No. 23-____

In the Supreme Court of the United States

TONY LOVE, PETITIONER

v.

RON NEAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether courts should determine the procedural due process protections that apply in prison disciplinary proceedings by balancing ordinary due process principles against a prison's penological needs under the test this Court established in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Superintendent v. Hill*, 472 U.S. 445 (1985), as the Second, Sixth, Eighth, Ninth, and Tenth Circuits hold, or whether courts should instead recognize only those rights recognized in *Wolff* and *Hill*, as the Seventh Circuit held below.

RELATED PROCEEDINGS

Supreme Court of the United States:

Love v. Neal, No. 23A584 (Jan. 2, 2024) (order extending the time to file a petition for a writ of certiorari)

United States Court of Appeals (7th Cir.):

Love v. Vanihel, No. 21-2406 (July 7, 2023)

United States District Court (S.D. Ind.):

Love v. Littlejohn, 2:20-cv-00281-JRS-MG (June 15, 2021)

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INTRODUCTION

This case presents an exceptionally important question on which the Seventh Circuit has taken an outlier view, in conflict with this Court's precedents. The Court's decisions in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Superintendent v. Hill*, 472 U.S. 445 (1985), make clear that the Fourteenth Amendment prohibits prison officials from revoking without due process time off a sentence that an inmate has earned for good behavior. That rule reflects the Court's longstanding admonition that there "is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff*, 418 U.S. at 555-56, and recognition that inmates have a "strong," constitutionally protected "interest in assuring that the loss of good time credits is not imposed arbitrarily." *Hill*, 472 U.S. at 454. Thus, except when necessary to accommodate a prison's "distinctive" penological interests, like maintaining safety and order, and promoting rehabilitation, *id.* at 454-55, prison officials generally cannot deny inmates basic due process protections, like the right to be heard by an open-minded decisionmaker during prison disciplinary proceedings. *Wolff*, 418 U.S. at 565-66.

The courts of appeals have understood *Wolff* and *Hill* to mean what they say—that is, as creating a balancing test requiring application of established procedural due process protections in prison hearings, as long as affording those protections would not prejudice the prison's legitimate penological interests. Until recently, the Seventh Circuit shared that understanding, aligning with the Second, Sixth, Eighth, Ninth, and Tenth Circuits. But in the case below, and despite appointing counsel, the Seventh Circuit took a

different approach, holding, despite *Wolff* and *Hill*'s balancing test, that courts may not recognize any due process rights that are not specifically recognized in *Wolff* or *Hill*. *See* App. 17a-20a (lead opinion of Brennan, J.). The Seventh Circuit then denied rehearing en banc after calling for a response, cementing the new approach. App. 46a-47a.

The court of appeals' new rule had dramatic consequences in this case. Since 2002, Petitioner Tony Love has been serving a 55-year sentence in Indiana for murder. During the first 16 years of his incarceration, Mr. Love earned 5,700 days (nearly 16 years) of good time credits—that is, time off of his incarceration for good behavior. App. 57a n.1, 61a. In 2018, however, prison officials found that Mr. Love assaulted two prison guards during a fight instigated by another inmate, causing the guards injuries such as black eyes, lacerations, and various welts and bruises. App. 51a-55a. The punishment was drastic and unprecedented. Prison officials decided to apply Executive Directive #17-09, which mandated that any inmate found to have assaulted a prison guard must automatically lose all of his good time credits, no matter how many credits that might be, the facts of the inmate's case, or any mitigating arguments the inmate might wish to make in his defense. Love CA7 Supplemental Appendix (SA), SA22-23. With prison officials prejudging his case by exercising their discretion to apply the directive, Mr. Love lost all 5,700 days—nearly 16 years—of good time credits. The effect was to add that time back to his sentence.

Executive Directive #17-09 was in effect for just three years—between February 2017 and March 2020. If the incident had occurred before February 2017, or after March 2020, Mr. Love could have lost no

more than a year's worth of good time credits—and even then, only if the officer conducting his disciplinary hearing determined, based on the hearing record and Mr. Love's mitigation arguments, that such a sanction was appropriate. *Compare* SA29-30 (2015 IDOC Disciplinary Code), *with* SA14-15 (2020 IDOC Disciplinary Code). Because Mr. Love's disciplinary hearing occurred during the three-year window when Executive Directive #17-09 was in effect—and because prison officials exercised their discretion to *apply* the directive, App. 25a—he lost all 5,700 days' worth of good time credits he had previously accumulated, rather than the maximum one year's worth he could have lost before or after the directive. RSA17.

The sanction was "unprecedented by a factor of ten." App. 30a (Hamilton, J., dissenting). As Judge Hamilton catalogued in his dissent below, "the most significant deprivation of good-time or earned credit considered by the circuits generally do not exceed two years." App. 37a n.2 (collecting cases). Here, by contrast, the Department of Correction's decision to revoke all of Mr. Love's earned good time credits moved Mr. Love's earliest possible release date from 2030 to 2046.

