No. 20-353

In the Supreme Court of the United States

J.H., BY CONSERVATOR, BETTY HARRIS,
Petitioner,
v.
WILLIAMSON COUNTY, TENNESSEE, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Respondents respectfully submit that the Court should deny the Petition for a Writ of Certiorari. The judgment below granting qualified immunity to McMahan was solidly grounded in this Court's precedents. This Court should reject the invitation to use this case to address abstract issues concerning qualified immunity that would not impact the outcome of this matter. The Petition presents no compelling reason for this Court's review.

STATEMENT OF THE CASE

A. Factual Background

Petitioner, J.H., challenges the grant of qualified immunity to Respondent Steve McMahan related to J.H.'s housing placement during a 21-day period in November and December 2013 while he was detained at the Williamson County Juvenile Detention Center ("WCJDC"). J.H. refers to his placement as "solitary confinement" but that characterization is inaccurate, given that J.H. was permitted to have daily in-person visits and phone calls with his parents and he interacted with other adults, including a nurse, his psychiatrist, his attorney, his guardian ad litem, and detention staff during the 21-day period of detention challenged by the Petition. Pet. App. 32a–33a.

McMahan was the detention supervisor of the WCJDC in 2013. He has since retired. The WCJDC is a small, 12-bed juvenile detention facility that typically houses juveniles for very short periods of time. Pet. App. 31a, 45a; R. 333-1, PageID#10557, 10600, 10603.

J.H. has an extensive history with the Williamson County Juvenile Court. He was detained in the WCJDC on October 13, 2013 after the Franklin Police Department filed petitions alleging that he had taken his mother's car without permission and wrecked it in a field. At the time, J.H. was on probation and on in-home detention related to other offenses, including a previous incident in which he had taken another car without permission and driven it into a ditch. His juvenile court history included, among other things, petitions for bullying his younger brother, harassing a special needs student at his school, physically assaulting his younger brother, and assaulting his mother. Pet. App. 31a; R. 111-1, PageID#1361–69.

On October 25, 2013, by Order of the Juvenile Court, J.H. was furloughed into the custody of his mother for the specific purpose of being transported for evaluation and treatment at a neurological treatment facility. On November 14, 2013, upon discovering that J.H. was not in a treatment facility, but at the home of his maternal grandmother, the Juvenile Court ordered that he be returned to the detention center. Because of the significant safety issues created each time J.H. was in his mother's care, and because his attorney requested a competency evaluation before disposition of the juvenile petitions, he was then held pending disposition. Pet. App. 3a; R. 333-1, PageID#10546–48, 10560–63.

Upon his return to the WCJDC on November 15, 2013, J.H. was placed in a dormitory with other juveniles. On November 17, 2013, J.H. was the subject of a report made to intake officers by three other

juveniles, who alleged that they were afraid of him because he had become angry, destroyed property, punched a window, and threatened to harm and sexually assault them if they reported his conduct.[1] J.H. denies making the alleged threats but admitted to certain conduct described by the other juveniles, including punching the window of the dormitory, destroying a shoe, and throwing an "anger fit." J.H. was moved to a single cell for safety reasons after this report. Pet. App. 31a–33a; R. 333-1, PageID#10552–53.

The reason for placing J.H. in a single cell was to keep him safe from other kids and to keep other kids safe from him. The determination to place J.H. in a single cell resulted from the November 17 incident combined with the general observation that J.H. did not get along well with other juveniles, and J.H.'s history of violent and aggressive behavior. Pet. App. 5a, 31a–32a.

McMahan's assessment that J.H. presented a risk to other juveniles was reasonable and supported not only by the report of the three juveniles housed with J.H., but also by J.H.'s Juvenile Court petitions for bullying and assault. McMahan's conclusion is also

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[1] J.H.'s assertion that "one of the juveniles recanted his story" (Pet. 11) is misleading. While one of the juveniles claimed in a deposition years after J.H.'s detention that he fabricated allegations against J.H. to get J.H. removed from the dormitory, it is undisputed that the three juveniles reported to juvenile detention officers that the actions described in the incident report occurred and that none of the juveniles recanted their allegations to detention staff while J.H. was housed in detention. Pet. App. 43a; R. 333-1, PageID #10552–53.

bolstered by statements of J.H.'s physicians[2] and judicial determinations.[3] Pet. App. 31a–32a; R. 111-1, PageID#1361–62.

While he was housed in a single cell, J.H. was not permitted to interact with other juveniles due to safety concerns, but he was permitted phone calls with his parents; regular in-person visits with his father; and regular visits with his mother until she tried to bring prescription medication into the facility without authorization, at which time her visits were limited to thirty minutes a week. He visited with other adults including the nurse, his psychiatrist, his attorney, and his guardian ad litem. J.H. also interacted with detention staff. He spent time in the TV room, recreation areas (both indoors and outdoors), and in the hallway working on homework. He was allowed to have books in his cell. Pet. App. 31a–33a, 54a; R. 231-3, PageID#4492.

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[2] In the fall of 2013, J.H.'s psychiatrist opined that he "represents a **very real risk** to other children, **thus I will not release him to be in a school environment**, as I am concerned for his behavior" and a letter from another physician stated that J.H. "continue[d] to exhibit significant physically and verbally aggressive behaviors that [were] creating extreme safety challenges at home for him and his family." Pet. App. 31a–32a; R. 386, PageID# 13270–71.

[3] Juvenile Magistrate Rogers stated his concern in November 2013 that, if released, J.H. "is a danger to the rest of the community." In December 2013, Judge Guffee determined that placement in a single cell was necessary "for [J.H.'s] protection and for "everyone else's protection[.]" R. 333-1, PageID# 10561, 10584.

