No. 20-554

In The Supreme Court of the United States

CRAIG EUGENE SMITH,

Petitioner,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

The Fourteenth Amendment's Due Process Clause only protects a prisoner's "state-created liberty interest in avoiding restrictive conditions of confinement" when the condition "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

The question presented is:

Whether a State "imposes atypical and significant hardship" when it (1) transfers a prisoner serving a life sentence back to a maximum-security prison after the prisoner served 19 months in a medium-security prison or (2) places the prisoner in administrative and disciplinary segregation for 12 months.

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INTRODUCTION

More than twenty-five years ago in *Sandin v. Conner*, 515 U.S. 472 (1995), this Court refocused its approach to determining when a State creates a liberty interest in a prisoner's conditions of confinement that is protected by the Fourteenth Amendment's Due Process Clause. The Court acknowledged that it had "strayed from the real concerns" of due process by focusing on the mandatory or discretionary nature of a given prison regulation. *Id.* at 483. And it instead returned to longstanding due process principles that such protected liberty interests will generally be limited to a condition that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

"Applying this refined inquiry, *Sandin* found no liberty interest protecting against a 30-day assignment to segregated confinement because it did not 'present a dramatic departure from the basic conditions of the inmate's sentence.'" *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (quoting *Sandin*, 515 U.S. at 485). The Court noted that the summary judgment record showed "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody" and that the general prison population was also "confined to cells for anywhere between 12 and 16 hours a day." *Id.* at 486 & n.8. The Court thus reasoned that the conditions of confinement "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction." *Id.*

Ten years later, this Court again applied *Sandin* to facts on the other end of the spectrum of prison conditions. In *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Court held that an indefinite transfer to a "Supermax" prison—which disqualified a prisoner from parole and had extremely "harsh" conditions—imposed atypical and significant hardship that gives rise to a protected liberty interest. *Id.* at 223-24. The Court noted that like "most solitary confinement facilities," in the Supermax, cells are lit 24 hours-per-day and exercise is permitted only one hour per day in a small indoor room. *Id.* at 224. But unlike typical segregation, "almost all human contact is prohibited"—including cell-to-cell conversation. *Id.* at 223-24. The Court thus held that "[w]hile any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship" "under any plausible baseline" of comparison to the ordinary incidents of prison life. *Ibid*.

Since *Sandin*, courts have varied in how they determine whether a condition "imposes atypical and significant hardship" on a prisoner "in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484; *see Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) ("Courts 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."). And perhaps this Court should resolve the "divergence" and answer the difficult question of "the appropriate baseline" against which to

compare a particular condition. *Wilkinson*, 545 U.S. at 223.

But this is not the case to do so. Smith contends that the State imposed atypical and significant hardship by transferring him back to continue serving his life sentence at a maximum-security prison after he had served 19 months in a medium-security prison and by placing him in administrative and disciplinary segregation for 12 months.

Yet Smith failed to develop the factual record necessary to conduct any robust analysis of whether the State imposed atypical and significant hardship on him. Summary judgment was granted because Smith submitted *no* evidence of his conditions of confinement or of any possible comparator baseline in Iowa prison. This bare factual record makes this case a poor vehicle to further refine the *Sandin* inquiry.

So too it is unnecessary to resolve the appropriate baseline in this case because—in the converse of *Wilkinson*—the conditions imposed on Smith are *not* "an atypical and significant hardship under any plausible baseline." *Wilkinson*, 545 U.S. at 223. Under any of the varying standards for determining atypical and significant hardship, the result would be the same. Neither the return transfer to a maximum-security prison nor the placement in administrative and disciplinary segregation for 12 months meet the standard for a protected liberty interest.

Perhaps this is because, with certain outliers, the debate over the proper baseline is largely academic.

And most courts have recognized the fundamental teaching that *Sandin* sets a high bar to involve courts in the day-to-day management of prison. *See Sandin*, 515 U.S. at 482-83.

Smith does not surpass that bar here. The petition should be denied.

STATEMENT OF THE CASE

1. *Factual background.* Petitioner Craig Smith was committed to the custody of the Iowa Department of Corrections in 1994 to serve a life sentence for his conviction of first-degree murder. Pet. App. 2a. Smith had killed another man who made an unwelcome sexual advance by beating the man with his fist and a metal pipe. *See State v. Smith*, 543 N.W. 2d 618, 619 (Iowa App. 1995).

