No. 13-1059

In the Supreme Court of the United States

RICHARD ORTEGA, PETITIONER

v.

IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether respondents are entitled to qualified immunity because it was not clearly established in the Sixth Circuit in March 2011 that their transfer of petitioner from home incarceration to jail violated the Due Process Clause or the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is Richard Ortega, who was the plaintiff-appellant below.

Respondents are United States Immigration and Customs Enforcement, Unknown Agents and Employees in the Employ of United States Immigration and Customs Enforcement, Louisville/Jefferson County Metro Government, Mark E. Bolton, Unknown Corrections Officers in the Employ of Louisville/Jefferson Metro Corrections, William Skaggs, Lori Eppler, and John Cloyd, all of whom were defendants-appellees below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 737 F.3d 435. The opinion of the district court (Pet. App. 18a-28a) is not published in the *Federal Supplement* but is available at 2012 WL 5835519.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2013. The petition for a writ of certiorari was filed on March 5, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal immigration authorities often seek the assistance of local law-enforcement officials in taking custody of aliens who are in the country unlawfully.

Under federal regulations, an "authorized immigration officer" may issue a "detainer" that "serves to advise another law enforcement agency that the Department [of Homeland Security] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. 287.7(a). The purpose of the detainer is to request that the law-enforcement agency "advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." *Ibid.* Upon the termination of the alien's non-immigration custody, a detainer asks a law-enforcement agency to "maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays[,] in order to permit assumption of custody by the Department." 8 C.F.R. 287.7(d).

2. Petitioner, a United States citizen, pleaded guilty in Kentucky state court to driving under the influence of alcohol. Pet. App. 2a-3a, 19a-20a. He was sentenced to 11 days of home incarceration, which required that he stay at home unless he had prior approval to go to work, religious services, or the doctor. See *id.* at 2a-3a, 19a. The following day, two Louisville Metro Corrections officers brought petitioner from his home to a detention facility after learning that a detainer had been issued by an agent of United States Immigration and Customs Enforcement (ICE). See *id.* at 3a. According to petitioner, that detainer had been issued mistakenly after the ICE agent confused petitioner with another person having a similar name and birth date who had previously been deported. See *id.* at 3a, 20a. Petitioner

was detained at jail for three or four days. See *id.* at 20a & n.1. He was ultimately ordered released by a state judge. See *ibid.*

3. Petitioner brought suit under 42 U.S.C. 1983 and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the two corrections officers and the ICE agent, all respondents here, in the United States District Court for the Western District of Kentucky. See Pet. App. 19a.[1] He argued that his detention in jail rather than in home incarceration violated, among other constitutional provisions, the Due Process Clause and the Fourth Amendment. See *id.* at 21a. Respondents moved to dismiss the complaint for failure to state a claim and asserted qualified immunity. See *ibid.*

The district court granted the motion to dismiss, holding that the corrections officers and the ICE agent were entitled to qualified immunity. See Pet. App. 18a-28a. As relevant here, the district court held that petitioner's Fourth Amendment claim against the corrections officers failed because "[n]o evidence suggests that [they] had reason to believe ICE's detainer was unlawful," and "[t]hus their action in serving a detainer on [petitioner] and moving him from one place of confinement to another was reasonable under the circumstances." *Id.* at 23a. With respect to petitioner's Due Process claim against the corrections officers, the district court held that "[e]ven assuming [petitioner] could establish a liberty interest in home confinement when he has been so sentenced," respondents did not violate any right that was "clearly established" when the relevant conduct occurred and

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[1] Petitioner also brought suit against institutional defendants, including ICE, and unknown individual defendants.

thus were entitled to qualified immunity. *Id.* at 24a-26a; see *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2023 (2014) ("An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.") (citation and internal quotation marks omitted). The officers, the court concluded, "had no reason to believe" that it was unconstitutional to transfer petitioner from home incarceration to jail when "act[ing] pursuant to a detainer." Pet. App. 25a.