Contrary to J.H.'s allegations in the Petition, throughout his stay in detention, he was provided with medical and mental health treatment in accordance with his physicians' instructions. J.H. alleges that he has a medical diagnosis of PANDAS,[4] which he claims manifests in a variety of behavioral and psychiatric disturbances. While in the WCJDC, detention staff administered oral antibiotics as prescribed by Dr. Elizabeth Latimer, the physician who was treating him for PANDAS. J.H. saw Dr. Latimer the day after his release from detention and she observed that he "appear[ed] more calm and in less distress." Detention staff also administered medications prescribed by a psychiatrist who was treating J.H., Dr. Amanda Sparks-Bushnell, and McMahan communicated with her regarding dosages. J.H. was transported to an appointment with his psychiatrist on December 6, 2013 and she noted improvement in his condition since his placement in detention. J.H. was also examined by a nurse while in detention. Both lower courts found as a matter of law that J.H. received constitutionally adequate medical and mental health treatment in detention and the Petition does not challenge that determination. Pet. App. 22a–23a, 53a–57a; R. 333-1, PageID#10569.

On December 7, 2013, J.H. alleged that he was sexually assaulted by juvenile detention employee

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[4] "PANDAS" stands for Pediatric Autoimmune Neuropsychiatric Disorders Associated with Streptococcal Infections. Pet. App. 2a. The existence of and diagnostic criteria for PANDAS are disputed. However, whether the condition exists and whether J.H. was properly diagnosed are irrelevant for purposes of this Petition.

Cruz. Cruz denies that he assaulted J.H. The Sixth Circuit affirmed summary judgment in favor of Williamson County as to J.H.'s claims of negligent training and supervision of Cruz and the Petition does not challenge that determination. Pet. App. 23a–24a, 53a, 58a.

On December 9, 2013, upon a motion from J.H.'s mother, Juvenile Judge Sharon Guffee reviewed the terms of J.H.'s confinement. At this hearing, J.H.'s mother's attorney introduced a letter from Dr. Latimer stating that although J.H. should not remain in detention long term, her "medical recommendation would be for [J.H.] to remain at the detention center until [her office was] able to assess his condition and work with a treatment facility to get him transitioned." Her recommendation was based upon reports from J.H.'s mother about J.H.'s behavior at home and resulting police encounters. Judge Guffee ordered that J.H. remain in detention segregated from other juveniles and further limited J.H.'s parental visitation and phone calls.[5] J.H. was released from detention on

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[5] Even after the Juvenile Court limited contact with his parents on December 9, 2013, detention staff continued to permit J.H. to have regular interaction with adults. Detention staff continued to talk with J.H. He had visits from his guardian ad litem, a DLAC advocate, his attorney, a psychologist, a detective, and a supervised visit with his parents during that time. Pet. App. 32a, 54a–55a; R. 333-1, PageID#10575, 10586.

The District Court determined that Judge Guffee was entitled to judicial immunity for her December 9, 2013 decisions and held that Adgent and McMahan were entitled to quasi-judicial immunity for their actions in implementing Judge Guffee's order. Pet. App. 6a. J.H. did not appeal those determinations.

December 19, 2013. Pet. App. 5a; R. 333-1, PageID#10581–84.

B. Procedural Background

Petitioner initially pursued various claims against Williamson County, Judge Sharon Guffee, Betsy Adgent and Steve McMahan, and summary judgment was granted, and affirmed, as to all claims against those parties. The Petition challenges only the grant of qualified immunity to McMahan related to J.H.'s claim that his substantive due process rights were violated when he was placed in a single cell from November 17 to December 8, 2013.

The district court granted qualified immunity in favor of McMahan as to J.H.'s "solitary confinement" claim. Pet. App. 48a. The district court declined to assess the first prong of qualified immunity, opting instead to begin with the second prong and concluding that J.H. had not shown a violation of clearly established law. Pet. App. 48a.

The Sixth Circuit affirmed the grant of qualified immunity to McMahan. The panel majority held that *if* J.H.'s assertions that "he was kept in solitary confinement as punishment for the November 17 incident, and that while in segregation he was fully isolated" were true, there would have been a constitutional violation[6], but qualified immunity would

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[6] Notably, the panel did not make a finding that J.H.'s characterization of events was true, but rather assumed the accuracy of his assertion that he was "fully isolated" for purposes of the Constitutional analysis.

apply. The panel majority held that the right at issue was not clearly established as of 2013, noting that many of the cases addressing solitary confinement were issued after 2013. Pet. App. 10a-17a.

Judge Readler wrote a concurrence agreeing with the majority's holding that Respondents did not violate clearly established law but disagreeing with the majority's assessment that the conduct ran afoul of substantive due process principles. Pet. App. 26a.

The concurrence noted that *Bell v. Wolfish*, 441 U.S. 520 (1979) was intended to prevent pretrial punishment for acts committed before one is detained and was not "intended to apply in the context of an official's effort to remedy misconduct committed while in custody." Pet. App. 27a. Because the change in J.H.'s housing placement is alleged to be punishment for the November 17 incident and not for the underlying delinquent conduct that landed J.H. in the detention center, *Bell* should not apply. Pet. App. 29a.

Even if *Bell* applied, Judge Readler opined that given the November 17 report and the opinions expressed by J.H.'s own physicians, "there was a legitimate basis for believing J.H. was a threat to others, and for acting accordingly, to ensure safety given the specific confines of the detention facility." Pet. App. 32a. Under *Bell*, detention officials are to be given "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Pet. App. 32a (citing *Bell*, 441 U.S. at 547).

In Judge Readler's assessment, the restrictions employed were not excessive. Judge Readler noted that while J.H. was not allowed to interact with juveniles, he had regular phone calls and visits with his parents as well as visits with a doctor, a psychologist, his attorney and his guardian ad litem. He further noted that J.H. conversed with guards, had books in his cell and was allowed privileges outside his cell, including visits to the "rec yard," exercising, watching T.V. and doing his homework in the hallway. Pet. App. 32a. These measures "honor[ed] the security concerns of the other detainees, who themselves enjoy constitutional protections from deliberate indifference of their detention officials." Pet. App. 33a. Judge Readler found that imposition of the restrictions was a reasonable judgment call by the detention facility and that "there was nothing reckless about how those officials balanced the interests of J.H. with those of the other detainees." Pet. App. 33a. Accordingly, Judge Readler would have held that there was no violation of J.H.'s substantive due process rights.