From 1995 to 2012, Smith was placed at the Iowa State Penitentiary ("ISP"), a maximum-security prison. He racked up a long disciplinary history in prison, including sexual misconduct toward a correctional officer, assault, fighting, and disruptive conduct. C.A. App. 73-74.

Smith was then transferred to the Fort Dodge Correctional Facility ("FDCF"), a medium-security prison. Pet. App. 2a. Aside from the security designation of each prison, the record is silent on the difference in conditions of confinement at these two prisons.

About 18 months into Smith's time at FDCF, Respondent Kelly Holder, a captain at the facility, received a confidential complaint under the Prison Rape Elimination Act alleging that Smith engaged in inappropriate sexual contact with other inmates. On May 28, 2014, Smith was placed in administrative segregation while Captain Holder investigated the complaint. Pet. App. 2a-3a.

When Smith was informed of the investigation and his placement in segregation, he acknowledged that he may have bumped into another prisoner and expressed his desire to transfer out of FDCF: "I don't want to sit here in your lockdown. I want to go back to ISP." C.A. App. 139.

A week later, Captain Holder issued Smith a disciplinary notice, which was also approved by Respondent Leslie Wagers. Pet. App. 3a. The Notice concluded—based on confidential statements of fellow prisoners—that Smith had violated prison disciplinary rules against threats and intimidation, sexual misconduct, sexual violence, obstructive or disruptive conduct, and attempt or complicity. Pet. App. 22a.

Respondent Jonathan Janssen, another officer at FDCF, served the disciplinary notice on Smith and conducted further investigation. Pet. App. 3a. Smith pleaded not guilty to the violations and asked to see the confidential evidence. Smith remained in administrative segregation pending a hearing before an administrative law judge. C.A. App. 140.

While awaiting the hearing, Smith asked to speak with his correctional counselor. During this meeting, he became very upset and again denied the allegations, saying that he would never make sexual advances toward anyone. Pet. App. 3a, 22a. He also told the counselor that if he was returned to ISP because of the allegations he would do something "horrific" and "very big" to get attention. C.A. App. 141. And he told her that "he would be willing to hurt an innocent person." Pet. App. 3a.

Smith soon after participated in an administrative hearing on the disciplinary notice before Respondent Niki Whitacre. At the hearing, Smith again denied the allegations. But this time he contended that the allegations arose because "some pedophile" made "gay" comments to him and Smith "cussed him out." C.A. App. 142. He also asked again to see the confidential witness statements. And when the administrative law judge denied his request, he became angry and threatened, "I guarantee there will be a lot more of this . . . there will be problems." *Ibid.*; Pet. App. 3a, 23a.

On June 24, 2014, the ALJ issued a decision finding Smith guilty of most of the alleged violations. Relying on the disciplinary notice, confidential statements and investigation, Smith's statements, and unspecified evidence in the Department's computer system, the ALJ found that Smith intimidated smaller or special needs prisoners to do sexual acts to or with him without their consent. C.A. App. 142. She also found that Smith used his size to threaten and intimidate victims and made repeated sexually harassing comments and advances.

Ibid. She concluded that this conduct violated prison disciplinary rules against threats and intimidation, sexual misconduct, sexual violence, and obstructive or disruptive conduct. *Ibid*.; Pet. App. 32a.

The ALJ thus imposed a sanction of 365 days loss of earned time and 365 days of disciplinary detention. Because Smith had already served 27 days in administrative segregation since the investigation began, the ALJ credited him this time served. Pet. App. 4a.

The ALJ also recommended that the Department of Corrections' classification committee transfer him back to ISP "for a more secured environment in order to protect staff and offenders from victimization." Pet. App. 4a, 23a. She based this recommendation on not just the disciplinary violations, but also Smith's threats to harm others made to his counselor. C.A. App. 142.

Smith appealed the ALJ's decision to the FDCF Warden, Respondent Jim McKinney. Pet. App. 4a.

While that appeal was pending—and about 19 months after Smith first arrived at FDCF—the Department transferred Smith back to ISP. Upon his return to ISP on July 11, 2014, Smith was placed in disciplinary segregation to keep serving the rest of his detention. With the transfer, Smith also lost his security classification, security points, inmate tier status, and his job at FDCF and the corresponding opportunity to earn wages. Pet. App. 4a.

Several weeks later, Warden McKinney denied Smith's appeal. He explained that he had read the confidential information and visited with some of the confidential informants and other prisoners who had lived in the same unit as Smith. Pet. App. 4a. Many told the Warden that they had asked Smith to "knock off" the behavior and that Smith ignored the requests and continued "to act in a predatory manner." Warden McKinney found the informants "credible and reliable" and thus declined to reverse the ALJ's decision or reduce the sanctions. C.A. App. 147.