The district court then turned to petitioner's claim that the ICE agent had violated the Due Process Clause and the Fourth Amendment by erroneously issuing a detainer. See Pet. App. 26a-28a. The court determined that "[a]n ICE agent could reasonably but erroneously issue a detainer for a U.S. citizen if there is an error in its database or if the individual's name is similar to someone else who is in the database." *Id.* at 27a. The court further explained that "[q]ualified immunity shields government officials who make objectively reasonable mistakes in discretionary decisions within the scope of their responsibilities." *Ibid.* (citing *Hensley* v. *Gassman*, 693 F.3d 681, 687 (6th Cir. 2012), cert. denied, 133 S. Ct. 1800 (2013)). Because the ICE agent had "made an unfortunate but honest mistake," the court held, he was entitled to qualified immunity. *Ibid.*

4. The court of appeals affirmed in a divided decision. See Pet. App. 1a-12a.

a. The court of appeals explained that petitioner's claims raised "two new constitutional law questions": (i) whether "an individual serving a sentence through home confinement ha[s] a liberty interest protected by

the Due Process Clause in not being moved to a traditional prison setting"; and (ii) whether the "same individual ha[s] a right protected by the Fourth Amendment in not being moved to a traditional prison setting in the absence of probable cause." Pet. App. 4a-5a. Before addressing whether respondents were entitled to qualified immunity on those claims, the court observed that "[f]ederal detainers do not raise constitutional problems in the normal course," such as where "a local prison keeps tabs on someone until his release, even if it moves him from one prison setting to another," or where "the local prison merely notifies federal immigration authorities before the inmate's release to allow them to take custody over him at the end of his prison sentence in order to begin removal proceedings." *Id.* at 5a. In those situations, no reasonable argument exists that the Due Process Clause or the Fourth Amendment has been violated. See *ibid.*

The court of appeals then concluded that it was not clearly established in March 2011 that transferring petitioner from home incarceration to jail in response to a detainer violated the Due Process Clause. The court first stated that petitioner was correct that "[a] transfer from home confinement to prison confinement * * * amounts to a sufficiently severe change in conditions to implicate due process." Pet. App. 6a-7a (citing *Sandin* v. *Conner*, 515 U.S. 472, 484 (1995)). But the court held that respondents were nevertheless entitled to qualified immunity because "[a]s of March 2011, no controlling authority or consensus of persuasive authority established that [petitioner] had a liberty interest in remaining on home confinement." *Id.* at 8a.

The court of appeals explained that "[t]he relevant Supreme Court precedent at the time dealt only with traditional confinement and probation or parole." Pet. App. 8a (citing *Young* v. *Harper*, 520 U.S. 143, 147-153 (1997); *Sandin*, 515 U.S. at 477-487; *Gagnon* v. *Scarpelli*, 411 U.S. 778, 781-782 (1973); *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972)). Because home incarceration "falls somewhere between traditional confinement and probation/parole," those precedents did not clearly establish a protected liberty interest. *Ibid.* The court of appeals therefore examined circuit decisions to determine whether petitioner's asserted right was clearly established notwithstanding the lack of authority from this Court. It found that its own precedent "hurts rather than helps [petitioner's] cause" because the Sixth Circuit had previously "held that a 'detainer which adversely affects a prisoner's classification and eligibility for rehabilitative programs does not activate a due process right.'" *Id.* at 8a-9a (quoting *Ganem* v. *United States INS*, No. 86-2075, 1987 WL 38350, at *1 (6th Cir. Aug. 5, 1987)). And the court failed to find a "'robust consensus' of persuasive authority establishing a liberty interest in home confinement" in other circuits. *Id.* at 9a-10a (discussing decisions from First and Seventh Circuits). It therefore held that petitioner had not succeeded in demonstrating that the asserted Due Process right was clearly established in March 2011. See *id.* at 10a.