Mr. Love sought federal habeas relief. He explained that the Indiana Department of Correction's decision to determine his punishment before his disciplinary hearing—even though Indiana law gives the hearing officer discretion about whether it revokes good time credits, and, if so, how many—violated due process. This Court's precedents establish that, outside of prison, defendants have the right to argue for a lesser sentence before they are punished, when the punishing authority has a choice over what sanction to impose. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471,

488 (1972). The Seventh Circuit, however, held that this rule does not apply in prison disciplinary hearings. Rather than apply the balancing test that this Court prescribed in *Wollf* and *Hill*, the court of appeals adopted a categorical rule that only those rights recognized in *Wolff* and *Hill* can apply in the prison context. Because it concluded that neither decision recognized the right to present mitigating arguments before an open-minded decisionmaker, the court of appeals held that the Department didn't violate Mr. Love's due process rights by applying Executive Directive #17-09. App. 26a.

The court of appeals' rule is wrong, and clearly so, and it warrants summary reversal or else plenary review. *Wolff* and *Hill* make clear that, depending on the circumstances, due process may require additional protections under the balancing test those decisions set out. *Hill* itself proves the point: using *Wolff*'s balancing test, *Hill* recognized that credit revocation decisions must be based on record evidence, even though *Wolff* never discussed that right. *See Hill*, 472 U.S. at 454. Neither decision says that *Wolff* or *Hill* is the last word on prison due process, and the Seventh Circuit appears to have invented that limitation out of whole cloth decades after *Wolff* and *Hill* were decided. Indeed, the whole point of a balancing test is that courts must apply it to the circumstances before them—not hold that no balancing can be conducted.

Not surprisingly, the Seventh Circuit's decision also conflicts with decisions from at least five courts of appeals. The Second, Sixth, Eighth, Ninth, and Tenth Circuits have each applied *Wolff* and *Hill*'s balancing test to recognize that inmates have a right to be disciplined only based on credible evidence—even though neither *Wolff* nor *Hill* recognizes that right. *Hensley v.*

Wilson, 850 F.2d 269, 282-83 (6th Cir. 1988); *accord, e.g.*, *Freitas v. Auger*, 837 F.2d 806, 810 (8th Cir. 1988); *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987); *Brown v. Smith*, 828 F.2d 1493, 1495 (10th Cir. 1987); *Taylor v. Rodriguez*, 238 F.3d 188, 194 (2d Cir. 2001). The Seventh Circuit's decision below is flatly inconsistent with these cases—indeed, the decision made clear the court will not recognize any due process protections unless those rights were raised by the litigants in *Wolff* and *Hill*, and recognized in those two opinions. *See* App. 17a-20a. Driving the point home, the full Seventh Circuit denied en banc review. App. 46a-47a.

If the Seventh Circuit had applied *Wolff* and *Hill*'s balancing test, Mr. Love likely would have secured habeas relief and a less severe sanction. The state has never offered a penological justification for deciding to revoke all of Mr. Love's credits without hearing his arguments as to why a lesser sanction is warranted. And if the Department of Correction decisionmakers had approached Mr. Love's hearing with an open mind, as due process requires, they likely would have settled on a punishment less severe than *de facto* increasing his incarceration by nearly 16 years. The other inmates involved in the fight for which Mr. Love was punished each lost fewer than half as many credits as Mr. Love did, even though they were found to have engaged in more dangerous conduct, such as starting the fight in the first place, and stealing an officer's pepper spray and using it to spray an officer in the face. The Department appears to have even decided not apply the Directive to one of these inmates, underscoring the real chance it would not have deprived Mr. Love of nearly 16 years' worth of credits if it had approached

his disciplinary hearing with an open mind. *See* App. 22a-23a.

Only this Court can resolve the split and prevent the fundamental injustice the court of appeals' decision inflicts on Mr. Love and threatens to impose on other inmates. Until recently, the Seventh Circuit agreed with the other courts of appeals that *Wolff* and *Hill* create a balancing test—not a categorical rule defining the outer limits of due process in prisons. Applying that balancing test, the Seventh Circuit previously imported the rule from *Brady v. Maryland*, 373 U.S. 83 (1963), into disciplinary hearings; barred prisons from refusing to share security footage with inmates; and prevented prisons from banning live witness testimony, even though those protections are not mentioned in *Wolff* or *Hill*. *See Chavis v. Rowe*, 643 F.2d 1281, 1285-86 (7th Cir. 1981); *Piggie v. Cotton*, 344 F.3d 674, 678-79 (7th Cir. 2003); *Whitlock v. Johnson*, 153 F.3d 380, 388 (7th Cir. 1998). But the decision below parts ways with this precedent, reflecting the newfound belief that Seventh Circuit precedent "forecloses" adding to *Wolff*'s and *Hill*'s protections. App. 19a. And the Seventh Circuit's denial of rehearing en banc means that only this Court can restore the Seventh Circuit's adherence to *Wolff* and *Hill* and ensure that inmates in that circuit receive the bedrock constitutional protections to which the Due Process Clause entitles them.

The Seventh Circuit's decision creates exactly the sort of "iron curtain drawn between the Constitution and the prisons of this country" that this Court's precedents abjure. *Wolff*, 418 U.S. at 555-56. The Court should grant review or summarily reverse.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-45a) is published at 73 F.4th 439. The district court's judgment (App. 50a-63a) is unpublished, but available at 2021 WL 2439232.