J.H.'s request for en banc review was denied and the Petition for a Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

I. This case is a poor vehicle for addressing the Questions Presented.

A. Petitioner did not press and the Sixth Circuit did not pass upon the Questions Presented for review.

As to the first Question Presented, neither of the lower courts held that *Hope v. Pelzer*, 536 U.S. 730

(2002), is "dead." The Sixth Circuit even cited *Hope* in its opinion. Pet. App. 10a. Review of this first question is unnecessary.

In outlining the standard for qualified immunity in the lower courts, J.H. did not identify two contradicting qualified immunity analyses as he has done in the Petition. Below, J.H. presented one cohesive qualified immunity standard citing *Hope* and subsequent Supreme Court precedent. R. 306, PageID#5639–40; App. R. 13, Page: 28–30. However, in the Petition, J.H. alleges that there is "a constant tension" between *Hope's* "fair warning" analysis and subsequent case law, like *Mullenix v. Luna*, 577 U.S. 7 (2015)*, White v. Pauly*, 137 S. Ct. 548 (2017)*, and District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), referencing "controlling authority of particularized facts." Pet. 22. J.H. did not press this distinction below, but instead raises it for the first time here. Similarly, in the lower courts, J.H. did not articulate an argument that different qualified immunity analyses should apply in life threatening scenarios versus circumstances where a defendant has an opportunity for deliberation and reflection.[7] Pet. 12,

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[7] J.H. suggests that this Court's jurisprudence requiring the "clearly established" right to be sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it developed only in the context of excessive force claims brought under the Fourth Amendment, where there is no opportunity for deliberation and reflection. Pet. 16-17. However, this is not the case. This Court has applied the same standard for qualified immunity in other contexts in recent years, and the requirement that a public official have some specific notice of the rights he is charged with upholding before being held liable for violating them is not unique to excessive force cases. *See, e.g.*,

17; R. 306, PageID#5639–40; App. R. 13, Page: 28–30. This Court is not the forum for arguments to be raised for the first time and therefore, this case is not the appropriate vehicle for addressing these issues.

As to the second Question Presented, the Sixth Circuit did not engage in lengthy discussion of the various non-judicial authorities cited by J.H. because such is unnecessary to the resolution of this case. Instead, the court below summarily (and correctly) found that the inapplicable regulations, journal articles and research papers identified by J.H. did not amount to "clearly established law." This holding is consistent with this Court's precedent and J.H. has not identified any case law to the contrary. *See Bell*, 441 U.S. at 543 n.27 (holding that standards issued by various groups and policy recommendations regarding conditions of confinement are not determinative of Constitutional requirements).

The Sixth Circuit did not analyze the Questions Presented in this Petition and there is no compelling reason for this Court to do so at this time. Instead, this Petition is simply about J.H.'s belief that the Sixth Circuit misapplied *Hope v. Pelzer* to the facts of this case. That mistaken belief, however, does not justify a grant of certiorari. *See* Supreme Court Rule 10 ("A petition for a 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.")

Taylor v. Barkes, 575 U.S. 822 (2015); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

B. Open questions regarding whether genuine issues of material fact exist render this case a poor vehicle for addressing the Questions Presented.

Even if J.H. had raised the Questions Presented in the courts below, this case would not be the case to decide the continuing validity of *Hope v. Pelzer* because of the manner in which the lower courts dealt with perceived factual issues regarding J.H.'s conditions of confinement. While both Courts agreed that McMahan was entitled to qualified immunity based upon the second prong of the analysis ("clearly established law"), the manner in which the lower courts dealt with the first prong of the analysis (whether a violation occurred) has left an open question as to whether a violation even occurred. The district court found that there was a genuine issue of fact as to "how much social interaction J.H. had while housed in a single cell" in the context of evaluating *J.H.*'s motion for summary judgment, not McMahan's. Pet. App. 44a. Respondents agree that there certainly was not evidence to support a finding in J.H.'s favor as to that issue. At the appellate level, the panel majority did not disturb the district court's determination, but instead evaluated whether J.H. could show a constitutional violation *if* his allegation that he was "fully isolated" for punitive purposes was true. Pet. App. 10a.

The record reveals that the specific undisputed facts are that J.H. had meaningful social contact including: phone calls with his parents; regular in-person visits with his father; regular visits with his mother (until she tried to bring prescription medication into the

facility without authorization, at which time her visits were limited by a judge to thirty minutes a week); and visits with the nurse, his psychiatrist, his attorney, and his guardian ad litem. J.H. conversed with detention staff. He spent time in the TV room, recreation areas (both indoors and outdoors), and in the hallway working on homework. He was allowed to have books in his cell. Pet. App. 31a–33a, 54a; R. 333-1, PageID#10554, 10563–65, 10567, 10570.

The panel majority's finding that a constitutional violation would have occurred *if* J.H.'s allegations were true and the notable absence of an opinion that a constitutional violation indeed occurred under the actual undisputed facts indicates that in the panel majority's view, the exact conditions of his confinement were material to assessing the first prong of qualified immunity: whether a constitutional violation occurred. When one examines the undisputed *facts*, as opposed to J.H.'s unsupported characterizations, it is clear that J.H. was never "fully isolated" and was not deprived of all meaningful social contact.[8]

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[8] The panel majority also left undisturbed the district court's finding that there was a genuine issue of fact as to "whether J.H. was placed in a single cell as punishment or for safety reasons." Pet. App. 44a. Again, that finding by the district court was made in the context of *J.H.'s* motion for summary judgment. J.H. has not offered evidence (other than his own subjective perception) to create an issue of fact as to Respondents' contention that his placement in a single cell was for safety reasons. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (a party opposing summary judgment "must set forth specific facts showing that there is a genuine issue for trial.").