The court of appeals concluded that "[a] similar problem undermines [petitioner's] Fourth Amendment claim—namely, no relevant authority existed at the time of the incident." Pet. App. 10a-11a. In particular, "[a]s of March 2011, no controlling authority established that moving a convict from home confine-

ment to prison confinement resulted in a new seizure within the meaning of the Fourth Amendment," and the court found no consensus of persuasive authority from other circuits either. *Id.* at 11a. Accordingly, the court held, "[t]he individual defendants reasonably could have thought that transferring [petitioner] to jail would not terminate his 'freedom of movement' within the meaning of the Fourth Amendment because home confinement serves as an off-the-premises jail." *Id.* at 11a-12a.[2]

b. Judge Keith dissented. See Pet. App. 12a-17a. He first observed that "[c]learly established rights include not only those specifically adjudicated [in prior decisions], but also those that are established by general applications of core constitutional principles." *Id.* at 14a. In this case, he saw the "core constitutional principle" as the proposition that "an officer must provide some process before seizing an individual from his home and taking him to jail." *Ibid.* Although he acknowledged that "the Supreme Court and this Court have only explained this principle in the probation and parole contexts," he believed that "the unlawfulness of the [corrections officers'] actions clearly was apparent." *Id.* at 14a-15a. He also viewed out-of-circuit precedent as "firmly establish[ing] that an individual serving a sentence outside of prison is entitled to some minimum amount of process before being arrested and taken to jail." *Id.* at 15a.

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[2] The court of appeals noted that petitioner had forfeited claims other than his Due Process and Fourth Amendment claims and all claims against defendants other than the two corrections officers and the ICE agent. See Pet. App. 4a. Petitioner does not renew those forfeited claims in his certiorari petition.

With respect to the ICE agent, Judge Keith took issue with the district court's conclusion that the agent's issuance of the erroneous detainer was "an unfortunate but honest mistake," arguing that "the district court could not possibly have assessed the reasonableness of [the agent's] error because the detainer was not part of the record at the motion to dismiss stage." Pet. App. 17a. He also believed that even if the ICE agent had made a mistake, "[t]o allow ICE to issue a detainer against an American citizen, with unlimited discretion and without any accountability, sets a dangerous precedent and offends any and all notions of due process." *Ibid.*

ARGUMENT

Petitioner does not directly seek review of the court of appeals' conclusion that his asserted Due Process and Fourth Amendment rights against being transferred from home incarceration to jail in response to the ICE-issued detainer were not clearly established in the Sixth Circuit in March 2011. Rather, petitioner asks this Court to address the general methodological question whether decisions other than those of this Court and the relevant circuit can establish legal principles that are sufficiently clear and specific that they foreclose qualified immunity "in a case with a novel fact pattern." Pet. i. That question is not properly presented by this case and does not warrant review in any event. The court of appeals did not hold that out-of-circuit precedent and other nonbinding decisions can never clearly establish constitutional rights or that there must be a precedent directly on point factually to overcome qualified immunity. Rather, the court held that the only precedents that petitioner cited would not have made clear to a rea-

sonable officer in the Sixth Circuit in March 2011 that the conduct in this case violated the Due Process Clause or the Fourth Amendment. That holding was correct and does not conflict with a decision of any other court of appeals. Accordingly, further review is unwarranted.

1. The court of appeals correctly held that respondents are entitled to qualified immunity because the asserted rights were not "sufficiently clear that a reasonable official would understand that [a transfer from home confinement to jail] violates" those rights. Pet. App. 11a (brackets in original) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)).

a. Section 1983 of Title 42 provides a cause of action against state officials for the deprivation of constitutional rights under color of state law. In certain circumstances, this Court has recognized a similar implied cause of action against federal officials. See *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971). This Court has interpreted both causes of action to incorporate common-law principles of official immunity. See *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1661-1662 (2012); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982).

Under those principles, "government officials performing discretionary functions generally are granted a qualified immunity" from suit for alleged constitutional violations. *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999). Qualified immunity shields individuals from suit unless their actions "violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow*, 457 U.S. at 818). The doctrine is designed to ensure both "that fear of

liability will not unduly inhibit officials in the discharge of their duties," *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (citation and internal quotation marks omitted), and that capable individuals are not deterred from participating in public service or distracted from the performance of their official responsibilities, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985). Qualified immunity promotes those objectives by affording "both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (citation and internal quotation marks omitted).

Defeating a claim of qualified immunity requires a plaintiff to plead and ultimately prove that (i) the defendant committed "a violation of a constitutional right" and (ii) "the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (citation omitted). To determine whether a right was "clearly established," a court must first define the right at the appropriate level of specificity. That is because framed at the broadest level—*e.g.*, the right to be free from unreasonable searches and seizures—any constitutional right would be clearly established, and thus no official would be entitled to qualified immunity. See *Wilson*, 526 U.S. at 614-615; *Anderson*, 483 U.S. at 639. Accordingly, a right must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012) (quoting *Anderson*, 483 U.S. at 640).