JURISDICTION

The court of appeals entered its judgment on July 7, 2023, and denied rehearing en banc on October 17, 2023. On January 2, 2024, Justice Barrett extended the time to file a petition for a writ of certiorari to March 15, 2024. *See* 28 U.S.C. § 2101(c). This petition is timely filed on March 15. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment's Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT

A. Legal background

1. Indiana law allows a prisoner to earn time off his sentence for "good behavior while imprisoned [or] confined." Ind. Code § 35-50-6-0.5(5). Under *Wolff* and *Hill*, prisoners have a constitutionally protected liberty interest in the good-time credits they earn, and thus must be afforded due process before those credits can be taken away. *Wolff*, 418 U.S. at 557. Consistent with that constitutional guarantee, Indiana law provides that, before a prisoner accused of violating an Indiana Department of Correction rule can "be deprived of any part of the … good time credit [he] has earned," Ind. Code § 35-50-6-5(a), he first "must be

granted a hearing" on "guilt or innocence and, if found guilty, [on] whether deprivation of … good time credit is an appropriate disciplinary action," *id.* § 35-50-6-5(b).

The "requirements of due process are flexible and depend on a balancing of interests affected by the relevant government action." *Hill*, 472 U.S. at 454. Due process requires the same protections in a prison disciplinary hearing that it requires outside of prison, except when necessary to accommodate a prison's unique penological needs. *Wolff*, 418 U.S. at 563-72; *Hill*, 472 U.S. at 454-55. And outside the prison-disciplinary context, settled due process principles provide that when the government is deciding how severely to punish a person, it must give him a fair opportunity to argue for a lesser sanction before a decisionmaker who has not predetermined the outcome. *See, e.g.*, *Morrissey*, 408 U.S. at 488.

2. On February 23, 2017, the Commissioner of the Indiana Department of Correction issued Executive Directive #17-09. Under the directive, prisoners convicted of A102 Assault/Battery that results in bodily or serious bodily injury to Department staff, volunteers, or visitors must lose *all* their earned good-time credits. SA22. The directive does not contemplate a hearing to determine whether complete revocation "is an appropriate disciplinary action for the violation." Ind. Code § 35-50-6-5(b).

The directive was in effect for just three years. *See* Love CA7 Opening Br. 36. Both before and after the directive, a prisoner could lose at most a year's worth of good-time credits for A102 Assault/Battery, and even then, only if the hearing officer thought that punishment justified after considering the evidence.

Compare SA29 *with* SA14. Under the directive, in contrast, prison officials would automatically revoke all of a prisoner's good-time credits for violating A102 Assault/Battery, no matter the circumstances. *See* SA22. But even when the directive was in effect, the Department of Correction retained discretion whether to apply it to any given case, *see* App. 25a—meaning discretion to keep an open mind rather than prejudge the punishment to be imposed on a particular inmate.

B. Factual and procedural background

1. Between 2002 and 2018, while serving a 55-year sentence for murder, Mr. Love earned 5,700 days—nearly 16 years—of good-time credits for good behavior. App. 1a-2a (Brennan, J.). Those credits made 2030 his earliest possible release date. App. 57a n.1.

2. In August 2018, Mr. Love and fellow inmates Antwan Webb, Sanchez Williams, and Matthew Schrock, Jr., were involved in an altercation with Department staff. App. 51a-55a. According to the Report of Conduct, Sgt. Hubbard pepper-sprayed Webb, who then struck Sgt. Hubbard before Mr. Love, Williams, and Schrock joined in the altercation. App. 52a-53a. When Officer Richey and Lt. Bynum tried to intervene, Schrock used Sgt. Hubbard's pepper spray on the officers. App. 53a-54a. During the scuffle, Mr. Love struck and injured the officers. App. 54a-55a.

3. As relevant here, prison officials charged Mr. Love with violating Department policy A102 Assault/Battery for striking Sgt. Hubbard. App. 3a-4a (Brennan, J.). A hearing officer found Mr. Love guilty and, applying Executive Directive #17-09, automatically revoked all 5,700 days of Mr. Love's good-time credits. App. 4a (Brennan, J.). The Department of

Correction denied his administrative appeals. *See* RSA13-16.

The sanctions moved Mr. Love's earliest possible release date from 2030 to 2046. App. 57a n.1. Mr. Love thus lost about twice as many credits as Webb, and nearly eight times as many as Schrock, even though he had been found guilty of participating in the same altercation for similar or lesser conduct. *See Schrock v. Warden*, No. 3:19-cv-121, 2020 WL 6455058, at *1 (N.D. Ind. Nov. 2, 2020); *Webb v. Warden*, No. 3:19-cv-273, 2020 WL 8910953, at *1 (N.D. Ind. April 21, 2020).

4. Mr. Love, proceeding pro se, sought federal habeas relief, which the district court denied. App. 5a (Brennan, J.). The court reasoned that Mr. Love's loss of 5,700 days of good-time credits was "allowed under [the directive]." App. 62a.