Within a week, Smith filed a supplemental appeal to the warden of ISP, where he had been returned. Smith argued that the confidential informants were not credible and reliable and again sought dismissal or reduction of sanctions. C.A. App. 149. The warden denied this appeal as well. Pet. App. 5a.

2. *Judicial Review of the Prison Discipline in State Court*. Less than a month after the denial of his supplemental appeal, Smith filed a pro se application for post-conviction relief in Iowa district court. Pet. App. 5a. Smith again challenged his disciplinary detention and loss of earned time, arguing that he didn't commit the violations and that the proper procedures for the use of confidential information had not been followed. Pet. App. 33a.

Nearly two years later—after Smith had already completed the disciplinary detention—the court granted his application for relief. The court concluded that the ALJ had not complied with Department of

Corrections procedures for relying on confidential information in a disciplinary hearing. Those procedures require the ALJ to prepare a summary of the confidential information for retention in the Department's computer system. Because the court found that the ALJ did not do so when she made her decision, the court struck all the confidential information from the record. And without the confidential information, the court held that there was not "some evidence" to support the disciplinary decision. Pet. App. 5a, 35a.

The court thus ordered the Department to update Smith's disciplinary records to reflect that he did not commit the violations alleged in the disciplinary notice. But the court recognized that it could not remove the disciplinary detention sanction because Smith had already served it. Pet. App. 6a.

Smith filed a grievance at ISP after receiving the district court order. He sought restoration of his lost earned time, transfer back to FDCF, return of his job, security points and tier status, back pay for lost wages, and other compensatory and punitive damages. C.A. App. 165. In responses issued by Department employees other than Respondents, the Department agreed that it would remove the disciplinary violation from his record and restore his lost earned time as required by the court order. But it denied Smith's remaining requests. C.A. App. 166, 168, 172.

Since Smith has been back at ISP, he has continued to add to his disciplinary history, including

multiple violations for engaging in threats and intimidation and even threats to kill. C.A. App. 71.

3. *This § 1983 lawsuit*. Dissatisfied with the limited practical effects of his successful challenge to his prison discipline in state court, Smith brought this suit against Respondents. He alleged that they violated his due process rights under the Fourteenth Amendment by imposing the 365-day disciplinary detention and transferring him back to a maximum-security prison indefinitely based on the now-expunged disciplinary violation. Pet. App. 6a, 28a. He sought declaratory relief, damages, and expungement of all reports and notes he received while in disciplinary detention. Pet. App. 19a.

Respondents moved for summary judgment arguing, among other things, that Smith had not been deprived of a liberty interest because he suffered no "atypical or significant hardship" under *Sandin v. Conner*, 515 U.S. 472 (1995). Smith resisted, represented by court-appointed counsel, contending that his conditions were like those at the Ohio Supermax prison in *Wilkinson v. Austin*, 545 U.S. 209 (2005). Pet. App. 26a. Despite receiving three extensions of time to file his resistance, Smith presented no evidence to the district court beyond a privilege log and what Respondents had offered in support of their motion. C.A. App. 3-4, iii-v.

The district court granted summary judgment, holding that Smith did not show "the sort of deprivation that, either alone or in aggregate, might be

considered an atypical and significant deprivation in relation to the ordinary incidents or prison life." The court reasoned that to defeat summary judgment, Smith "must do more than identify deprivations without putting them into factual context." Yet Smith failed to do so. Pet. App. 28a.

With respect to his prison transfer, the court found that "Smith states he was sent from a medium security institution to a maximum security institution, but unlike the description in *Wilkinson*, Smith provides no details about what life is like at either institution." And though Smith claimed that transfer also caused "lost security points and tier status," the court noted "the record is quiet on the difference in living conditions for inmates at those different security and tier statuses." Pet. App. 28a.

Similarly, the court recognized that while Smith had served a year of segregation, he provided "no facts describing how the detention he served differs from other types of confinement." The court accepted that duration of confinement was one factor under *Sandin*, but "[w]ithout a comparison between inmates inside and outside of segregation or other totally discretionary confinement, it is not possible for the Court to conclude Smith creates a genuine dispute that his placement in segregation for even a year worked a major disruption in his environment." Pet. App. 28a (cleaned up).

