No. 20-554

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the petition explained, Pet. 12-21, this case implicates an important question about how courts determine whether a prisoner has been deprived of a fundamental liberty interest. Respondents concede, moreover, that courts of appeals have "varied" in how they answer that question—i.e., how they determine that "a condition 'imposes atypical and significant hardship' on a prisoner 'in relation to the ordinary incidents of prison life.'" Opp. 2 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)); *see also* Opp. 13. And respondents even admit that "perhaps this Court should resolve the 'divergence' and answer this difficult question of 'the appropriate baseline' against which to compare a particular condition." Opp. 2-3 (quoting *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005)).

It is thus agreed that this case implicates a fundamentally important question over which the courts of appeals are intractably divided. Respondents nevertheless offer two reasons for this Court to deny review. Neither is persuasive.

First, respondents contend that petitioner's conditions of confinement were not atypical and significant under any court of appeals' test. But as the petition explained, Pet. 16-17, 19-20, petitioner suffered an atypical and significant hardship under the holistic approach adopted by the First and Tenth Circuits. That approach—consistent with this Court's precedent in *Sandin* and *Wilkinson*—considers the penological justification for and duration of the prisoner's conditions of confinement in assessing whether the conditions are "atypical and significant." Where, as

here, the conditions are imposed for an indefinite term without *any* legitimate penological justification, they clearly satisfy that test. The Eighth Circuit's refusal to even consider the indefinite nature of petitioner's conditions of confinement or the fact that they were imposed on petitioner without any disciplinary justification squarely implicates the circuit conflict, and warrants this Court's review.

Second, respondents argue that petitioner failed to develop the factual record necessary to analyze this important legal question. But this case contains the key facts necessary to resolve the question presented. It is undisputed that petitioner's transfer to a maximum-security facility—and the severe negative consequences that have flowed from that transfer—are for an indeterminate duration. And it is clear that the only justification for petitioner's discipline—the disciplinary report alleging that he violated prison rules—was expunged from his record. It is true that this case does not include a particularly complex factual record, but that makes this case a *more* appropriate vehicle for certiorari, because it will allow the Court to cleanly answer the purely legal question presented and thus resolve the circuit conflict.

The petition should be granted.

A. Petitioner's Conditions Of Confinement Were Atypical And Significant Under This Court's Precedent And Under The First And Tenth Circuit Tests.

Respondents acknowledge that the courts of appeals are intractably divided over how to determine

whether a prisoner suffered an atypical and significant hardship and thus was deprived of a fundamental liberty interest. Opp. 2, 13. And they concede that this question is an important and difficult one that this Court should resolve. Opp. 2-3. But respondents protest that this case is not the appropriate vehicle to resolve the question because petitioner's conditions of confinement were not atypical or significant under any relevant test. That is wrong.

1. The petition explained why petitioner's indefinite detention without disciplinary justification was atypical and significant under both this Court's precedent and that of the First and Tenth Circuits. Pet. 16-17, 19-20.

This Court has consistently recognized that the "atypical and significant hardship" inquiry should not be limited, as the Eighth Circuit has limited it here, to a strict comparison between the prisoner's conditions and those of a particular prison population. Instead, the Court has employed a more flexible analysis weighing factors such as the duration of the confinement and the justification or reasons for the confinement in determining whether a prisoner suffered an atypical or significant hardship. *See, e.g.*, *Wilkinson*, 545 U.S. at 223-24 (contrasting "short duration of segregation" in *Sandin* with indefinite duration of the confinement in *Wilkinson*); *see also Sandin*, 515 U.S. at 484-85 ("discipline by prison officials" can be imposed in response to a wide range of conduct without implicating liberty interests because it "effectuates prison management and prisoner rehabilitation goals").

Based on this precedent, the First and Tenth Circuits have correctly held that the "atypical and significant hardship" inquiry requires the examination of a "few key factors," including: "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 … ." *Estate of DiMarco v. Wyoming Dep't of Corrs.*, 473 F.3d 1334, 1342 (10th Cir. 2007); *see also Skinner v. Cunningham*, 430 F.3d 483, 487 (1st Cir. 2005), (considering (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").

Under these circuits' test, it is clear that petitioner suffered an atypical and significant hardship. Petitioner was assigned to a year's-worth of disciplinary detention before he was transferred to a maximum-security facility where he lost his employment, wages, security points, security classification, and inmate tier status. Pet. 7-8, 15-17. That transfer, and all of its attendant consequences, came with no expiration date and no indication that the Department of Corrections intends ever to return petitioner to a medium security facility. Petitioner's conditions of confinement are at least "indeterminate"—and likely indefinite—in duration. *Estate of DiMarco*, 473 F.3d at 1342.

There also was no penological justification to support imposing these severe and restrictive conditions. The disciplinary report that was the basis for these

measures was expunged after a state court found that there was not even "some evidence" to support its allegations. Pet. App. 35a. Without the 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 Estate of DiMarco*, 473 F.3d at 1342; *Skinner*, 430 F.3d at 487.

2. Respondents spill a great deal of ink explaining why petitioner's confinement is not atypical and significant under tests applied by *other* courts of appeals, Opp. 17-19, 20-21, but that is the whole point—those courts of appeals are wrong, and petitioner would prevail under the proper test. And when it comes to answering *that* question—i.e., whether petitioner would prevail under the flexible holistic analysis that considers as key factors the duration of a condition of confinement and its penological justification—respondents' arguments are superficial.

