a disciplinary process—credits the prisoners had earned under Nebraska's good time credit scheme. The Court recognized that the Constitution itself did not guarantee the prisoners good-time credits. But, the Court explained, the revocation of the credits still implicated a protected liberty interest because the State had created a statutory right to the credits and allowed for a deprivation of that right only for serious misconduct. *Id.* at 557. The Court thus recognized that a prisoner can have a Due Process Clause-protected liberty interest that arises either from the Constitution itself or from an expectation or interest created by state law or policy. *See id.*

Since *Wolff*, the Court has attempted to clarify the test for determining whether a prisoner has a state-created liberty interest in avoiding particular conditions of confinement. In *Sandin v. Conner*, 515 U.S. 472 (1995), the Court explained that state-created liberty interests are "generally limited to freedom from restraint which, … imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484 (citations omitted). The Court concluded that the prisoner there—who was briefly placed in disciplinary segregation—had not suffered an "atypical and significant hardship" because the conditions in "disciplinary segregation … mirrored those conditions imposed upon inmates in administrative segregation and protective custody" and even inmates in the general population experienced "significant amounts

of lockdown time." *Id.* at 486. The prisoner, moreover, was only placed in disciplinary segregation for a period of 30 days so the segregation "did not work a major disruption in his environment." *Id.*

The Court again applied the "atypical and significant hardship" test in *Wilkinson v. Austin*, 545 U.S. 209 (2005). There, the Court began by recognizing that in *Sandin*'s wake, courts of appeals had "not reached consistent conclusions for identifying" how to "measure what is atypical and significant in any particular prison system." *Id.* But the Court declined to resolve that issue because it concluded that the solitary confinement to which the prisoner in *Wilkinson* was subjected "impose[d] an atypical and significant hardship under any plausible baseline." *Id.* In reaching that conclusion, the Court acknowledged that the conditions themselves "likely would apply to most solitary confinement facilities." *Id.* at 224. What set Wilkinson's confinement apart, however, were the facts that the confinement resulted in disqualification for parole and that the confinement was "indefinite" in "duration." *Id.*

The question presented here is whether courts determining if a prisoner has suffered an "atypical and significant" hardship must consider factors such as the duration of and justification for the particular conditions imposed, or whether they can confine their analysis to a comparison of the conditions of other prison populations. The court below adopted the latter approach, in conflict with the approach of several other circuits and this Court's precedents. *See infra* at 12-21.

B. Factual And Procedural Background

1. *Disciplinary Proceedings*

a. In 1994, petitioner was committed to the custody of the Iowa Department of Corrections. App. 2a. After spending time at other facilities—including the maximum-security Iowa State Penitentiary—petitioner was transferred in 2012 to a medium security facility known as Ford Dodge Correctional Facility. App. 2a.

During his first eighteen months at Fort Dodge, petitioner obtained and maintained employment, earned wages from his work, and enjoyed specific security and inmate tier statuses. Petitioner's record reflects no disciplinary actions during his first eighteen months at Fort Dodge. App. 22a.

b. On May 28, 2014, almost two years after his transfer, petitioner was placed in administrative segregation pending an investigation into allegations from unnamed individuals that petitioner had inappropriate contact with another inmate. App. 2a-3a. One week later, on June 4, 2014, respondent Officer Kelly Holder, a member of the correctional staff at Fort Dodge, prepared a disciplinary notice, alleging that petitioner violated the prison's disciplinary rules against threats and intimidation, sexual misconduct, obstructive/disruptive conduct, sexual violence, and attempt or complicity in those activities. App. 2a-3a, 22a. Shortly after, respondent Officer Leslie Wagers approved the disciplinary notice. App. 3a. On June 12, 2014, respondent Officer Jonathan Janssen served the notice on petitioner. App. 3a.

When petitioner received the disciplinary notice, he realized that it was based on confidential statements and that the names of his accusers were withheld. App. 3a, 22a. At a meeting with a correctional officer, petitioner denied the allegations against him and pleaded not guilty to the rule violations. App. 3a, 22a-23a.

c. On June 18, 2014, respondent Niki Whitacre, an Administrative Law Judge ("ALJ"), conducted a hearing on the disciplinary notice. At the hearing, petitioner denied the allegations and asked to see the confidential information underlying the complaint against him. App. 3a, 23a. His request was denied. App. 3a, 23a.

Six days later, on June 24, 2014, the ALJ found petitioner guilty of several rule violations. App. 3a, 23a. As punishment, the ALJ sentenced petitioner to 365 days of disciplinary detention (with credit for 27 days already served in administrative segregation) and 365 days' loss of earned time. App. 4a, 23a. The ALJ also recommended that petitioner be transferred to the Iowa State Penitentiary, a maximum security facility, "for a more secured environment in order to protect staff and offenders from victimization." App. 4a, 23a.