Mr. Love appealed, and the Seventh Circuit appointed counsel. Mr. Love argued that the Department deprived him of due process by revoking nearly 16 years of good-time credits without giving him an opportunity to argue for a lesser sanction before an open-minded decisionmaker. By comparison, Schrock and Webb, who "participated in the same altercation as Love," lost only 730 and 2,553 days of good-time credits, and it's not clear that the Department even applied the directive to Schrock. App. 22a-23a (Brennan, J.); Love CA7 Opening Br. 8-9, 21, 36.

Splitting 2–1, the panel denied relief, with each judge writing separately. Judge Brennan reasoned that Mr. Love wasn't entitled to habeas relief because his due process claim failed on the merits—the court, in his view, could not recognize due process protections beyond those recognized in *Wolff* and *Hill*.

Specifically, Judge Brennan opined that Mr. Love procedurally defaulted his claim by failing to raise it in his administrative appeal. App. 7a-8a. Judge Brennan concluded that there was cause to excuse the default, *see* App. 9a-11a, because prison officials misled Mr. Love "as to which policies applied to his disciplinary rehearing and what potential penalties he faced." App. 9a. But there was not prejudice, Judge Brennan concluded, because the Department had not violated Mr. Love's due process rights, since neither *Wolff* nor *Hill* specifically requires a hearing before an open-minded decisionmaker before imposition of sanctions, and circuit precedent "foreclose[d]" adding to *Wolff's* and *Hill*'s protections. App. 19a-20a, 26a (citing *Crawford v. Littlejohn*, 963 F.3d 681, 683 (7th Cir. 2020)). Judge Kirsch concurred only in the judgment, concluding that Mr. Love waived his claim by failing to present it to the district court. App. 27a-29a.

Judge Hamilton dissented. He would have held that the Department violated Mr. Love's due process rights by "[i]mposing such severe punishment through … minimal and informal procedures." App. 30a. But on the question presented here, Judge Hamilton agreed with Judge Brennan that lower courts must not "add procedures to the ones adopted in" *Wolff* and *Hill* "where they apply." App. 38a.

5. On October 17, 2023, the Seventh Circuit denied Mr. Love's petition for rehearing en banc. App. 46a-47a. Justice Barrett subsequently extended the time for Mr. Love to file a petition for certiorari to March 15, 2024.

REASONS FOR GRANTING THE PETITION

This case presents a circuit split over an exceptionally important question involving the due process

protections available to prison inmates. The Seventh Circuit's rule that prisoners have no due process rights during credit revocation proceedings that are not explicitly discussed in *Wolff* contradicts this Court's precedents and creates a split with five other circuits. The Court should grant review and reverse.

I. The court of appeals' decision contravenes this Court's precedents; splits from the longstanding rule in other circuits; and severely prejudices Mr. Love and threatens fundamental unfairness if left uncorrected.

Under the decision below, due process cannot require procedural protections beyond those identified in *Wolff* and *Hill*. *See* App. 19a-20a; App. 38a (Hamilton, J., dissenting). That conclusion conflicts with precedent from this Court and other courts of appeals. *Wolff* and *Hill* themselves make clear that, depending on the circumstances, due process may require additional protections. That's the very point of *Wolff* and *Hill*'s balancing test: "The requirements of due process are flexible and depend on a balancing of interests affected by the relevant government action." *Hill*, 472 U.S. at 454. Indeed, *Hill* recognized that prisoners have a right for credit revocation determinations to be based on evidence in the disciplinary hearing record, even though that right was not discussed anywhere in *Wolff*. Other circuits' caselaw have repeatedly used that balancing test to hold that due process requires protections beyond those addressed in *Wolff* or *Hill*.

The court of appeals' rule severely prejudiced Mr. Love in this case, and threatens disregard of basic due process principles if not reversed. If the Seventh Circuit had applied *Wolff* and *Hill*'s balancing test, it would have recognized that Mr. Love had the right to

present mitigation arguments before being punished, since the state never offered penological reasons why the Department of Correction needed to decide how to deploy its punishment discretion before Mr. Love's hearing. And if Mr. Love had the opportunity to present mitigation arguments, he likely would have received a lesser sanction. Mr. Love lost twice as many credits as Webb, who started the fight, and Schrock, who pepper sprayed a guard in the face. An open-minded decisionmaker likely would not have punished Mr. Love more harshly than two inmates with worse behavior in the same altercation. This case thus shows the grave danger of allowing the Seventh Circuit to subvert this Court's clear precedent on the methodological question presented.

II. The question presented is important, and this case is a good vehicle to resolve the question. Indeed, this case is a good candidate for summary reversal to restore the vitality of *Wolff* and *Hill*.

The Seventh Circuit's departure from this Court's precedent and the decisions of other courts of appeals warrants this Court's review. The decision below enables prison officials to deny well-recognized due process rights without any penological justification so long as *Wolff* or *Hill* doesn't address those protections—no matter the circumstances or the gravity of the charges or the punishment that might be imposed. It frustrates the balancing test that this Court's precedent mandates by treating *Wolff* and *Hill* as foreclosing any due process challenges other than those the parties in *Wolff* and *Hill* raised to this Court.