Smith appealed—represented by new court-appointed counsel—arguing that summary judgment

was inappropriate because "a reasonable jury could have found . . . that Smith's disciplinary detention and transfer to ISP imposed a deprivation that was an atypical and significant hardship." Pet. App. 7a.

The Eighth Circuit affirmed the district court's grant of summary judgment. The court first recognized that "whether conditions of confinement constitute an atypical and significant hardship is a question of law for the court to determine when the facts are undisputed." Pet. App. 10a. And considering the undisputed fact record before the district court, the Eighth Circuit held that neither the transfer back to a maximum-security prison and its incidental consequences nor the placement in administrative and disciplinary segregation for 12 months constituted such a hardship.

The Eighth Circuit reasoned that the transfer alone did not amount to an atypical and significant hardship because "there is no liberty interest in assignment to any particular prison," particularly when it was a prison that the prisoner had "previously inhabited." Pet. App. 16a. Nor did the loss of the job or other incidental consequences of the transfer. Pet. App. 17a. And Smith's claim based on the 12 months of segregation failed because Smith had not "set forth facts describing his conditions of confinement." Pet. App. 17a.

Smith filed a pro se petition for rehearing en banc, which was denied by the Eighth Circuit. Pet. App. 30a. And Smith then filed the pending petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. Petitioner failed to develop the factual record necessary to analyze whether the State imposed "atypical and significant hardship."

In considering whether a State creates a liberty interest in a prisoner's conditions of confinement that is protected by the Fourteenth Amendment's Due Process Clause, this Court conducts a fact-specific inquiry to determine whether a condition "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" *Sandin*, 515 U.S. at 484.

Sandin and *Wilkinson* were both decided on robust factual records—*Sandin* on summary judgment and *Wilkinson* after an eight-day trial with extensive evidence. *See Sandin*, 515 U.S. at 476; *Wilkinson*, 545 U.S. at 218. These facts were the tools for comparing the nature of the challenged conditions with ordinary incidents of prison life. And they were the grist for debate between majority and dissenting opinions, sharpening and refining the result.

Take *Sandin*, where the record contained evidence of the prisoner's conditions in disciplinary segregation—as well as similar conditions in administrative segregation and protective custody—down to the number of permitted phone calls and visitors and the restraints used when exercising or showering. *Sandin*, 515 U.S. at 476 & n.2; *id.* at 494 (Breyer, J., dissenting). It also contained evidence of conditions for prisoners in

the general population, such as the hours per day they are confined in their cells and activities they could otherwise engage in. *Id.* at 486 & n.8; *id.* at 494 (Breyer, J., dissenting).

And in *Wilkinson*, the trial record detailed many features of the Supermax prison: the lighting, the size of the cells, the types of doors, meal practices, and more. *Wilkinson*, 545 U.S. at 214, 223-24. The Court had evidence of the hours per day prisoners were kept in their cells and how recreation occurred when they left. And the record detailed how the Supermax compared with other state prisons. *Ibid.*; *see also Austin v. Wilkinson*, 189 F. Supp. 2d 719, 722-26 (N.D. Ohio 2002) (making detailed findings of fact on the conditions at the Supermax after the eight-day bench trial ultimately reviewed in *Wilkinson*).

Unlike these past cases, the record necessary to conduct any robust or nuanced *Sandin* analysis is absent here. Summary judgment was granted against Smith because he submitted no evidence of his conditions of confinement. Pet. App. 28a-29a, 17a. Not the conditions in the medium-security prison or the maximum-security prison. Not in administrative segregation or disciplinary segregation. He provided no details about the hours of confinement, activities permitted, or any other aspect of the nature of any of these confinements. Nor did Smith offer any evidence of the ordinary incidents of prison life at either prison, at other maximum-security prisons in Iowa, or in the Iowa prison system as a whole.

Indeed, when resisting Respondents' motion for summary judgment, Smith did not present a single piece of additional evidence on his conditions of confinement or the conditions in the Iowa prison system beyond what Respondents had offered in support of their motion. C.A. App. 3-4, iii-v.

The district court mainly relied on Smith's failure to present facts supporting his claim in granting summary judgment against him. *See* Pet. App. 28a ("At the summary judgment stage, to create a jury question Smith must do more than identify deprivations without putting them into factual context."); *ibid.* ("Smith states he was sent from a medium security institution to a maximum security institution, but unlike the description in *Wilkinson*, Smith provides no details about what life is like at either institution."); *ibid.* ("Without a comparison between inmates inside and outside of segregation or other totally discretionary confinement, it is not possible for the Court to conclude Smith creates a genuine dispute that his placement in segregation for even a year worked a major disruption in his environment." (cleaned up)). And the Eighth Circuit agreed. Pet. App. 17a.

