No. 15-31

In the Supreme Court of the United States

ALFREDO PRIETO,
Petitioner,
v.
HAROLD C. CLARKE, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Evidence continues to build about the drastic psychological harm inflicted by long-term solitary confinement like that imposed on petitioner here. *See* Br. of Amici Curiae Corrections Experts; Br. of Amici Curiae Professors and Practitioners of Psychiatry and Psychology. This case presents an important opportunity for this Court to finally resolve whether states must afford such inmates due process before maintaining them in extreme conditions of long-term solitary confinement that sharply depart from the ordinary incidents of prison life. Respondents' attempts to derail this important case fail.

Much of respondents' opposition focuses on denying or avoiding the deep division in the circuit courts over the questions presented. That effort is not persuasive. This Court and other courts have recognized—for good reason—that the courts of appeals are sharply divided on the questions presented. This Court's review is necessary to resolve those entrenched splits.

Second, Virginia's determined effort to moot this case—including by executing petitioner before this Court can reach the questions presented—should not be rewarded. Another similarly-situated inmate with an identical interest recently moved to intervene in or join this action. This Court has previously granted similar motions and should do so here.

Third, the State's suggestion that "interim" changes to conditions on Virginia's death row—after the filing of the petition in this case—somehow obviate the need for resolution of the important questions presented should be rejected. Such "voluntary cessation of allegedly illegal conduct does not moot a case." *United States v. Concentrated Phosphate Export Ass'n*, 393

U.S. 199, 203 (1968). And particularly here, where respondents vigorously defend the judgment below, make only provisional changes, and explicitly reserve the right to resume their prior conduct, certiorari is strongly warranted.

Whether the Constitution requires states to afford inmates basic procedural safeguards before imposing undeniably severe conditions of solitary confinement is an important issue that warrants this Court's guidance sooner rather than later. *Cf. Davis v. Ayala*, 135 S. Ct. 2187, 2208-10 (2015) (Kennedy, J., concurring). This case provides a timely and sound vehicle to resolve that important question. The petition should be granted.

I. CERTIORARI IS WARRANTED TO RESOLVE THE ENTRENCHED CONFLICT ON THE QUESTIONS PRESENTED

A. Certiorari Is Warranted On The First Question Presented

Respondents devote the bulk of their opposition to attempting to reconcile the Second and Fourth Circuits' two-part analysis with this Court's precedents and the decisions of other court of appeals. Opp.18-33. They do not succeed.

1. Respondents attempt to reframe the first question presented as whether *Sandin v. Conner*, 515 U.S. 472 (1995), and *Wilkinson v. Austin*, 545 U.S. 209 (2005) "dispensed with the requirement that a State-created liberty interest be one that the State actually created." Opp.18. That is *not* the question presented and misses the point entirely.

a. Petitioner's argument is not that *Sandin* and *Wilkinson* treat state laws, regulations, or policies as irrelevant. Quite the opposite. State regulations and

practices establish the *baseline* consequences that follow from a criminal conviction within a jurisdiction—*i.e.* "'the ordinary incidents of prison life.'" *Wilkinson*, 545 U.S. at 223 (citation omitted). States exercise substantial discretion in establishing what those baseline conditions are. *See*, *e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (ordinary right to good-time credits established by Nebraska law). *Sandin* and *Wilkinson* simply acknowledge that inmates have a liberty interest in avoiding significant deprivations relative to that state-created baseline, thereby requiring states to provide due process before "impos[ing] an atypical and significant hardship in relation to the ordinary incidents of prison life." *Wilkinson*, 545 U.S. at 223; *see also* Brief for the United States as Amicus Curiae 8, *Wilkinson*, 545 U.S. 209 (2005) (No. 04-495), 2005 WL 273649 ("[S]tate action creates a liberty interest when it 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" (citation omitted)).

b. When it comes to the actual first question presented, respondents cannot reconcile this Court's precedents with the "two-part analysis" adopted by the court below—one part of which requires inmates to satisfy a test this Court expressly "abandon[ed]" in *Sandin*. 515 U.S. at 483 n.5.

Under the Fourth Circuit's approach, an inmate cannot establish a liberty interest without showing that state "'statutes or regulations require, in "language of an unmistakably mandatory character," that a prisoner not suffer a particular deprivation absent specified predicates.'" *Tellier v. Fields*, 280 F.3d 69, 81 (2d Cir. 2000) (quoting, *inter alia*, *Hewitt v. Helms*, 459 U.S.

