

No. 17-8768

IN THE
SUPREME COURT OF THE UNITED STATES

OSIEL RODRIGUEZ,

Petitioner,

v.

CHARLES RATLEDGE,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

**REPLY BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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ARGUMENT

Petitioner Osiel Rodriguez states the following in reply to the United States' brief in opposition to his petition for appeal:

1. The Government does not deny that the courts of appeals are divided on both of the questions presented in Rodriguez's petition for certiorari.

a. As explained in Rodriguez's petition, the courts of appeals are split over whether federal prisoners can bring habeas claims under 28 U.S.C. §2241 to challenge a change in the inmate's conditions of confinement. The Government does not dispute this. Nor does the Government dispute that the circuits disallowing these types of habeas claims rely on a misreading of *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Those circuits erroneously read *Preiser* as limiting habeas to claims that challenge the fact or duration of employment, a question the Government concedes this Court has left open. Gov't' Opp. Br. at 12. The Government identifies no reason to delay resolution of this split which currently makes the availability of habeas relief a fortuity based on the happenstance of an inmate's place of incarceration.

b. As explained in Rodriguez's petition, the court of appeals are also split over the baseline to determine whether a change in an inmate's conditions of confinement subjects the inmate to atypical and significant hardship. The Government does not dispute that the circuits are hopelessly divided over this issue too. The Government also does not contest that prison officials would benefit from a clear, uniform rule that defines the baseline, in contrast to the confusion that permeates the courts of appeals.

2. Unable to deny a deep and mature division among the circuits that hinders the interests of justice, the Government improperly argues the merits of Rodriguez's underlying claim for relief. The Government overlooks that there has been no trial. The Government relies

on disputed facts that, contrary to the Government's brief, must be construed in Rodriguez's favor since his petition was denied on summary judgment.

a. The Government says "the record does not indicate" that transfer to ADX Supermax imposes an atypical and significant hardship compared to the ordinary incidents of prison life. Gov't Opp. Br. at 9. That is misleading because the district court never held an evidentiary hearing on the question. The Government argued below that Rodriguez's transfer to ADX Supermax did not impose an atypical and significant hardship as a matter of law based on *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012), and the district court agreed. So just as there is no record that transfer to ADX Supermax imposes an atypical and significant hardship, there is no record it does not. The Government did not contest Rodriguez's claim with evidence, and for purposes of summary judgment the question was a disputed fact that had to be construed in Rodriguez's favor. What Rodriguez seeks is the opportunity to make his record, to show under the correct standard that his transfer subjected him to atypical and significant hardship compared to the ordinary incidents of prison life. Indeed, imposing atypical and significant hardship is the very purpose of ADX Supermax.

b. Relying on *Rezaq*, the Government says "the court of appeals correctly recognized that '[t]he conditions at ADX Florence do not constitute an atypical and significant hardship.'" Gov't Opp. Br. at 9. The Government's argument, however, begs the question whether *Rezaq* prescribes the correct baseline for that determination. The Government also overlooks that even *Rezaq* requires a case-by-case factual determination which the lower courts did not give Rodriguez. In particular, one of the factors under *Rezaq*'s four-part test is whether the inmate's segregation relates to and furthers the BOP's legitimate penological interests. 677

F.3d at 1013. That determination is necessarily unique to each inmate and cannot be applied as a matter of law to the circumstances presented by different inmates.

For instance, one of the justifications for the transfer of the *Rezaq* inmates was national security concerns. *Ibid.* That was not a factor for Rodriguez's transfer. The 10th Circuit's determination that transfer of the *Rezaq* defendants furthered a legitimate penological interest, therefore, does not answer whether Rodriguez's transfer did the same. There needed to be a particularized determination based on the facts and circumstances of Rodriguez's transfer. That particularized inquiry must answer something *Rezaq* did not address--how could Rodriguez's transfer further a legitimate penological interest if it was based on an invalid, unlawful determination that he attempted to escape from USP Lee. No legitimate penological interest is served by transferring an inmate to ADX Supermax for grounds that do not exist.

c. The Government argues that "no court of appeals has adopted an approach more favorable" to Rodriguez's position than *Rezaq*. Gov't Opp. Br. at 10. That is incorrect. Each of the other standards other courts of appeals have adopted are more liberal than *Rezaq*.

d. The Government contends that Rodriguez received due process in the administrative transfer process. Gov't Opp. Br. at 11. Not so. Rodriguez was not allowed to challenge his conviction for attempted escape from USP Lee in the transfer proceeding. Yet, that conviction was unlawful and invalid. It occurred only when the BOP violated its regulations and reversed Rodriguez's acquittal on what the hearing officer called a far-fetched" and "hard to believe" charge. Notably, the Government's brief does not deny that the conviction violated BOP regulations and Rodriguez's due process rights. Not allowing Rodriguez to oppose the grounds proffered for transfer is not due process.

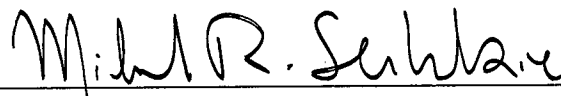
e. The Government claims Rodriguez said in the transfer proceeding that he attempted to escape from USP Lee. Gov't Opp. Br. at 4, 12. Rodriguez denies that. The "statement" the Government points to was not written by Rodriguez. It was written by a hearing officer purporting to recount what Rodriguez said, and the statement refers not to USP Lee, but to the two other institutions from which Rodriguez attempted to escape years earlier and for which he previously had been sanctioned. The Government construes the comment in the hearing officer's report as referring to USP Lee, but the statement has to be construed in Rodriguez's favor since this case was decided on summary judgment. Rodriguez had a pending habeas challenge to his conviction for attempted escape from USP Lee when the transfer proceeding occurred. It strains credulity to believe he confessed to the charge in the transfer proceeding when he was opposing transfer on the basis that the conviction was improper.

CONCLUSION

Petitioner Osiel Rodriguez respectfully requests that the Court grant this petition and issue a writ of certiorari to the Court of Appeals for the Fourth Circuit for the foregoing reasons.

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Respectfully submitted,



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