There are no meaningful impediments to this Court's review. Although the state argued below that Mr. Love procedurally defaulted and forfeited his

claims, a majority of the panel held that the state caused Mr. Love's default by misleading him about the basis for its credit revocation decision. *See* App. 9a-11a. And the court's holding that he could not show prejudice to excuse his default and forfeiture rested on the notion that *Wolff* and *Hill* foreclose recognition of any due process rights not specifically recognized in those opinions. *See* App. 17a-20a. That conclusion was wrong. If the Court corrects it, there will be no barrier on remand to the court of appeals' addressing Mr. Love's claims on the merits—and no serious argument that Mr. Love should not have had the opportunity to present arguments in mitigation to an open-minded decisionmaker.

I. The Seventh Circuit's decision contravenes this Court's precedent and creates a circuit split.

Wolff and *Hill* establish that prisoners facing revocation of good time credits are entitled to the same basic due process protections as everyone else, unless there is a valid penological reason why those protections should give way in the prison setting. *Wolff*, 418 U.S. at 564-72. The court below violated *Wolff* and *Hill* by failing to apply this test, and instead deciding that courts can *never* recognize due process rights in prison hearings that were not already recognized by *Wolff* and *Hill*. The court's decision splits from the decisions of at least five other courts of appeals, which have faithfully applied *Wolff*'s balancing test to recognize due process rights beyond those discussed in *Wolff*. And the decision severely prejudiced Mr. Love. If the court had applied the correct test, it likely would not have upheld the Department of Correction's decision to decide how to punish Mr. Love without hearing from him first. And if the Department had heard from

Mr. Love first, it likely would not have decided to punish him between two and eight times more harshly than other inmates involved in the same fight.

A. *Wolff* and *Hill* require courts to balance a prison's penological interests against an inmate's right to procedural due process in prison disciplinary proceedings.

In *Wolff*, the Supreme Court held that prison inmates have a constitutionally protected liberty interest in good time credits earned under state law. 418 U.S. at 557. As a result, the Court held, prison officials cannot revoke those credits without first providing "those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.*

An inmate's "strong interest in assuring that the loss of good time credits is not imposed arbitrability … must be accommodated," bearing in mind "the distinctive setting of a prison." *Hill*, 472 U.S. at 454. *Wolff* and *Hill* thus set out a balancing test to determine the procedures to which prisoners are entitled. Courts assess whether applying ordinary due process requirements in the prison context would harm the prison's "legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation." *Id.* at 454-55. Due process will generally not require prison officials to adopt procedures that create "considerable potential for havoc inside the prison walls." *See Wolff*, 418 U.S. at 567. In other words, courts must balance the

need to protect prisoners' procedural rights against the prison's penological interests. *Wolff*, 418 U.S. at 561; *Hill*, 472 U.S. at 454. When applying bedrock due process principles would not cause special problems for prison officials, the Supreme Court made clear, due process must prevail. *Wolff*, 418 U.S. at 566.

1. *Wolff* applied this balancing test to hold that prison officials must afford prisoners several procedural protections during prison disciplinary proceedings. *Id.* at 563-66. *First*, officials must give the inmate at least 24 hours' advance written notice of the charges against him. *Id.* at 564. *Second*, officials must allow the inmate to call witnesses and present documentary evidence in his defense at a hearing before a disinterested decisionmaker. *Id.* at 566. *Third*, officials must provide a written statement of decision explaining the reasons for the prison's ultimate action and what evidence they relied on. *Id.* at 564-65.

The Court explained, for example, that a written decision is fundamental to due process because it "helps to insure that [prison] administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts … will act fairly." *Id.* at 565. Moreover, the Court observed that except where prison officials must redact sensitive or confidential information, it could "perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements." *Id.* Because prison officials do not have valid penological reasons for failing to provide written statements, the Court held that prisons must apply ordinary due process principles and provide them. *See id.*

Wolff's balancing cut the other way for the rights to assistance of counsel and to confront and cross-

examine witnesses. The Court held that due process did not require counsel or cross-examination because they cut against a prison's needs to maintain order and safety. *Id.* at 567-69.

2. *Hill* provided another example of *Wolff*'s test in action. There, the Court relied on the *Wolff* balancing test to add to the protections recognized in *Wolff*. *Hill* held that due process requires a prison's disciplinary decision to be based on evidence in the disciplinary record. *Hill*, 472 U.S. at 454. The Court first observed that bedrock due process principles generally require government officials to make decisions based on the evidentiary record before them in order to "prevent arbitrary deprivations" of protected rights. *Id.* at 455 (collecting cases). And "recognizing that due process requires some evidentiary basis for a decision to revoke good time credits," the Court reasoned, would "not impose significant new burdens on proceedings within the prison." *Id.* It would also not conflict with *Wolff*, which had already required prison officials to provide a written statement of decision. *Id.* Since prison officials had no valid penological reason to base their disciplinary decisions on extra-record evidence, the Court enforced bedrock due process law and held that a prison disciplinary board's decision "to revoke good time credits" must be supported by "some evidence" in the record. *Id.*

B. The Seventh Circuit's decision contradicts *Wolff* and *Hill* by scrapping this Court's balancing test and treating those decisions as the final word on prisoners' due process rights.