J.H.'s conclusory allegation, therefore, likely should not have been "assumed" true for purposes of summary judgment. This Court previously held that in evaluating a summary judgment motion, a district court "'must resolve any factual issue of controversy in favor of the non-moving party' only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). The concurring judge correctly credited the specific undisputed facts, instead of J.H.'s unsupported conclusory allegation. Pet. App. 31a.

However, even taking J.H.'s conclusory allegations as fact, both the district court and the panel majority correctly granted qualified immunity. While both courts (and the concurring judge) ultimately reached the correct conclusion in granting qualified immunity, evaluating the facts under a different standard for qualified immunity, or otherwise altering or overturning the lower courts' grant of qualified immunity would require review of these perceived factual issues and the underlying, unresolved question of whether a constitutional violation even occurred, making this case a poor vehicle for addressing the Questions Presented.

Alternatively, if the courts below were correct and J.H.'s conclusory allegations somehow create genuine issues of fact, the unresolved factual disputes identified by the lower courts would hamper this Court's ability

to provide meaningful guidance to lower courts regarding the qualified immunity analysis in the context of this case, and therefore the Petition should be denied.

C. The resolution of the first Question Presented would not change the outcome of this case.

The continuing viability of *Hope v. Pelzer* is not outcome determinative in this case because application of *Hope* does not alter the conclusion that qualified immunity is appropriate here. In *Hope*, prison guards working for the Alabama Department of Corrections (ADOC) were denied qualified immunity for punishing an inmate by handcuffing him to a hitching post. 536 U.S. at 741-42. The inmate remained attached to the post shirtless all day while the sun burned his skin. During the seven hours he spent attached to the post, he was given water once or twice and was not allowed bathroom breaks. *Id.* at 734-35. Alabama was the only state at that time that handcuffed prisoners to hitching posts if they refused to work. *Id.* at 733.

The legal authority addressing the constitutional violation at issue in *Hope* was far more robust than the legal authority offered by J.H. in this case. In holding that the prison guards were not entitled to qualified immunity, the Court invoked moral reasoning, noting the "obvious cruelty" of the conduct, but the Court did not stop there. *Id.* at 745. The Court relied upon binding Eleventh Circuit precedent condemning similar but not identical practices, an ADOC regulation that placed certain limits on the use of the hitching post that were frequently ignored by officers, and a

Department of Justice report specifically advising the ADOC of the unconstitutionality of its use of the hitching post before the incidents in the case occurred. *Id.* at 742-45.

J.H. argues that *Hope* looked to non-judicial authorities (an ADOC regulation and a DOJ report) but ignores that *Hope* also cited binding circuit precedent. The Court did not hold that either the regulation or the DOJ report was an independent basis for obviousness, but rather relied upon a constellation of factors, including binding precedent addressing similar practices, in finding that a reasonable official would have had fair notice of the unconstitutionality of his conduct.

The situation here is very different. J.H. admits that there was no controlling authority indicating that his housing placement in the detention facility amounted to a violation of his Fourteenth Amendment rights. Pet. 1. J.H. has not cited any circuit court opinion from before 2013 addressing either solitary confinement of juveniles or housing of juveniles in conditions like J.H.'s, where a juvenile detainee was separated from other juveniles, but interacted regularly with his parents and other adults. Instead, in claiming that a reasonable official would have had fair warning that his housing placement was unconstitutional, J.H. relies on inapplicable regulations and policies, journal articles, and research studies. Contrary to J.H.'s assertions, *Hope* does not stand for the proposition that these publications amount to "clearly established law."

While factually similar case law is usually required to show clearly established case law, *Hope* leaves room for the rare situation where the unlawfulness of conduct is so obvious that it is indisputable that the official had sufficient "fair warning." By way of example, Petitioner cites a hypothetical case wherein welfare officials are accused of selling foster children into slavery, which would be obviously unconstitutional even in the absence of case law on point. Pet. 20 (citing *United States v. Lanier*, 520 U.S. 259, 271 (1997)). This Court's more recent decisions underscore that application of *Hope's* "obvious" exception is indeed rare. *Wesby*, 138 S. Ct. at 590; *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). The present case is far from the rare obvious one.

A Sixth Circuit Judge opined in 2020 that J.H.'s housing placement did not violate his constitutional rights, making it clear that a reasonable juvenile detention center employee in 2013 would not have had fair warning that his actions violated constitutional rights. Pet. App. 32a.[9] Where even learned judges disagree on a constitutional question, "it is unfair to subject [officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *Reichle v. Howards*, 566 U.S. 658, 670 (2012).

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[9] No opinion in this case found a violation of constitutional rights under the actual undisputed facts presented. The majority opinion expressly based its analysis on the premise that J.H.'s conclusory allegations were true (which they are not) and the concurring opinion found that there was no constitutional violation.

Unlike the hypothetical scenario of a welfare official selling foster children into slavery, the lack of case law in this area in 2013 is not indicative of obvious unconstitutionality. The journal articles cited by J.H. acknowledge that use of "solitary confinement" is widespread for adults and juveniles. While cases addressing solitary confinement of juveniles have emerged since 2013, the case law, even for true solitary confinement, was undeveloped at that time.