Petitioner appealed the ALJ's decision to respondent Warden James McKinney and later to Warden Nick Ludwick, but both his appeals were denied. App. 4a-5a, 23a.

d. Three weeks after the ALJ issued her order—on July 11, 2014—petitioner was transferred from Fort Dodge to the maximum-security Iowa State

Penitentiary. App. 4a. There, petitioner was placed in segregation to serve the remainder of his disciplinary segregation. And, as a consequence of his transfer, petitioner lost his employment, wages, security classification, security points, and inmate tier status. App. 4a.

2. *Application For Post-Conviction Relief*

a. On October 9, 2014, petitioner filed an application for post-conviction relief in the Iowa District Court for Lee County, arguing that the ALJ had provided an inadequate statement of the evidence against him and had improperly relied on confidential information in adjudicating his case. App. 5a, 23a-24a, 31a-36a.

b. After a trial, the Iowa District Court ruled in petitioner's favor. Prison discipline cannot be sustained, the court explained, unless there is "some evidence" supporting the disciplinary decision. App. 33a (citing *Backstrom v. Iowa Dist. Ct. for Jones Cty.*, 508 N.W.2d 705, 710 (Iowa 1993); *Superintendent, Mass. Corr. Inst., Walpole v. Hill,* 472 U.S. 455 (1985)). In petitioner's case, "the entire case and set of allegations against [petitioner]"—including the "disciplinary notice itself"—are "based upon confidential information." App. 33a. Thus, "[i]f for any reason the confidential information portion of this investigation is eliminated, there is no other evidence … to support the ALJ's decision." App. 33a-34a.

The court then proceeded to examine whether the ALJ had complied with the procedures for the use of confidential information, and concluded that she had

not. App. 34a-35a. As a result, the court struck from the factual record all of the confidential information. "Without that confidential information," the court explained, "there [was] not even 'some evidence' to support the disciplinary allegations against [petitioner]." App. 35a. Accordingly, the court granted petitioner's application for post-conviction relief and ordered his disciplinary records to "reflect that he was not found to have violated the rules as identified in the disciplinary notice issued on June 4, 2014." App. 36a.

c. Based on the court's order, the Department of Corrections restored petitioner's earned time credits and expunged the report from his disciplinary record. App. 6a. But the Department did not transfer petitioner back to the medium security facility. Instead, he remains at the maximum security facility where he is unable to have a job and earn wages. Nor have his former security classification, security points, or tier status been restored. App. 6a, 25a.

3. *This Lawsuit*

a. On December 22, 2016, petitioner brought suit under 42 U.S.C. § 1983, alleging that respondents violated his due process rights under the Fourteenth Amendment when they transferred him to the maximum security facility based on a later-expunged disciplinary report. Respondents subsequently moved for summary judgment, and the district court granted their motion.

b. Petitioner appealed, and on March 31, 2020, the Eighth Circuit affirmed. When, as here, a prisoner challenges the conditions of his confinement as

a violation of the Fourteenth Amendment's Due Process Clause, the court explained, a prisoner must first establish that he was deprived of a constitutionally protected or state-created "liberty interest." App. 8a. Prisoners "possess a state-created liberty interest in avoiding assignment to conditions of confinement that 'impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" App. 9a (quoting *Wilkinson*, 545 U.S. at 223). But, as the court recognized, "the Court of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system." App. 12a (quoting *Wilkinson*, 545 U.S. at 223).

Despite this lack of a consistent baseline for determining whether conditions of confinement are "atypical and significant," the court concluded that petitioner's conditions were not. Petitioner's transfer from the medium security Fort Dodge to the maximum security Iowa State Penitentiary was not atypical or significant, the court reasoned, because "there is no liberty interest in assignment to any particular prison" and petitioner had previously inhabited the prison to which he was transferred. App. 15a (quotation omitted). The court acknowledged that petitioner was transferred to the Penitentiary for an "indefinite duration" with "no sign that he will be moved to a less restrictive prison anytime soon," but failed to explain why that "indefinite duration" did not affect its analysis of whether petitioner's transfer was atypical and significant. App. 16a.

Next, the court turned to the conditions of petitioner's confinement. The court concluded that petitioner did not suffer atypical and significant hardship when he was sent to administrative segregation and disciplinary detention because he had "failed to set forth facts describing his conditions of confinement." App. 17a. And as to petitioner's loss of employment, wages, security classification, security points, and inmate tier status, the court concluded that "none of these losses, individually or collectively, amounts to an atypical and significant hardship" as compared to the ordinary incidents of prison life. App. 17a.