Whatever the merits of providing greater clarity to the *Sandin* standard, the barren factual record in this case does not provide a good vehicle to do so.

II. Under any standard for comparison, Smith's conditions of confinement were not atypical and significant hardship.

To be sure, courts of appeals have varied in how they determine whether a condition "imposes atypical and significant hardship" on a prisoner "in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484; *see Wilkinson*, 545 U.S. at 223 ("Courts 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.").

But this case is a poor vehicle to resolve the "divergence" over "the appropriate baseline" against which to compare a particular condition because the conditions imposed on Smith are *not* "an atypical and significant hardship under any plausible baseline." *Wilkinson*, 545 U.S. at 223. And therefore, whether comparing against conditions in the general prison population, in high-security prisons, or in other types of segregation, or just considering multi-factor tests, Smith's conditions of confinement are not atypical and significant hardship.

Smith challenges two actions imposed by the State: (1) his transfer back to a maximum-security prison from a medium-security prison and corresponding incidental consequences and (2) his placement in administrative and disciplinary segregation for 12 months.

1. In considering the first condition—his transfer back to ISP, a maximum-security prison, after serving 19 months at a medium-security prison—the Eighth Circuit relied on its precedent that ordinarily transfers to a higher security institution are not atypical and significant hardship. Pet. App. 16a (citing *Freitas v. Ault*, 109 F.3d 1335, 1337 (8th Cir. 1997)).

a. As Smith recognizes, this Eighth Circuit approach of comparing to the conditions of the general prison population appears to be followed by the most circuits. Pet. 13 (citing *Beverati v. Smith*, 120 F.3d 500 (4th Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996), *opinion amended on denial of rehearing*, 135 F.3d 1318 (9th Cir. 1998)).

This approach is correct and consistent with the guidance of *Sandin* and *Wilkinson* to compare the hardship "in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. And without more evidence in the record, there is no basis to conclude that Smith's placement at ISP was atypical and significant hardship. Besides, the record shows that the transfer returned Smith to the same prison where he had served 17 years of his life sentence after only being in a medium-security prison for 19 months.

In fact, the record shows that at times, Smith expressed a preference to return to the maximum-security prison. C.A. App. 139. And while "not dispositive of the liberty interest analysis," this subjective expectation "does provide some evidence that the conditions

suffered were expected within the contour of the actual sentence imposed." *Sandin*, 515 U.S. at 486 n.9.

Moreover, ISP is a maximum-security prison, not a Supermax like the prison in *Wilkinson*. Smith submitted no evidence that all human contact and conversation are prohibited at ISP, that the lights are always on, or any of the other harsh conditions present in *Wilkinson*. *See Wilkinson*, 545 U.S. at 214, 223-24. He hasn't demonstrated—nor could he—that his transfer back to ISP has any effect on the length of his life sentence. In short, this is not *Wilkinson*.

And the result reflects longstanding due process precedent that there is generally no liberty interest in avoiding a transfer to a maximum-security prison absent all the extreme circumstances of *Wilkinson*. *See Meachum v. Fano*, 427 U.S. 215, 225 (1976) ("Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose."); *see also* Iowa Code § 904.503(1)(a) ("The director [of the Department of Corrections] may transfer at the expense of the department an inmate of one institution to another institution under the director's control if the director is satisfied that the transfer is in the best interests of the institutions or inmates.")

b. Circuits following other approaches to the *Sandin* analysis would reach the same result on the transfer. Comparing the conditions at ISP to a maximum-security prison—like the Seventh Circuit, Pet. 13-14 (citing *Marion v. Radtke*, 641 F.3d 874 (7th Cir.

2011))—would clearly not be "atypical and significant" since the baseline is the very same. Even more so, comparing the general population conditions at ISP with its segregation populations—like the Third Circuit, Pet. 14 (citing *Griffin v. Vaughn*, 112 F.3d 703 (3d Cir. 1997))—would show no hardship at all. Such a baseline would be *more* restrictive than the challenged conditions. That is not an atypical and significant hardship.

Smith contends that he would fare better under the more "holistic" approach of the First and Tenth Circuits because his transfer back to ISP is indefinite and without "penological justification." Pet. 16. But the Tenth Circuit concluded a transfer to a federal Supermax prison did not constitute atypical and significant hardship after considering whether it supported a penological interest, had extreme conditions, extended duration of confinement, and was indefinite in length. *See Rezaq v. Nalley*, 677 F.3d 1001, 1011-17 (10th Cir. 2012); *see also Skinner v. Cunningham*, 430 F.3d 483, 486-87 (1st Cir. 2005) (considering rationality, duration, and necessity in evaluating typicality and significance of condition).