In the absence of controlling authority addressing "solitary confinement" of juveniles in 2013, it would be reasonable to look to the only possible corollary, case law addressing segregated housing of adults, for guidance. It is clear that in the context of adult detention, even placement in true "solitary confinement", a term that cannot be said to describe the conditions of J.H.'s detention, did not violate the Eighth Amendment under Sixth Circuit precedent. *See Merchants v. Hawk-Sawyer*, 37 F. App'x 143, 145 (6th Cir. 2002); *Alexander v. Vittitow*, 2017 U.S. App. LEXIS 22601, at *12-13 (6th Cir. Nov. 9, 2017); *Bishawi v. Ne. Ohio Corr. Ctr.*, 628 F. App'x 339, 345-46 (6th Cir. 2014); *Evans v. Vinson*, 427 F. App'x 437, 443 (6th Cir. 2011).[10] Single cell confinement cannot be considered "obvious cruelty" within the meaning of *Hope* in light of clear precedent holding that even much more restrictive conditions are *not* cruel and unusual punishment. Cases holding that short-term placement in solitary confinement does not amount to an atypical

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[10] *See also Haralson v. Campuzano*, 356 F. App'x 692, 696-97 (5th Cir. 2009); *Hernandez v. Velasquez*, 522 F.3d 556, 559 (5th Cir. 2008).

or significant hardship, even if not applicable to pretrial detainees, are also instructive in this regard. *Sandin v. Conner*, 515 U.S. 472 (1995); *Jones v. Baker*, 155 F.3d 810, 812 (6th Cir. 1998); *Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir. 1997); *Rimmer-Bey v. Brown*, 62 F.3d 789, 791 (6th Cir. 1995).[11] The narrow exception identified in *Hope* simply does not apply in this case.

Because this case does not turn on the applicability of *Hope*, this Court need not address the first Question Presented in the Petition.

D. The resolution of the second Question Presented would not change the outcome of this case.

The Sixth Circuit's determination that the sources relied upon by J.H. do not amount to "clearly established law" is consistent with this Court's precedent. Outside of the rare, obvious case referenced in *Hope*, this Court has repeatedly emphasized that "clearly established" entails the existence of clear precedent applicable to the circumstances at issue. *Wesby*, 138 S. Ct. at 589-90. To be clearly established, a legal principle must have a "sufficiently clear

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[11] Contrary to Petitioner's assertion, Respondents did not argue that "there was no difference between prisoners and pre-trial detainees, therefore requiring the Court to use the 'atypical and significant hardship' test described in *Sandlin (sic) v. Conner*, 515 U.S. 472, 484 (1995)." Pet. 26. Respondents acknowledge the different constitutional provisions related to pretrial and post-conviction detainees and cite *Sandin* and its progeny simply as additional support demonstrating that the state of the law in 2013 did not provide fair warning that short-term solitary confinement might be viewed as unconstitutional.

foundation in then-existing precedent." *Id.* at 589. "It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* at 590. To be clearly established, the legal principle must prohibit the official's conduct in the particular circumstances before him. *Id.* "The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* (citing *Saucier*, 533 U.S. at 202). A high degree of specificity is required. *Id.* (citing *Mullenix v. Luna*, 577 U.S. 7 (2015)).

The case law cited by J.H. does not show a violation of clearly established law in 2013. J.H. cites *Doe v. Hommrich*, 2017 U.S. Dist. LEXIS 42290 (M.D. Tenn. March 22, 2017), which addresses punitive solitary confinement.[12] Even if the instant case involved punitive confinement (which is disputed), *Hommrich* was not decided until 2017, years after J.H.'s detention. While certainly instructive for detention staff going forward, *Hommrich* is not determinative of "clearly established law" in 2013. This distinction was correctly recognized by the district judge in the instant case, who also authored the *Hommrich* opinion.

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[12] J.H. notes that the *Hommrich* Court cited scientific findings and international authorities, some of which were also cited by J.H. While such materials were evaluated in addressing the request for preliminary injunctive relief (not damages) in *Hommrich*, they are not indicative of clearly established law for purposes of qualified immunity.

The concurrence in *Davis v. Ayala*, 135 S. Ct. 2187 (2015), which urges further consideration of the issue of solitary confinement,[13] is also not instructive. That case was published two years after the events in this action and therefore was not available in 2013. Further, Justice Kennedy notes "indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular," citing reports from 2014 and 2015. *Id.* at 2210. He acknowledges the potential harm of solitary confinement and states: "Of course, prison officials must have discretion to decide that in some instances, temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates." *Id.* The acknowledgement in 2015 that these issues warrant further discussion underscores the lack of clearly established law in 2013 as to constitutional parameters of segregated housing.

In re Medley, 134 U.S. 160, 170 (1890), is also not indicative of clearly established law. Since it was decided, courts, including the Supreme Court, have held that even true solitary confinement does not implicate a protected liberty interest (except where of significant duration, which is obviously not at issue in

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[13] Justice Kennedy identifies the "usual pattern" of solitary confinement as being held "all or most of the past twenty years or more in a windowless cell no larger than a typical parking spot for twenty-three hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone." *Id.* at 2208. The conditions of confinement described by Justice Kennedy were not the conditions of J.H.'s confinement at WCJDC.

this case). Therefore, that case cannot be viewed as clearly establishing law with respect to even true solitary confinement.

J.H. cites *Graham v. Florida*, 560 U.S. 48 (2010), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), for the proposition that the standard of care for juveniles is different than for adults. While those cases indicate that juveniles are treated differently than adults for some purposes, *i.e.* the death penalty and sentencing to life without parole, they do not address solitary confinement of juvenile detainees. The broad general proposition that juveniles are different from adults is not sufficient to set forth the contours for the housing of juveniles in detention settings such that the circumstances of this case could be considered a violation of "clearly established law" in 2013. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (noting that "'clearly established law' should not be defined 'at a high level of generality.'"); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (clearly established law must be "particularized" to the facts of the case and "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

J.H. acknowledges that case law does not clearly establish that his constitutional rights were violated by his housing placement in 2013. Pet. 1. In the absence of such authority, J.H. relies on regulations and policies that were not applicable to the WCJDC in 2013, journal articles and research studies, but those sources also do not amount to "clearly established law."

J.H.'s reliance on PREA and DCS regulations is misplaced because neither PREA nor the DCS regulations cited by J.H. were controlling authority as to the WCJDC in 2013.