Nowhere in its analysis did the court mention that these conditions—including the segregation, detention, loss of employment, wages, security classification, security points, and inmate tier status—were imposed on petitioner without "even some evidence" to support a finding of misconduct on petitioner's part. To the contrary, the court stated that under its precedent, "a demotion to segregation, even without cause, is not itself an atypical and significant hardship." App. 13a (quoting *Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003)).

Because it held that the "conditions of confinement that [petitioner] faced … do not amount to an atypical and significant deprivation when compared to ordinary incidents of prison life," the court affirmed the judgment of the district court. App. 17a-18a.

c. Petitioner filed a pro se petition for rehearing en banc. On May 26, 2020, the Eighth Circuit denied rehearing. App. 30a. This petition followed.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve a circuit conflict over how to determine whether a prisoner has suffered an "atypical and significant hardship" such that he has a state-created liberty interest in avoiding his particular conditions of confinement. The courts of appeals are intractably divided over that important and recurring question, and this petition presents an ideal vehicle to resolve the division. The court below, moreover, resolved that question in a manner inconsistent with this Court's precedents.

A. The Courts Of Appeals Are Intractably Divided Over How To Determine Whether Prisoners Have Suffered An Atypical And Significant Hardship

To determine whether a prisoner has a state-created liberty interest in avoiding particular conditions of confinement, courts must assess whether those conditions "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Wilkinson*, 545 U.S. at 223 (quoting *Sandin*, 515 U.S. at 484). But, as this Court has recognized, the courts of appeals "have not reached consistent conclusions" on how to "measure what is atypical and significant in any particular prison system." *Id.* These varying approaches are a "source of major"—and recurring—"disagreement" among circuit courts. *Skinner v. Cunningham*, 430 F.3d 483, 486 (1st Cir. 2005); *see Rezaq v. Nalley*, 677 F.3d 1001, 1011 (10th Cir. 2012) ("Our sister circuits are certainly not in agreement regarding the correct approach.").

1. Several courts of appeals adopt a strict comparative approach to the "atypical and significant" inquiry, assessing whether the conditions of the prisoner's confinement are similar to those of other prisoners without considering the reason or justification for that confinement. Even among those courts, however, there is significant variation in terms of which prison population is the focus of the comparison.

a. The Fourth, Eighth, and Ninth Circuits concentrate on the general population in the prison as the relevant comparator. In *Beverati v. Smith*, 120 F.3d 500 (4th Cir. 1997), for example, the Fourth Circuit concluded that the prisoner-plaintiffs did not have a state-created liberty interest in avoiding administrative segregation because "the conditions in administrative segregation [we]re similar in most respects to those experienced by inmates in the general population." *Id.* at 503-04. Likewise, the Ninth Circuit in *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996), *opinion amended on denial of rehearing*, 135 F.3d 1318 (9th Cir. 1998), interpreted *Sandin* as suggesting "that a major difference between the conditions for the general prison population and the segregated population triggers a right to a hearing." *Id.* at 1088; *see also Phillips*, 320 F.3d at 847 ("[I]n order for Phillips to assert a liberty interest, he must show some difference between his new conditions in segregation and the conditions in the general population which amounts to an atypical and significant hardship.").

b. The Seventh Circuit also focuses on the general prison population, but it uses high-security prisons

as its baseline, not the particular prison in which the individual is incarcerated. "[T]he right comparison," in the Seventh Circuit's view, "is between the ordinary conditions of a high-security prison in the state, and the conditions under which a prisoner is actually held." *Marion v. Radtke*, 641 F.3d 874, 876 (7th Cir. 2011).

c. Instead of comparing to the general prison population, other courts of appeals concentrate on the population in segregation. If a prisoner objects to his placement in disciplinary segregation, these courts consider whether it is "atypical" for prisoners to be segregated and whether the prisoner's conditions are consistent with those of other prisoners in segregation.

The Third Circuit adopted this approach in *Griffin v. Vaughn*, 112 F.3d 703 (3d Cir. 1997). The prisoner there objected to his placement in administrative custody while he was under investigation for a violation of prison rules. In concluding that the prisoner did not have a state-created liberty interest, the Third Circuit explicitly rejected the Ninth Circuit's approach, and declined to compare his conditions to those of the general prison population. *Id.* at 706 n.2. Instead, the court considered whether it was common for prisoners to be subjected to administrative custody for lengthy periods of time. *See id.* at 707. Because "it [was] not extraordinary for inmates in a myriad of circumstances to find themselves exposed to the conditions to which [the prisoner] was subjected"—and to find themselves so exposed for "a substantial period of time"—the court concluded that the prisoner did not have a state-

created liberty interest in avoiding those conditions. *Id.* at 708.