1. The court of appeals held that due process cannot require procedural protections beyond those

identified in *Wolff* and *Hill*. App. 19a-20a; App. 38a (Hamilton, J., dissenting). That is wrong. Neither *Wolff* nor *Hill* purported to exhaustively catalogue which protections due process requires in prison disciplinary proceedings. Instead, as explained above, those decisions established a balancing test to determine the procedures prisoners are due. *Supra* pp. 15-17. The court of appeals' rule eviscerates that balancing test by holding that *Wolff* and *Hill* foreclose any due process protections the parties in those cases did not raise and the Court did not recognize. The court of appeals' decision's disregard of *Wolff* and *Hill*'s clear guidance warrants review if not summary reversal.

2. The court of appeals' contrary reasoning lacks merit, and only underscores the need for this Court's intervention.

First, the court of appeals reasoned that lower courts cannot add to *Wolff*'s and *Hill*'s protections. *See* App. 18a-20a. But neither *Wolff* nor *Hill* purported to exhaustively list the protections due process requires in prison disciplinary proceedings. To the contrary, the Court applied *Wolff*'s balancing test in *Hill* to add to *Wolff*'s list, holding that due process requires a prison's disciplinary decision to be based on "some evidence" in the disciplinary record. 472 U.S. at 454-55. The Seventh Circuit's decision is flatly irreconcilable with *Hill*. If the Seventh Circuit were correct, the Court in *Hill* could have simply held that inmates have no right to have disciplinary decisions turn on record evidence, because *Wolff* did not discuss that right. But the Court in *Hill* did no such thing; it applied *Wolff*'s balancing test and recognized a due

process right *Wolff* did not discuss. *See Hill*, 472 U.S. at 454.

To be sure, the Court has cautioned lower courts not to re-balance whether due process requires the specific protections rejected in *Wolff*, including the assistance of counsel and the opportunity to confront or cross-examine witnesses. *See Baxter v. Palmigiano*, 425 U.S. 308, 324 (1976). But neither *Wolff* nor *Hill* addressed an inmate's right to present mitigation arguments before an open-minded decisionmaker, and thus addressing Mr. Love's claim would not require a court to upset the balance *Wolff* and *Hill* struck for other rights.

Second, the court of appeals reasoned that it could not recognize Mr. Love's right to present mitigation arguments before an open-minded decisionmaker because neither *Wolff* nor *Hill* address a prisoner's due process rights at the punishment phase of a disciplinary hearing. *See* App. 20a. But it doesn't matter that the sanctions phase is a "novel context" as compared with the guilt phase in *Wolff* and *Hill*, *contra* App. 20a (Brennan, J.), precisely because the point of *Wolff* and *Hill* is that due process requires a "flexible" balancing test even in the prison-disciplinary context, *Hill*, 472 U.S. at 454. By design, that test can account for a variety of circumstances in the prison-disciplinary context.

C. The Seventh Circuit's decision creates a split with the Second, Sixth, Eighth, Ninth, and Tenth Circuits that only this Court can resolve.

1. The Seventh Circuit's holding splits from the decisions of least five other courts of appeals.

The Seventh Circuit's decision is a major outlier among the lower courts. Other courts of appeals have faithfully applied *Wolff* and *Hill*'s balancing test to recognize due process rights that were not discussed in those decisions.

For example, the Second, Sixth, Eighth, Ninth and Tenth Circuits have held that, to satisfy due process, "prison disciplinary committees are obligated to assess the reliability of inmate informants upon whose testimony they rely to deprive inmates of good time credits." *Hensley*, 850 F.2d at 283; *accord, e.g.*, *Freita*, 837 F.2d at 810; *Cato*, 824 F.2d at 705; *Brown*, 828 F.2d at 1495; *Taylor*, 238 F.3d at 194; *see also Scott v. Trimble*, 538 F. App'x 780, 780 (9th Cir. 2013) (mem. op.) (reversing revocation of good time credits because of lack "reliable evidence" supporting sanctions). Neither *Wolff* nor *Hill* addresses the reliability of informants. Yet those circuit decisions balanced the due process interests against the potential penological burdens, just as *Wolff* and *Hill* instruct. *See, e.g.*, *Freitas*, 837 F.2d at 810.

Taylor is typical of these cases. There, a prisoner claimed that his jailors deprived of him of due process by determining that he was a gang member and placing him in restrictive custody based on confidential informant statements, without assessing whether the informants were reliable. *See Taylor*, 238 F.3d at 194. The Second Circuit agreed. Faithfully applying *Wolff* and *Hill*'s balance testing, the court determined that prison officials had no good reason to dispense with credibility determinations—a staple of procedural due process—in prison disciplinary proceedings. The court reasoned that "[r]equiring an independent credibility assessment ensures not only a fair hearing and discipline based on reliable evidence, but also places a

minimal burden on prison officials conducting such hearings, with the assurance that judicial review is available." *Id.* By contrast, if the court had applied the test the Seventh Circuit applied below, it would have rejected Taylor's claims because neither *Wolff* nor *Hill* discusses credibility determinations.