PREA does not establish a private right of action and a plaintiff may not "attempt to enforce statutes or policies that do not themselves create a private right of action by bootstrapping such standards" into a constitutional claim. *Bowens v. Wetzel*, 674 F. App'x 133, 137 (3d Cir. 2017); *see Hill v. Hickman Cnty. Jail*, 2015 U.S. Dist. LEXIS 110865 (M.D. Tenn. Aug. 21, 2015). Further, J.H. cannot rely on PREA to support this claim because PREA was not mandatory for the WCJDC in 2013. *National Standards to Prevent, Detect, and Respond to Prison Rape*, 77 Fed. Reg. 37106, 37110 (June 20, 2012) ("PREA does not require State and local facilities to comply with the Department's standards, nor does it enact a mechanism for the Department to direct or enforce such compliance."); *Thompson v. Coulter*, 680 F. App'x 707, 711-12 (10th Cir. 2017) (because Utah has not adopted PREA, the plaintiff could not rely on PREA to support his claim).[14]

J.H.'s expert's opinion that PREA regulations applied to local detention facilities in 2013, in addition to being a legal conclusion as to which she is not qualified to opine, is contradicted by the legal

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[14] Since December 2013, WCJDC has become PREA-compliant. While PREA does not mandate compliance of local detention facilities, WCJDC entered into a contract with the State of Tennessee in 2014, a provision of which requires PREA-compliance. R. 333-1, PageID#10606.

authorities above. Further, PREA cannot be used to establish a standard of care in 2013 when J.H.'s expert acknowledges that no juvenile detention facility in the country had been certified as PREA-compliant in 2013, and admits that she is not aware of any juvenile detention facility in Tennessee that had begun to implement PREA in December 2013. Because PREA was not applicable to the WCJDC in 2013, this case is not indicative of "constant tension" between the legislative and judicial branches, as J.H. proclaims. Pet. 24.

Petitioner implies that Tennessee agreed to be bound by the PREA regulations in 2003 (Pet. 28), but the PREA regulations did not even become effective until 2012. R. 305-4, PageID#5383. The Tennessee Department of Children's Services (DCS) issued a report on July 20, 2014 stating that it embraced the principles of PREA for its facilities and contract providers. R. 305-4, PageID#5382. Such was not applicable to the WCJDC in 2013, both because it had not yet been issued and because the WCJDC was not a contract provider for DCS in 2013.

Petitioner identifies PREA requirements related to isolation and then states that DCS adopted the PREA standards in 2010 in Policy 18.8. Pet. 28. However, that policy, as adopted in 2010, does not contain language from PREA regarding requirements for residents who are isolated from others. *See* R. 305-4, PageID#5384–94. Even if the DCS policy had included such language at that time, the policy applied only to DCS facilities and contracted providers and the WCJDC did not fall into either of those categories in

2013. Similarly, DCS Policy 25.10, also cited by J.H., was not applicable to the WCJDC in 2013.

Even if the Tennessee Corrections Institute (TCI) minimum standards cited by J.H. were applicable in 2013,[15] the requirement of a disciplinary hearing within 72-hours of placement in segregation would not have applied to J.H.'s placement for safety reasons. Further, while such a regulation might be relevant to a procedural due process claim, J.H. did not plead one, and does not pursue a procedural due process claim here. Those standards did not prohibit single cell housing of juveniles.

Petitioner cites articles published in the Washington University Journal of Law & Policy (WJL) and the Journal of the American Academy of Psychiatry and the Law (JAAPL), a policy statement of the American Academy of Child and Adolescent Psychiatry (AACAP), a publication of the Americans Civil Liberties Union (ACLU), and a United Nations resolution.[16] These materials do not create "clearly

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[15] The enabling statute, Tenn. Code Ann. § 41-1-140, was amended in 1996, removing the statutory authority to promulgate regulations governing juvenile detention facilities from TCI and re-assigning it to DCS, although DCS did not issue regulations until 2017. Accordingly, the TCI Minimum Standards were not controlling legal authority in 2013, although they were the operational standards most recently supplied by the State.

[16] The WJL and JAAPL articles specifically address confinement of adults, and AACAP statement relies upon studies of adults. Despite publication of those articles, solitary confinement of adults continues to be upheld as constitutional in the Sixth Circuit. *Rivers v. Turner*, No. 16-4241, 2017 U.S. App. LEXIS 25764, at *10

established law," nor do the research studies cited in the Amici Curiae Brief filed below.

In *Bell v. Wolfish*, this Court held that standards issued by various groups and recommendations of a Policy Task Force regarding conditions of confinement were not determinative of Constitutional requirements. 441 U.S. at 543 n.27. In *Rhodes v. Chapman*, 452 U.S. 337 (1981), this Court held that double celling did not violate prisoners' Eighth Amendment rights even though several studies recommended that each inmate have at least 50-55 square feet of living quarters. Justice Marshall noted in his dissent, "No one would suggest that a study, no matter how competent, could ever establish a constitutional rule." *Id.* at 376 n.8. Since recommendations of various groups and research studies do not establish the constitutional minima for purposes of assessing whether a constitutional violation occurred, they certainly do not show that a constitutional right was "clearly established" for purposes of qualified immunity. This conclusion is well-founded. Clearly established law should not be dictated by publications from advocacy groups or research

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(6th Cir. Dec. 15, 2017) (segregation for eight and a half months did not violate prisoner's rights because "segregated confinement in itself does not constitute atypical and significant hardship."); *Powell v. Washington*, No. 17-1262, 2017 U.S. App. LEXIS 25477, at *9 (6th Cir. Dec. 18, 2017) (Prisoner's six-month confinement in administrative segregation is not an atypical and significant hardship and therefore does not implicate due process rights). The secondary materials relied upon by J.H. do not amount to "clearly established law" with respect to juveniles when those materials are directed toward adults and the conditions described remain permissible for adults under Sixth Circuit precedent.