460, 471-72 (1983)); *see* Opp.27 (quoting *Frazier v. Coughlin*, 81 F.3d 313, 317 (2d Cir. 1996) (a liberty interest may not arise "in the absence of a particular state regulation or statute that (under *Hewitt*) would create one"). This Court has explained, however, that "the touchstone of the inquiry … is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" *Wilkinson*, 545 U.S. at 223 (citation omitted).

Respondents argue that *Sandin* merely "established an independent barrier" to identifying a liberty interest, while leaving intact *Hewitt*'s requirement that inmates point to language of an unmistakably mandatory character in state statutes or regulations. Opp.20. Not so. *Sandin* and *Wilkinson* make clear that this Court did not add a second step to *Hewitt*'s analysis, but instead "abrogated the methodology of parsing the language of particular regulations." *Wilkinson*, 545 U.S. at 222; *see also Sandin*, 515 U.S. at 483 ("[T]he search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause.").

Respondents particularly struggle to explain *Wilkinson*, where this Court unanimously found a liberty interest established solely by asking whether the inmates' conditions "'impose[d] atypical and significant hardship on the inmate[s] in relation to the ordinary incidents of prison life.'" 545 U.S. at 223 (citation omitted). Nowhere in *Wilkinson* did this Court look to mandatory language in state regulations. Respondents attempt to square that result with its

two-part test by hypothesizing that this Court was "apparently influenced by the fact that, under Ohio's prison regulations, placement in supermax 'disqualifie[d] an otherwise eligible inmate for parole consideration.'" Opp.26 (citation omitted). But Ohio itself abolished parole *nine years* before *Wilkinson* and told this Court that for "any Ohio inmates sentenced since then, the 'no-parole-eligibility' rule means nothing." Brief for Petitioners 44, *Wilkinson v. Austin*, 545 U.S. 209 (No. 04-495), 2005 WL 282135 (*Wilkinson* Petr's Br.). Not only that, it acknowledged that 90% of inmates placed into supermax were already parole-ineligible. *Id.* Ohio's parole regulations cannot, therefore, bear the weight respondents give them.

As *Wilkinson* makes clear, the two-part analysis adopted by the Second and Fourth Circuits contradicts this Court's precedents and warrants this Court's attention.

2. Respondents also deny the significant conflict between the Second and Fourth Circuits and numerous other courts of appeals. Opp.27-33. Respondents' denial springs from their remarkable claim—notwithstanding over 2,000 appellate cases citing *Sandin* or *Wilkinson*, many finding a liberty interest—that "the Second and Fourth Circuits are the only courts of appeals to have ruled on the question presented here." Opp.33. Because the caselaw leaves no doubt that the conflict is real and substantial, however, this Court's review is warranted.

a. First, both the Fourth and Ninth Circuit have specifically recognized that the courts are split regarding whether *Tellier*'s two-part analysis is good law. *See, e.g.*, Pet.App.5a n.3 (noting conflict between Second and Ninth Circuit); *Chappell v. Mandeville*, 706

F.3d 1052, 1066-68 (9th Cir. 2013) (Graham, J., concurring) (same). Respondents dismiss Judge Bybee's majority opinion in *Chappell* as "the ruling of only a single judge on the issue presented here." Opp.30. That is flat wrong. Judge Berzon expressly joined Section III.B of Judge Bybee's opinion, where the plaintiff's due process claim was resolved. *See* 706 F.3d at 1062-65; *id.* at 1069 (Berzon, J., dissenting in part) ("I join Part III.B of the majority opinion ….").

b. Respondents fare little better when attempting to brush aside the other cases on which petitioner relies. *See* Pet.18-21. Respondents repeatedly admit that other circuits have "reject[ed] the mandatory-language approach used in *Hewitt*." Opp. 28 (citing *Powell v. Weiss*, 757 F.3d 338, 345 (3d Cir. 2014)); *see also* Opp.29 (same for the Sixth and Seventh Circuit). Those results directly conflict, of course, with the Second and Fourth Circuit's two-part analysis, which requires an inmate to satisfy *Hewitt*'s mandatory-language approach.