Once the right is properly framed, a court must ask whether "every reasonable official would [have under-

stood] that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093 (citation and internal quotation marks omitted; brackets in original). For that to be true, "existing precedent must have placed the * * * constitutional question confronted by the official beyond debate." *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2023 (2014) (citation and internal quotation marks omitted). This requires "controlling authority" or at least "a robust 'consensus of cases of persuasive authority'" establishing that the official's conduct was unconstitutional. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quoting *Wilson*, 526 U.S. at 617). Although the authority need not be "directly on point," it must be sufficiently similar to place the relevant constitutional question "beyond debate." *Id.* at 2083.

b. In light of the foregoing principles, the court of appeals correctly held that petitioner's clearly established constitutional rights had not been violated. The court first stated that either "on-point, controlling authority *or* a 'robust consensus of cases of persuasive authority'" could clearly establish a constitutional right. Pet. App. 8a (emphasis added) (quoting *al-Kidd*, 131 S. Ct. at 2084). It further determined that this Court's decisions addressing probation or parole —which are not forms of incarceration—would not have put an officer on clear notice that moving petitioner from home incarceration to jail violated the Due Process Clause or the Fourth Amendment, and that no Sixth Circuit case had addressed the issue. Petitioner does not dispute those conclusions in his certiorari petition.

The court of appeals then proceeded to consider the out-of-circuit precedents addressing home con-

finement that petitioner had cited. Those decisions (from the First and Seventh Circuits), however, did not demonstrate that the right in question was clearly established. See Pet. App. 9a-10a. For example, in *Paige* v. *Hudson*, 341 F.3d 642 (7th Cir. 2003), the plaintiff had been required to spend six months in "home detention" as part of his *probation*. When he violated a condition of that probation by failing to obtain work, the corrections department that ran the home-incarceration program terminated his participation in the program and notified his probation officer, who arrested the plaintiff and asked the sentencing court to revoke his probation. See *id.* at 643. The plaintiff brought suit against officials of the corrections department. In holding that the defendants were entitled to summary judgment, the Seventh Circuit first noted the "initial question" whether the plaintiff's transfer from home detention to jail was a sufficient deprivation of liberty to trigger Due Process protections at all and stated that "[w]e think it is a sufficient reduction." *Ibid.* But the court went on to hold that the corrections department had not deprived the plaintiff of his liberty, because it had no power to order him jailed; only the probation officer and the sentencing court had that power. See *id.* at 644.

The Seventh Circuit later concluded, in a case in which the plaintiff had served his *sentence* partially in home confinement, that *Paige* had held only that "removing a *probationer* from home detention status * * * qualified * * * as a sufficient reduction in freedom to be deemed a deprivation of liberty requiring due process." *Domka* v. *Portage Cnty.*, 523 F.3d 776, 781 (2008) (citation and internal quotation marks omitted). The court explained that *Paige* was not

"necessarily controlling here; the fact that [the plaintiff] was not a probationer but instead a prisoner serving his time outside the jail renders *Paige* distinguishable." *Ibid.* And the Seventh Circuit further observed that "[t]he law in a case such as this, where the convict is not technically 'imprisoned,' is still evolving." *Ibid.* Because the court was able to resolve the case on other grounds, it "save[d] for another day the narrow question of whether a prisoner—as opposed to a probationer, parolee or pre-parolee—has a liberty interest in a home detention program." *Ibid.*

Given that the Seventh Circuit itself does not understand *Paige* to have decided the question whether a prisoner has a Due Process liberty interest in home incarceration (and that the discussion in *Paige* was dicta in any event), that decision cannot reasonably be thought to contribute to a "robust consensus of persuasive authority" that would have put an officer in the Sixth Circuit on clear notice that the conduct here was unconstitutional. Pet. App. 9a (internal quotation marks omitted). The court of appeals in this case therefore did not err in rejecting petitioner's reliance on *Paige*.