studies because advocacy on both sides of virtually any important constitutional issue would inevitably produce confusing and conflicting guidance for state officials.[17]

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[17] Studies have reached conflicting conclusions regarding the effects of solitary confinement, thereby demonstrating that studies cannot be relied upon to dictate clearly established law. A study published in 2013 found that inmates in the Colorado prison system did **not** experience significant psychological decline in administrative segregation. *See* Maureen L. O'Keefe, et al., *A Longitudinal Study of Administrative Segregation*, 41 J AM ACAD PSYCHIATRY LAW 49, 49-60 (2013). The year-long study examined inmates with and without mental illness in administrative segregation as well as a control group in general population. The results of the study did **not** support the hypothesis that inmates experience significant psychological decline in administrative segregation. *Id.* at 56. Twenty percent of the inmates improved in administrative segregation over time, while 7% got worse, with the remainder staying stable. Paul Gendreau & Ryan Labrecque, *The Effects of Administrative Segregation: A Lesson in Knowledge Cumulation*, in The Oxford Handbook of Prisons and Imprisonment (John Wooldredge and Paula Smith eds., 2015), p. 10. Earlier studies reaching the opposite conclusion failed to empirically assess previous mental health histories of the studied inmates, so it was not clear from the results of those studies whether the solitary confinement conditions caused mental distress or whether symptoms were pre-existing. Gendreau, *supra*, p. 32; O'Keefe, *supra*, pp. 49-50. The results of the Colorado study were consistent with two prior studies that found that administrative segregation of up to 10 days and of 60 days did not result in deterioration of mental health. O'Keefe, *supra*, p. 50.

These studies demonstrate that in 2013, the effects of segregation were disputed even within the psychiatric community. A researcher addressing the subject in 2007 noted, "[T]he literature on the impact of segregation is, at best, equivocal." Carl B. Clements, et al., *Systemic Issues and Correctional Outcomes, Expanding the Scope of Correctional Psychology*, CRIMINAL JUSTICE

United Nations resolutions are not clearly established law. A 2015 UN General Assembly Resolution prohibits the use of "prolonged solitary confinement" for adults, yet longstanding Sixth Circuit precedent holds that segregated confinement is not an "atypical and significant hardship."[18] That principle has been applied subsequent to the introduction of the UN Resolution. *Rivers*, 2017 U.S. App. LEXIS 25764, at *10; *Powell,* 2017 U.S. App. LEXIS 25477, at *9. Similarly, the ACLU criticizes the use of solitary confinement in adult facilities, while such conditions remain permissible under Sixth Circuit precedent. These publications and position statements are not "clearly established law."[19]

AND BEHAVIOR, Vol. 34 No. 7, pp. 919-32, July 2007, p. 925. And in 2015, another researcher who studied administrative segregation noted that the assumption that administrative segregation will exacerbate mental illness "is naïve" and "is not predicted from theory." He stated, "Mentally disordered offenders function best in quiet environments, which reduce confusing perceptual and cognitive stimuli." Gendreau, *supra*, p. 18. Studies available in 2013 demonstrate that there was not universal agreement among mental health professionals as to the effects of segregation, and even if there had been, such would not constitute "clearly established law" that would dictate expectations for juvenile detention staff.

[18] With limited exceptions for extremely long periods of isolation, which is clearly not an issue in this case.

[19] ACLU reports contradict applicable law in a number of areas, further exhibiting that ACLU publications are not reflective of "clearly established law." For example, the ACLU published a statement opposing the death penalty in 2014, but the death penalty remains constitutional. *See Tucker v. Louisiana*, 136 S. Ct. 1801 (2016).

The National Commission on Correctional Healthcare (NCCH) statement cited by Petitioner (Pet. 25, n. 2) is not sufficient to confer Constitutional rights, and in any event, was adopted in April 2016, years after J.H.'s detention. The statement acknowledges widespread use of solitary confinement in the U.S. and increased controversy regarding the use of same in "recent years", an indication that the law in this area was not clearly established in 2013.

The Sixth Circuit's ruling that the inapplicable regulations, journal articles, and research studies cited by J.H. are not "clearly established law" is consistent with this Court's precedent. J.H. has not cited any law to the contrary. This Court's review on this point is not necessary, nor is it a good use of this Court's resources.

II. The Court of Appeals decision does not conflict with any other circuit, nor do the other public policy concerns cited by J.H. justify review of this particular case.

J.H. has not identified any circuit court opinion contrary to the holding of the Sixth Circuit in this case. J.H. has not identified a case denying qualified immunity in circumstances even remotely similar to those presented in this case and he certainly has not pointed to a split of authority sufficient to necessitate this Court's review.

As to the first Question Presented, J.H. has not identified a split of authority as to the continuing validity of *Hope v. Pelzer*. The courts below did not opine that *Hope v. Pelzer* is "dead" nor would such a finding be determinative in this case. As to the second

Question Presented, J.H. has not identified any split of authority addressing "when other authorities, such as statutes, policies, administrative orders, and published professional opinions establish that a reasonable state actor defendant had 'fair warning' that his conduct was unconstitutional." J.H. has not identified any case in which sources similar to those he relied upon were found to constitute clearly established law.

The only circuit split identified by J.H. is related to whether qualified immunity is appropriate for social workers who make false statements to obtain a child removal order. Pet. 22. This "split of authority" focuses more on the differences in the underlying "clearly established law" in the respective circuits than upon analysis of the qualified immunity standard. Even if the alleged split of authority is more than illusory, that factual scenario is so far afield of the issues in this case that those cases do not merit consideration here. This case certainly is not the proper vehicle to determine clearly established law for social workers seeking child removal orders. J.H. has not identified any relevant split of authority or any other compelling reason for this Court's review.

Review of this case would not resolve the concerns raised by Justice Thomas in *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) and *Ziglar v. Abassi*, 137 S. Ct. 1843 (2017), because Petitioner is not asking this Court to re-examine the underpinnings of qualified immunity. Rather, Petitioner has asked only for unnecessary clarification of the qualified immunity standard.