Similarly, in *Hensley*, the Sixth Circuit agreed "that prison disciplinary committees are obligated to assess the reliability of inmate informants upon whose testimony they rely to deprive inmates of good time credits," and further held that prison officials must create a "contemporaneous written record" detailing "the evidence relied upon" for those credibility determinations. 850 F.2d at 283. Applying *Wolff* and *Hill*'s balancing test, the court weighed the due process benefits of requiring reliability determinations—namely, "[r]equiring a contemporaneous record of evidence helps to assure that a disciplinary committee will act fairly and actually make an independent assessment of the evidence and of informant reliability and permits judicial review of that assessment"—against the prison's asserted "need" to "preserve informant anonymity." *Id.* at 282-83. The court concluded that the prison's asserted penological interest was "irrelevant" to the issue at hand, because the prison could always keep the details of reliability determinations confidential if they would jeopardize inmate safety. *Id.* at 282. Once again, if the Sixth Circuit had followed the court below's approach, it would have rejected Hensley's claims because they weren't specifically addressed by *Wolff* or *Hill*.

2. Only this Court can correct the court of appeals' erroneous test.

Until relatively recently, the Seventh Circuit repeatedly applied *Wolff* and *Hill*'s balancing test to find that due process requires protections beyond those enumerated in *Wolff* and *Hill*. For example, in *Chavis*, 643 F.2d at 1285-86, the court held that the rule from *Brady* applies to prison disciplinary proceedings and requires prison officials to disclose material exculpatory evidence to the prisoner. In *Piggie*, 344 F.3d at 678-79, the court held that due process prohibits bans on the disclosure of prison security footage. And in *Whitlock*, 153 F.3d at 388, the court held that due process prohibits bans on live witness testimony in disciplinary hearings.

In the decision below, however, the court of appeals renounced this precedent, reasoning that more recent decisions "probably foreclose[]" adding to *Wolff*'s and *Hill*'s protections. App. 19a (Brennan, J.). The full Seventh Circuit then denied rehearing en banc, App. 46a-47a, forgoing a chance to correct the departure from this Court's precedents and to prevent the split it was creating with the decisions of other courts of appeals. The Seventh Circuit has thus made clear that it will not resolve the conflict. Only this Court can bring the Seventh Circuit into line with *Wolff*, *Hill*, and the other courts of appeals that follow *Wolff* and *Hill*'s balancing test.

D. The Seventh Circuit's failure to apply the right methodological test—the balancing test *Wolff* and *Hill* mandate—produces injustice for Mr. Love and threatens unfair outcomes in other cases, as well.

Because the court of appeals concluded that it could never add to *Wolff*'s and *Hill*'s protections, it failed to apply the bedrock due process principle that

the government must generally hear from affected persons before depriving them of liberty. That failure led to a bizarre and arbitrary result: the Department of Correction punished Mr. Love much more harshly than other inmates who committed worse conduct during the same fight.

1. When the government is considering a discretionary action that would interfere with a protected liberty interest, due process requires it to provide the affected person "notice … and a fair opportunity for rebuttal." *See Wilkinson v. Austin*, 545 U.S. 209, 225-26 (2005) (collecting cases). A fair opportunity for rebuttal requires: (1) that the government not have made up its mind before the hearing ever takes place; and (2) giving the affected person a chance to argue "that circumstances in mitigation suggest" that the government should not take its proposed action. *E.g.*, *Morrissey*, 408 U.S. at 488. Put differently: ordinary due process principles require an opportunity to present arguments at the sanctions phase to an open-minded, neutral decisionmaker who has not already predetermined the outcome. *See id.*

Neither *Wolff* nor *Hill* addressed how this due process requirement applies in prison disciplinary proceedings. *See supra* pp. 15-17. Thus, *Wolff* and *Hill* required the court of appeals to ask whether the prison's legitimate penological interests outweigh the inmate's interests in an opportunity to make mitigation arguments at the sanctions phase to an open-minded decisionmaker.

The answer to that question is straightforward: the prison's interests do not outweigh the inmate's interest in the fundamental due process right to an open-minded decisionmaker. And the state hasn't

argued otherwise—it just contends that it doesn't need to answer that question, because *Wolff* and *Hill*'s balancing test somehow doesn't apply. Requiring prison officials to come to disciplinary hearings with an open mind about how they will exercise their statutory disciplinary discretion would not compromise safety, stymie a prison's ability to use good-time credit revocations as a tool to promote rehabilitation, or increase prisons' administrative burdens. *See Hill*, 472 U.S. at 454-55.

2. Applying *Wolff* and *Hill*'s balancing test makes clear that the Indiana Department of Correction violated Mr. Love's due process rights by predetermining that it would revoke all his good-time credits without giving him an opportunity to argue for a lesser sanction to a neutral, open-minded decisionmaker. Indiana law gives prison officials discretion to determine whether to revoke good-time credits for disciplinary infractions, and if so, how many credits to take away. *See* Ind. Code § 35-50-6-5(a)-(b). Thus, although *applying* Executive Directive #17-09 results in "an automatic determinate sanction," App. 17a (Brennan, J.), *whether to apply* the directive in the first place "*was* a discretionary choice," as the Seventh Circuit panel recognized, App. 26a. As a result, Mr. Love's punishment wasn't like a statutory mandatory minimum sentence, and due process required the Department to give Mr. Love an opportunity to convince an open-minded decisionmaker to impose a lesser sanction.