Admittedly, the record is not fully developed for consideration of such an analysis since Smith did not argue for the use of this standard in the district court or Eighth Circuit. But even so, Smith's transfer back to ISP does not meet this standard for finding atypical and significant hardship either. Contrary to Smith's assertion, the transfer was not based "solely" on the reversed prison discipline. Pet. 16. The ALJ recommended the transfer because of his threats to harm

other as well. C.A. App. 142. So even assuming the actions that led to his discipline must be disregarded, there was still rational justification and penological interests in his placement at a maximum-security prison. The conditions are not extreme and do not increase the duration of Smith's sentence. And while there is no definite end to his placement other than the end of his sentence—this is just one factor in the analysis.

2. Turning to the 12 months of administrative and disciplinary segregation, again Smith presented no evidence that his conditions in segregation varied enough from any comparator that it was atypical and significant hardship.

a. The Eighth Circuit relied on this lack of factual record and its prior precedent that ordinarily segregation is not atypical and significant hardship to reject Smith's claims. Pet. App. 17a. And other cases comparing the conditions of segregation at ISP with those in the general population show the result would likely be the same, even if Smith had submitted the necessary evidence. *See Wycoff v. Nichols*, 94 F.3d 1187 (8th Cir. 1996) (holding segregation at ISP was not atypical and significant hardship); *Wilson v. Harper*, 949 F. Supp. 714, 716-19 (S.D. Iowa 1996) (detailing conditions in the general population and segregation at ISP).

Other circuits that, like the Eighth Circuit, compare the challenged conditions of segregation with those in the general population have likewise held that similar impositions of segregation are not atypical and

significant hardship. *See Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997) (6 months of administrative segregation); *Hernandez v. Velasquez*, 522 F.3d 556, 562-63 (5th Cir. 2008) (13 months of administrative segregation).

b. If the 12 months of administrative and disciplinary segregation are not "atypical and significant" when compared to the general prison population, then it logically follows the condition is even less atypical when compared to other types of discretionary segregation as in the Third Circuit's approach. *See Griffin*, 112 F.3d at 706-07. Here, because 27 days of Smith's challenged segregation *were* administrative segregation, the conditions would be precisely identical to a discretionary type of segregation. And without some further evidence in the record, there is no basis to conclude otherwise.

The same holds true with a comparison to the general population of a maximum-security prison as in the Seventh Circuit. *See Marion*, 641 F.3d at 876. Although Smith did not present evidence of the precise differences, it is intuitively true that the conditions in the general population of a maximum-security prison are more restrictive than those in a lower security prison. And thus the difference between those conditions and segregation would be even less atypical and significant.

Again, Smith holds out his strongest case for the "holistic" multi-factored approach, contending that he could succeed because the segregation stemmed from

prison discipline that was ultimately reversed. Pet. 16-17; *see also Rezaq*, 677 F.3d at 1011-17; *Skinner*, 430 F.3d at 486-87. Smith is right that his discipline was ultimately reversed because the Iowa district court concluded the ALJ had not prepared a required report about her use of confidential information. That removed it from his record and returned his earned time. Fair enough.

But that does not erase the fact that the Department received complaints that Smith was engaged in serious sexual harassment and assault that they had an obligation to investigate. And that investigation led to a founded determination by the ALJ. Placing Smith in segregation for the investigation and because of the founded discipline was rational and supported by penological interests. To do otherwise—to ignore the complaints or release him back to the general population despite the ALJ's findings—would have been irrational. Smith took fair advantage of his opportunity to challenge and test the propriety of his disciplinary proceeding. But while such a challenge was pending, segregation remained appropriate. *Cf. Wycoff v. Nichols*, 94 F.3d 1187 (8th Cir. 1996) (holding no due process violation when a successful appeal of prison discipline cures the error in the proceeding).

At bottom, Smith's due process claim fails because he presented no evidence that either his transfer back to a maximum-security prison from a medium-security prison or his placement in administrative and disciplinary segregation for twelve months was an atypical and significant hardship from the ordinary incidents of

prison life. Neither condition amounted to a major departure from the conditions of Smith's life sentence. And this case does not present a good opportunity to explore the contours of the *Sandin* analysis.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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