2. In contrast, other courts of appeals have eschewed a strict comparative approach, favoring a multi-factor test that examines holistically a prisoner's conditions of confinement, the duration of the confinement, and the state's justification for imposing the confinement.

a. In *Estate of DiMarco v. Wyoming Department of Corrections*, 473 F.3d 1334 (10th Cir. 2007), for example, the Tenth Circuit rejected the strict comparative approaches adopted by other circuits. *Id.* at 1341-42. Adopting "a rigid either/or assessment," the court explained, would be a "simplistic" reading of *Sandin*. Instead, the court examined "a few key factors, none dispositive, as the Supreme Court did in *Wilkinson*." *Id.* at 1342. Among those factors, the court considered "whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of the placement are extreme; (3) the placement increases the duration of confinement, as it did in *Wilkinson*; and (4) the placement is indeterminate … ." *Id.*; *see also Grissom v. Roberts*, 902 F.3d 1162, 1169 (10th Cir. 2018) (same).

b. The First Circuit in *Skinner v. Cunningham*, 430 F.3d 483 (1st Cir. 2005), similarly rejected the strict comparative approaches described above, in favor of an analysis of several factors. *Id.* at 486-87 (describing different circuits' approaches to "atypical and significant" hardship analysis). The court concluded that the disciplinary segregation at issue there was not "atypical and significant" after exam-

ining a list of factors, including: (1) whether the reasons for the prisoner's confinement were "rational;" (2) whether the "duration" was "excessive;" and (3) whether the "central condition … was essential to its purpose." *Id.* at 487. Because the court concluded that the segregation was rational, not excessive, and central to the prison's goals, it determined "[t]aking all the circumstances into account" that his "temporary isolation" was "not unconstitutional either in its essential character or in its duration." *Id.*

3. Under the holistic approach adopted by the First and Tenth Circuits, it would have been clear that petitioner suffered an "atypical and significant hardship" when after being assigned to a year's-worth of disciplinary detention, he was transferred to a maximum security facility where he lost his employment, wages, security points, security classification, and inmate tier status. Petitioner's transfer—and the severe negative consequences that flowed from that transfer—are "indeterminate" in duration. *Estate of DiMarco*, 473 F.3d at 1342. The transfer came with no expiration date and as of now, petitioner has spent six years in the maximum security facility with nothing in the record suggesting the Department of Corrections intends ever to return him to a medium security facility.

Equally important, there was no penological justification to support the imposition of these restrictive conditions. The sole basis for petitioner's discipline was a disciplinary report that was expunged by court order after the Iowa state court found that there was not even "some evidence" to support the allegations contained in the report. Without the dis-

ciplinary report, there was no "rational" justification for or "legitimate penological interest" in punishing petitioner at all, let alone imposing the restrictive and indefinite conditions described above. *See id.* at 1342; *Skinner*, 430 F.3d at 487.

* * *

Petitioner, in short, was subjected to indefinite (likely permanent) punitive conditions without cause. Under the approach of the Third, Fourth, Seventh, Eighth, and Ninth Circuits, he was nevertheless not subject to an "atypical and significant hardship" that could implicate a due process liberty interest because his conditions were not atypical compared to a comparator group. Under the First and Tenth Circuits' holistic approach, in contrast, the reviewing court would be required to consider the duration and penological justification for the relevant punishment. The constitutionality of a prisoner's conditions of confinement should not turn on the happenstance of the geographical circuit in which he is located. Only this Court can resolve the circuit conflict and establish national uniformity on the question presented. And because petitioner's punishment here is indefinite and wholly without justification, he would prevail if the Court adopted the First and Tenth Circuits' holistic approach, so the petition presents an ideal vehicle to resolve the circuit conflict.

The petition should be granted.

B. The Decision Below Is Wrong

The conflict of authority over a recurring and important legal question suffices to warrant this

Court's review. Review is additionally appropriate because the decision below is incorrect.