Indeed, Mr. Love's argument for that procedural protection is particularly compelling. As Judge Hamilton recognized in dissent, "the due process balance weighs … heavily in favor of" Mr. Love given the strength of his interests in avoiding the "severe

punishment imposed." App. 36a-37a. The state also failed to articulate any penological need to make up its mind before hearing from Mr. Love.

3. An opportunity to present arguments to an open-minded decisionmaker likely would have made a difference. Mr. Love could have argued that (1) a more limited credit revocation was appropriate given that he did not start the altercation, steal a guard's weapon, or deploy pepper spray, and his conduct did not cause permanent injuries, and (2) his credit revocation should have been more in line with those of Schrock or Webb, who lost 730 and 2,553 days of credit, respectively. Opening Br. 36, 46-47; Love CA7 Reply 26.

Those arguments likely would have changed the result. After all, when it issued the revised adult offender policy in March 2020, SA9-18, the Department abandoned the directive altogether for the offense of which Mr. Love was found guilty. Under the current policy, Mr. Love couldn't have lost more than a year's worth of credits. *Compare* SA22 *with* SA14. The Department clearly does not think that requiring a prisoner to forfeit nearly 16 years of credits is an appropriate sanction for Mr. Love's violation. That makes sense: as Judge Hamilton explained in dissent, 16 years is an unprecedented deprivation—"the most significant deprivations of good-time or earned credit considered by the circuits generally do not exceed two years." App. 37a n.2. An open-minded decisionmaker confronting this context likely would not have deprived Mr. Love of all 5,700 days of his good-time credits.

II. The question presented is important, and there are no barriers to this Court's review.

The question presented is crucial, and this case is a good vehicle for resolving it—or even summarily reversing to bring the Seventh Circuit back in line with this Court's precedent and the decisions of the other courts of appeals.

A. This appeal presents an issue of exceptional importance. The Seventh Circuit's departure from this Court's and other courts of appeals' precedent endorsed a nearly 16-year extension of Mr. Love's prison time. As Judge Hamilton observed in dissent, "[i]mposing such severe punishment through [such] minimal and informal procedures is … unprecedented by a factor of ten." App. 30a; *accord* App. 36a. And under the court of appeals' decision, courts can *never* examine the context and circumstances of an individual case to determine the process due, no matter the circumstances or the gravity of the charges or punishment that might be imposed. Indeed, the Seventh Circuit's decision makes prison due process turn on which issues two litigants chose to raise in *Wolff* and *Hill*, rather than due process principles long recognized as fundamental by this Court.

B. There are no meaningful barriers to the Court's review. The issue of whether lower courts can employ *Wolff* and *Hill*'s balancing test to recognize due process rights not recognized in *Wolff* and *Hill* themselves was squarely presented below. A majority of the panel determined that Seventh Circuit precedent forecloses adding to *Wolff*'s and *Hill*'s protections. App. 19a-20a; App. 38a (Hamilton, J., dissenting). If this Court reverses the decision below, Mr. Love will likely win relief, given that the Department

of Correction has never articulated a penological reason why it had to make up its mind about how to punish Mr. Love in advance. *Supra* pp. 22-25.

Although the state argued below that Mr. Love procedurally defaulted his claims by failing to raise them in his prison disciplinary proceedings, two members of the panel found that the state "caused his procedural default by misleading him as to which policies applied to his disciplinary rehearing and what potential penalties he faced." App. 9a. And while Judge Brennan found that Mr. Love could not show prejudice, that was based largely on his view that circuit precedent "foreclose[d]" adding "to the *Wolff* and *Hill* protections." App. 19a. If the Court holds that *Wolff* and *Hill* are not the final word on due process in prison hearings, Mr. Love will be able to show prejudice because ordinary due process requires an opportunity to present mitigation arguments before a neutral decisionmaker, and the state has never even tried to argue that it has a valid penological justification for turning the penalty phase of disciplinary hearings into empty formalities.

The state also argued below that Mr. Love forfeited his claims by failing to present them when he was proceeding pro se before the district court. But Judge Brennan decided not to excuse the forfeiture because he thought circuit precedent doomed Mr. Love on the merits based on his incorrect view of the methodological question presented here, *see* App. 19a-20a, and Judge Hamilton would have excused the forfeiture. *See* App. 40a-41a. Thus, if this Court corrects the court of appeals' error of law on the question presented, the court of appeals on remand would reach Mr. Love's claim on the merits.

* * *

The court of appeals contravened *Wolff* and *Hill* when it concluded that prisoners are categorically ineligible for any due process protections not raised by the petitioners in *Wolff* and *Hill*. The Court should intervene to ensure that the decision below does not erect the sort of "iron curtain drawn between the Constitution and the prisons of this country" that the Court has foresworn. *Wolff*, 418 U.S. at 555-56. The due process protection Mr. Love seeks here is fundamental—the opportunity to make mitigation arguments to an open-minded decisionmaker—and there are no legitimate penological interests in depriving him of that bedrock guarantee. The Court should grant review or summarily reverse.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted.

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