Respondents likewise have no answer for cases in which courts have found a liberty interest simply by employing the test articulated in *Sandin* and *Wilkinson*, without any discussion of whether inmates were *entitled*, by virtue of mandatory language in state regulations, to avoid those conditions absent procedural predicates. *See, e.g.*, *Wilkerson v. Goodwin*, 774 F.3d 845, 856 (5th Cir. 2014) ("Viewed collectively, there can be no doubt that [plaintiff's] *conditions* are sufficiently severe to give rise to a liberty interest under *Sandin*.") (emphasis added); *Shoats v. Horn*, 213 F.3d 140, 143-44 (3d Cir. 2000).

c. Respondents suggest that the real question is whether the courts of appeals are split on whether a

state-created liberty interest requires a "State-law-predicate." Opp.28. But as explained earlier, *supra* at 2-3, that confuses the issue. No one disputes that state practice is relevant. State laws, regulations, and policies establish the baseline consequences of a criminal conviction within a given jurisdiction—the "*normal* limits or range of custody" that a conviction authorizes the state to impose, *i.e.*, the ordinary incidents of prison life. *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (emphasis added). When state action imposes atypical and significant hardships in relation to that norm, a liberty interest is implicated.

B. This Is An Ideal Case To Resolve What Constitutes The "Ordinary Incidents Of Prison Life"

Respondents admit that "'the 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.'" Opp.33-34 (quoting *Wilkinson*, 545 U.S. at 223). The referenced cases involved inmates convicted of different crimes and serving different sentences. Respondents nonetheless argue that certiorari is not warranted because there is no split *specifically* with respect to death-sentenced inmates. That objection is misplaced.

1. First, the extent to which a petitioner's sentence impacts what constitutes the "ordinary incidents of prison life" under *Wilkinson* is itself an important aspect of the conflict on which this Court's review is warranted.

As the petition explained, many circuit courts consider that conditions "'can only be truly "ordinary" when experienced by a significant proportion of the

prison population.'" Pet.22-24 (citations omitted). Under those courts' approach, petitioner's particular conviction and sentence would not impact the baseline. In other circuits it could. The D.C. Circuit, for instance, defines the baseline by examining the conditions that prison officials "routinely impose on inmates serving similar sentences." *Hatch v. District of Columbia*, 184 F.3d 846, 847 (D.C. Cir. 1999). Still other circuits employ multi-factor balancing tests that take into account the penological purpose of the confinement at issue. Those circuits might well consider the arguments on which respondents rely to suggest that "[d]eath-row offenders are sui generis." Opp.35-38. This case, no less than any other, permits this Court to resolve that conflict.

2. In any event, *Wilkinson* makes clear that the considerations on which respondents rely (Opp.35-38) to suggest that "the restrictive conditions of confinement on death row are warranted" do not affect whether a *liberty interest* is implicated in this case. In *Wilkinson*, Ohio argued that supermax prisoners were the "most dangerous" of all prisoners in Ohio's system and their detention was necessary "in order to make the entire system safer." *Wilkinson* Petr's Br. 4. This Court unanimously held, however, that such considerations did not alter the existence of a liberty interest. *See Wilkinson*, 545 U.S. at 224 ("[Ohio State Penitentiary's] harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose …. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance.").

3. It also makes little sense to decline to review this case in light of petitioner's sentence when the

court below dismissed that fact as irrelevant to determining the correct baseline. *See, e.g.*, Pet.App.16a ("We do not hold, or even suggest, that differences in the nature of a conviction or the length of a sentence give rise to different liberty interests."). Instead, the court below concluded that the baseline is a function of the conditions to which an inmate is "entitled."[1] *See* Pet.App.17a. Thus, had this case been about an inmate convicted of burglary or serving a 20-year sentence, and Virginia directed that all such individuals be placed in solitary confinement, the exact same result would have followed.

4. Respondents finally assert that other circuit courts do not treat the general population as the baseline for death-sentenced inmates. Opp.34-35. That is misleading. The two *1980s* circuit cases on which respondents rely substantially predate *Sandin* and *Wilkinson*. They did not identify a baseline *at all*, because this Court's modern framework did not yet exist.[2]

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[1] As petitioner has explained and is illustrated by the changes respondents purport to be making to their "death-row-housing policies," Opp.6-9, petitioner's conditions are the product of VDOC operating procedures that may be modified at any time, *not* state laws or regulations, nor his conviction or sentence, *see* Pet.27 n.2.