This Court recently denied multiple petitions challenging qualified immunity. *Brennan v. Dawson*,

No. 18-913, 2020 U.S. LEXIS 3209 (June 15, 2020); *Baxter v. Bracey*, No. 18-1287, 140 S. Ct. 1862 (June 15, 2020); *Anderson v. City of Minneapolis*, No. 19-656, 2020 U.S. LEXIS 3220 (June 15, 2020); *Zadeh v. Robinson*, No. 19-676, 2020 U.S. LEXIS 3170 (June 15, 2020); *Corbitt v. Vickers*, No. 19-679, 2020 U.S. LEXIS 3152 (June 15, 2020); *West v. Winfield*, No. 19-899, 2020 U.S. LEXIS 3153 (June 15, 2020). This petition presents a less compelling case for review of the qualified immunity standard than those recently denied.

This case does not implicate Petitioner's concern that qualified immunity can systematically deprive individuals of a constitutional remedy when courts decline to address whether a constitutional violation occurred because the panel majority, presuming J.H.'s conclusory allegations were true, addressed solitary confinement of juveniles and those with mental illnesses.[20] A number of changes have occurred in the legal landscape with respect to solitary confinement since 2013. As noted above, *Doe v. Hommrich* was decided in 2017. The panel majority's 2020 decision in this case will be instructive moving forward. Additionally, the federal government issued guidelines related to the use of restrictive housing for juveniles in January 2016.[21] DCS issued new minimum standards

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[20] Moreover, if the Court were interested in addressing this issue, the solution would be to revisit *Pearson v. Callahan*, 555 U.S. 223 (2009), not overhaul qualified immunity. In any event, this case does not present the proper vehicle for such review.

[21] *U.S. Department of Justice Report and Recommendations Concerning the Use of Restrictive Housing, Final Report*, January 2016.

for juvenile detention centers in June of 2017 that are applicable to the WCJDC and place limits on the use of "seclusion."[22] The Tennessee General Assembly passed the Juvenile Justice Reform Act of 2018 addressing housing issues with respect to juvenile detainees. Tenn. Code Ann. § 37-1-101, *et seq*. These new measures, adopted years after the events in this case, represent a significant departure from the standards that were in effect in 2013. This guidance was not available in 2013, further bolstering Respondents' argument that clearly established law holding J.H.'s conditions of confinement unconstitutional did not exist in 2013. Because of these changes and because the panel majority addressed these issues, review of this case need not be undertaken to address the concerns raised by Justice Sotomayor in *Apodaca v. Raemisch*, 139 S. Ct. 5 (2018). More specific guidance would be difficult, if not impossible, to provide effectively in the context of this case, given the uncertainty surrounding the lower courts' factual determinations, discussed in § I.B.

III. The lower courts' grant of qualified immunity was correct.

Even if this Court were to engage in error correction, such is not necessary here where qualified immunity was properly granted. Officials are entitled to qualified immunity unless (1) they violated a federal statutory or constitutional right, and (2) the

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[22] Tenn. Dept. of Children's Servs. Minimum Standards for Juvenile Detention Centers and Temporary Holding Resources, Chapter 0250-04-08-.11.

unlawfulness of their conduct was "clearly established at the time." *Wesby*, 138 S. Ct. at 589.

McMahan did not violate J.H.'s Fourteenth Amendment rights by placing him in a single cell. If a condition of pretrial detention is "reasonably related to a legitimate governmental objective," it does not, without more, amount to punishment. *Bell*, 441 U.S. at 538. As explained above, J.H. was placed in a single cell due to safety concerns after a November 17, 2013 incident in which three juveniles reported that J.H. threatened them and engaged in destructive behavior. J.H.'s housing placement was not changed as a punishment but rather to further the legitimate government objective of maintaining the safety of the juveniles in the facility. McMahan's conclusion that allowing J.H. to interact with other juveniles would present safety concerns is supported by the opinions of J.H.'s treating physicians, who noted around that same time that his "significant physically and verbally aggressive behaviors … creat[ed] extreme challenges at home" (Pet. App. 31a–32a) and that he "represent[ed] a very real risk to other children" (R. 386, PageID#13270–71). Detention staff reasonably believed that limiting J.H.'s interaction with other juveniles was necessary to ensure safety.

McMahan had a duty to protect other juveniles from J.H. It is critical to the effective management of a juvenile detention facility that when a juvenile acts out in an aggressive and destructive manner, as J.H. did, that facility staff be able to separate that juvenile from children who might otherwise be harmed. Separating a juvenile who poses a threat to other juveniles in

detention is exactly the sort of determination that the *Bell* Court warned should be left to the discretion of facility administrators and given wide deference by courts. J.H.'s placement was changed, not as punishment, but to further the legitimate government objective of maintaining the security of the facility and the safety of the juveniles within it, including J.H. Such an administrative placement is not punitive under *Bell*.

McMahan did not violate "clearly established law" with respect to J.H.'s housing placement in 2013. Recent precedent from this Court supports a particularized analysis of whether the conduct at issue violated clearly established law in light of then-existing precedent. *Wesby*, 138 S. Ct. at 589-90; *White*, 137 S. Ct. at 552; *Mullenix*, 577 U.S. 7. J.H. has not cited any pre-2013 case law presenting even remotely similar facts and the inapplicable regulations, journal articles and research studies he cites simply do not amount to clearly established law. As explained above, *Hope v. Pelzer* does not alter this conclusion.

The district judge and panel judges unanimously agree that qualified immunity is warranted in this case. It would be unfair to subject McMahan to potential monetary liability where the law at the time of the conduct in question was undeveloped and has only since begun to emerge and where judges continue to disagree about whether a constitutional violation even occurred. Certiorari is unwarranted to review the Sixth Circuit's application of settled qualified immunity principles to this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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