Respondents concede that "there [is] no definite end to [petitioner's] placement" in the maximum-security Iowa State Penitentiary (ISP). Opp. 20. They attempt to gloss over that fact by pointing out that petitioner had previously inhabited ISP and that ISP is a maximum-security prison, not a Supermax. Opp. 17-18; *see also* Opp. 8. But those arguments cannot be reconciled with this Court's decision in *Wilkinson v. Austin*, which recognizes that while any particular condition of confinement may not, in isolation, implicate a liberty interest, when that condition is indefinitely imposed, it can. *See* 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").[1]

Respondents also acknowledge that the report that formed the basis for petitioner's discipline was "removed … from his record" under the state court's order granting petitioner's application for post-conviction relief. Opp. 22. They maintain, however, that expunging the report "does not erase the fact that the Department received complaints" against petitioner and that the ALJ determined, after an investigation of those complaints, that petitioner committed the violations alleged. *Id.* But that is precisely what expunging a record does. *See United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004) ("[A] defendant who seeks expungement requests 'the judicial editing of history.' … [I]n general when a defendant moves to expunge records, she asks that the court destroy or seal the records of the fact of the defendant's conviction and not the conviction itself." (quoting *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972)). And no matter what the ALJ determined, a *state court* concluded on post-conviction review that there was not even "some evidence" to support the allegations contained in the report. Pet. App. 35a.

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[1] Respondents also note that petitioner's administrative segregation notice reports petitioner as stating that he would rather go back to ISP than "sit here in your lockdown." C.A. App. 139; Opp. 17-18. It is hardly surprising that when faced with a choice between disciplinary segregation and a transfer to a different institution, a prisoner would prefer to avoid segregation. That does not mean his conditions were not atypical or significant.

Respondents note that the disciplinary report listed other justifications, apart from petitioner's alleged violations of prison rules, for petitioner's discipline. Opp. 19-20 (citing C.A. App. 142 and noting that ALJ recommended transfer because of petitioner's threats of harm to others). But again, the Department of Corrections removed the entire disciplinary hearing and ruling from petitioner's record under the state court's order. C.A. App. 166. It does not matter if that ruling listed other reasons for petitioner's discipline because that ruling must be treated as if it never existed. And without the disciplinary report, respondents can offer no plausible penological justification for petitioner's conditions of confinement.

Finally, respondents cite *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012), which they say is an example of a case in which the Tenth Circuit determined under its holistic approach that conditions like petitioner's do not impose an atypical or significant hardship. Opp. 19. But that case supports petitioner's view. The plaintiffs there argued that the disciplinary justification for a particular condition is "not relevant" at all "to the liberty interest inquiry." *Rezaq,* 677 F.3d at 1013 (quotation omitted). The court rejected that argument, holding that "[l]egitimate penological interests are a relevant consideration under settled Tenth Circuit precedent." *Id.* It then concluded that penological justifications offered by the Bureau of Prisons supported the confinement at issue in that case. *Id.* at 1013-14. Here, in contrast, there is "not even some evidence" to support or penological justifi-

cation for the imposition of the discipline on petitioner. Pet. App. 35a.[2] Petitioner would thus prevail in the First and Tenth Circuits because those courts employ a different legal standard from the one applied by the court below and by several other circuits. Pet. 12-17. That state of affairs is intolerable—the scope of a prisoner's liberty interest under the Due Process Clause should not turn on the happenstance of geography—and only this Court can resolve the conflict. The petition should be granted.

B. The Factual Record In This Case Is Adequate To Resolve The Question Presented.

Respondents alternatively contend that this case is a poor vehicle because petitioner has failed to develop the factual record necessary to resolve the question presented. Respondents are wrong. When the correct analysis is applied, no additional facts are necessary to conclude that petitioner's confinement was atypical and significant. That analysis, as explained, requires consideration of the conditions of the prisoner's confinement, the duration of that confinement, and the state's justification for imposing the confinement. *See* Pet. 15-21; *supra* at 3-4. Here, it is undisputed that petitioner was placed in disciplinary segregation—i.e., the "Hole," C.A. App. 15—and then transferred to a maximum-security prison where he

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[2] The conditions of confinement in *Rezaq* also were "not indefinite" because the prisoners had available "twice-yearly reviews" to determine whether they should be eligible for a transfer. *Rezaq*, 677 F.3d at 1016. Respondents do not contend that petitioner has similarly available review opportunities.

lost his inmate tier status, employment, wages, and security status for an indefinite period of time. Pet. App. 4a, 23a, 25a; C.A. App. 143-46, 182. It is likewise clear that there was no disciplinary or penological justification for the imposition of those conditions—again, there was not even "some evidence" to support the disciplinary charges that prompted them. Pet. App. 35a. Together, those facts are sufficient to establish that petitioner's discipline imposed an "atypical and significant hardship."

Respondents argue that this case lacks the minute details about the prisoners' confinement—including, for example, the number of phone calls and visitors, the restraints used while exercising, the hours per day of confinement, the lighting and size of the cells, and meal practices—featured in *Sandin* and *Wilkinson*. Opp. 13-14. But *Sandin* and *Wilkinson* did not purport to hold that each of those details is necessary to support a conclusion that a prisoner has suffered an atypical or significant hardship. And unlike this case, neither of those cases involved disciplinary conditions that were imposed both indefinitely and with no legitimate penological justification.

If anything, the more straightforward and undisputed factual record makes this case an ideal vehicle for resolution of the legal question implicated. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). This petition presents a clean vehicle for the Court to decide a purely legal question that respondents admit is important, and

that has divided the courts of appeals. The Court should grant certiorari, and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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