[2] Respondents' unpublished district court citations (at Op.35 & n.161) also offer little support. *Williams v. Wetzel* compared a death-sentenced inmate's conditions with conditions experienced by "inmates held in administrative custody"—the general baseline used for *all* inmates within the Third Circuit. No. 12-944, 2013 U.S. Dist. LEXIS 184000, at *16-19 (W.D. Pa. Dec. 9, 2013). Respondents' Ohio cases are off-point, involving challenges to transfers between death row facilities. That leaves only *Lisle v. McDaniel*, No. 3:10-cv-00064-LRH-VPC, 2012 U.S. Dist. LEXIS

5. *Wilkinson* recognized, but reserved decision, on how to resolve "the baseline from which to measure what is atypical and significant in any particular prison system." 545 U.S. at 223. That question continues to divide the courts of appeals.

II. THE QUESTIONS PRESENTED WARRANT THIS COURT'S REVIEW NOW

Respondents finally suggest this case is a poor vehicle. None of respondents' purported vehicle issues, however, justify foregoing this important opportunity to resolve a longstanding "source of major disagreement" among the courts of appeals. *Skinner v. Cunningham*, 430 F.3d 483, 486 (1st Cir. 2005).

First, respondents note that shortly after this Court called for a response to the petition, Virginia scheduled petitioner's execution for October 1, 2015. Petitioner is actively seeking relief from that mandate in this Court and elsewhere. But in any event, another Virginia inmate identically situated to petitioner has moved to intervene in or join this case. *See* Motion of Mark Eric Lawlor to Intervene or Join. This Court has previously granted such motions to alleviate similar mootness considerations. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 807 (2005) (granting additional terminally-ill patients leave to intervene); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 1133 (2012) (permitting new business owners to join where named business owner was entering bankruptcy).

Second, respondents rely on certain "changes" to conditions on death row that they purportedly made in August 2015—only after the filing of the petition for a

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170471, at *9-11 (D. Nev. July 5, 2012), which did not provide any rationale or analysis for its conclusion.

writ of certiorari. Opp.7-8. But a defendant's voluntary cessation of allegedly illegal conduct does not render the case moot unless "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see also City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n.10 (1982) (if voluntary cessation mooted a case, "the courts would be compelled to leave '[the] defendant … free to return to his old ways'") (citation omitted).

This Court has also long been skeptical of last-minute policy changes that threaten to "insulate a favorable decision from review." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 & n.1 (2001) (citation omitted). Those concerns are heightened here where respondents vigorously defend the decision below, claim their former policy was "warranted," Opp.37, commit only to "explore improvements" through "interim" rules, Opp.7 n.52,[3] explain that such "interim" rules "are not intended to establish a State-created liberty interest," Clarke Affidavit Exh. A, and reserve the right to withdraw those privileges, *id.*

Finally, respondents suggest this is a poor vehicle to address concerns about the "'human toll wrought by extended terms of isolation' in solitary confinement" because Virginia historically placed inmates into such extreme isolation only for "on average, seven to ten years." Opp.38-40 (quoting *Davis*, 135 S. Ct. at 2209

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[3] *See also* Affidavit of Harold Clarke, Director, Virginia Department of Corrections, attaching Interim Offender Rules & Regulations (Aug. 5, 2015), *Porter v. Clarke*, No. 1:14-cv-01588 (E.D. Va. Aug. 10, 2015), ECF No. 85-1 ("Clarke Affidavit").

(Kennedy, J., concurring)). But solitary confinement imposes drastic psychological consequences long before that. Br. of Amici Curiae Professors and Practitioners of Psychiatry and Psychology 6-7 (noting that "prolonged solitary confinement" that "exceeds three months" causes "significant and well documented psychological effects"). Respondents' related suggestion that Virginia has always afforded petitioner significant "human contact and interaction," Opp.39, is wholly inconsistent with the undisputed record below and the views of all four judges to consider this case. Pet.17a, 21-22a (Wynn, J., dissenting), 39a-40a.

* * *

The courts of appeals are deeply divided on both questions presented. Those questions are critically important, Pet.30-36, both to petitioner and to the other "25,000 inmates in the United States … serving their sentence in whole or substantial part in solitary confinement, many regardless of their conduct in prison." *Davis*, 135 S. Ct. at 2208-09 (Kennedy, J., concurring). Such questions undeniably warrant this Court's review. Sup. Ct. R. 10(a), (c). And this case presents an uncommon opportunity to resolve those important questions now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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