1. This Court's precedent makes clear that the "atypical and significant hardship" inquiry should not be limited to a strict comparison between the prisoner's conditions and those of a particular prison population—whatever the relevant population may be. Both *Sandin* and *Wilkinson* embody a more flexible analysis considering factors such as the duration of the confinement and the justification or reasons for the confinement as part of their analysis of whether a prisoner suffered an atypical or significant hardship.

a. The duration of the prisoners' confinement played a significant role in this Court's analysis in both *Sandin* and *Wilkinson*. In *Sandin*, "the short duration of segregation"—30 days—did not "work a major disruption in the inmate's environment." *Wilkinson*, 545 U.S. at 223 (citing *Sandin*, 515 U.S. at 486). By contrast, in *Wilkinson*, the indefinite duration of the confinement—with only annual reviews—was one of the central reasons that the prisoner's confinement was considered atypical and significant despite the fact that the conditions themselves "likely would apply to most … facilities." *Id.* at 224. In the face of conditions that were perhaps not uncommon, in other words, the Court found that the indefinite duration of those conditions made them atypical and significant.

b. This Court's precedent also reveals that the justification for the particular conditions of confinement is an important factor in determining whether a set of conditions is atypical and significant. In

Sandin, the Court distinguished *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Ingraham v. Wright*, 430 U.S. 651 (1977). *Sandin*, U.S. at 484-85. In those cases, the Court concluded that the petitioners—pretrial detainees in *Bell* and school children in *Ingraham*—had due process rights to remain free from certain forms of punishment. *See id.* (citing *Bell*, 441 U.S. at 535; *Ingraham*, 430 U.S. at 674). *Sandin*—which involved an incarcerated prisoner—was different, the Court explained, because "[t]he punishment of incarcerated prisoners … serves different aims": "It effectuates prison management and prisoner rehabilitation goals." *Sandin*, 515 U.S. at 485. "Discipline by prison officials" can therefore be imposed "in response to a wide range of misconduct," without implicating the prisoner's liberty interests. *Id.*

A prisoner's liberty interest in avoiding certain conditions of confinement, in other words, is tied to the goals of prisoner punishment. Discipline can be tolerated in response to a wide range of misconduct because it serves legitimate prison management and prisoner rehabilitation goals. But where discipline is imposed absent any misconduct, it no longer effectuates those goals and can infringe on the prisoner's liberty interest.

In short, adopting a strict comparative approach—without considering the justification for and duration of the conditions of confinement—is, as the Tenth Circuit noted, too "simplistic" and cannot be squared with this Court's precedent. *Estate of DiMarco*, 473 F.3d at 1342.

2. The decision below cannot be reconciled with these principles. Instead of adopting the holistic ap-

proach embodied in *Sandin* and *Wilkinson*, the court brushed aside the indefinite duration of petitioner's conditions and ignored altogether the lack of reason for the imposition of the punishment.

a. The decision below acknowledged that petitioner "has been in the maximum security facility for nearly five years, and there is no sign that he will be moved to a less restrictive facility anytime soon." App. 16a (quotation omitted). But the court dismissed the indefinite nature of that confinement on the grounds that there is "no liberty interest in assignment to any particular prison" and that petitioner was returning to an institution he had previously inhabited. That conclusion cannot be reconciled with *Sandin* and *Wilkinson*, in which the Court established that while any particular condition of confinement may not, in isolation, implicate a liberty interest, when that condition is indefinitely imposed, it can. *See Wilkinson*, 545 U.S. at 224 (noting that while "conditions standing alone might not be sufficient to create a liberty interest," duration of the conditions and their effect in disqualifying the prisoner for parole consideration "impose[d] an atypical and significant hardship within the correctional context").

b. Nor did the decision below even purport to consider the reason—or lack thereof—for petitioner's conditions of confinement. The court acknowledged, in describing the background of petitioner's disciplinary proceedings, that the state court held that "there is not even 'some evidence' to support the disciplinary allegations against [petitioner]." App. 6a (quotation omitted). But when the court evaluated

whether petitioner's conditions of confinement were atypical and significant, it failed to explain how there could possibly be a justification for imposing those conditions, let alone considered how the lack of a justification might affect its assessment whether the conditions were atypical and significant. Because this Court's precedents make clear that the reason or justification for the conditions of confinement is a relevant factor in analyzing whether those conditions are atypical and significant, *see supra* at 18-19, the decision below—in failing to consider that factor—is incorrect.

The decision below misunderstood this Court's precedent and adhered to a strict comparative approach without considering factors like the duration of and justification for conditions of confinement. Under a faithful reading of this Court's precedent, the court would have considered those factors as part of a holistic analysis. And under that analysis, the court of appeals would have been forced to conclude that because petitioner's conditions of confinement were imposed indefinitely and based on no evidence or justification, petitioner had a liberty interest in avoiding them. This Court should grant certiorari to resolve the circuit conflict on that issue, and should reverse the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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