The First Circuit decision cited by petitioner was similarly insufficient to support petitioner's argument that his clearly established rights were violated by the officers' conduct in this case. As the decision below noted, *González-Fuentes* v. *Molina*, 607 F.3d 864 (2010), cert. denied, 131 S. Ct. 1568 (2011), like *Paige*, determined only in dicta that "home confinement sufficiently resembles probation and parole to create a protected liberty interest in remaining on home confinement." Pet. App. 9a-10a (citing *González-Fuentes*, 607 F.3d at 890); see 607 F.3d at 893-894 (ultimately

"conclud[ing] that any procedural due process violations do not justify the respective remedies that the two sets of appellees have requested"). More importantly, the First Circuit characterized the question as "an open one," making clear that the answer did not follow directly from settled principles. Pet. App. 10a (citing *González-Fuentes*, 607 F.3d at 887). That observation refutes any contention that there exists a robust consensus of persuasive authority.

The court of appeals thus properly applied the qualified-immunity framework set forth in this Court's opinion and correctly held that respondents were entitled to qualified immunity.[3]

2. This case does not implicate any conflict of authority among the circuits. Petitioner does not claim that certiorari is warranted to resolve any disagreement with respect to the question whether it was clearly established in March 2011 that petitioner's transfer from home incarceration to jail violated the Due Process Clause or the Fourth Amendment. Rather, petitioner identifies two purported conflicts over broader methodological questions: (i) "what sources of authority clearly establish a right" (Pet. 9-14) (capitalization altered); and (ii) the "analytical framework[] for determining the apparent unlawfulness of official conduct in novel factual circumstances" (Pet.

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[3] If this Court were to grant review, the federal respondents would renew the argument that the ICE agent "made an objectively reasonable mistake in a discretionary decision within the scope of his responsibilities" as an alternative ground supporting the judgment below. Gov't C.A. Br. 9-11; see Pet. App. 27a ("An ICE agent could reasonably but erroneously issue a detainer for a U.S. citizen if there is an error in its database or if the individual's name is similar to someone else who is in the database.").

14-15). Neither of those purported conflicts warrants further review.

a. Petitioner argues (Pet. 9-14) that the circuits are divided over which sources of authority a court may examine in determining whether a right is clearly established. Some circuit opinions have stated, for example, that only binding precedent from this Court, the relevant circuit, or the relevant state supreme court can clearly establish constitutional rights. See, *e.g.*, *Keating* v. *City of Miami*, 598 F.3d 753, 766 (11th Cir.) (requiring "law as interpreted by the Supreme Court, the Eleventh Circuit, or the Supreme Court of Florida to show that the constitutional violation was clearly established") (citation and internal quotation marks omitted), cert. dismissed, 131 S. Ct. 501 (2010). Other opinions have stated that courts may consult any judicial precedent, including district-court decisions and authority from other jurisdictions. See, *e.g.*, *Boyd* v. *Benton Cnty.*, 374 F.3d 773, 781 (9th Cir. 2004) ("[I]n the absence of binding precedent, we look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts.") (citations and internal quotation marks omitted).

Regardless, this case is an unsuitable vehicle to resolve any disagreement on that score because the court of appeals did not refuse to consider any non-controlling judicial decisions in conducting its analysis. To the contrary, the court determined that "[a]s of March 2011, no controlling authority *or consensus of persuasive authority* established that [petitioner] had a liberty interest in remaining on home confinement," Pet. App. 8a (emphasis added), or that a trans-

fer from home confinement to jail constituted a Fourth Amendment seizure, see *id.* at 10a-12a. In prior decisions, moreover, the Sixth Circuit has not limited its consideration to authority from this Court, the Sixth Circuit, and the relevant state supreme court. See, *e.g.*, *Hidden Vill., LLC* v. *City of Lakewood*, 734 F.3d 519, 529 (6th Cir. 2013) (examining out-of-circuit precedent, including an unpublished decision, and district-court decisions to ascertain whether a consensus of authority existed); *Gean* v. *Hattaway*, 330 F.3d 758, 767-768 (6th Cir. 2003) ("If no binding precedent is directly on point, the court may still find a clearly established right if it can discern a generally applicable principle from either binding or persuasive authorities whose specific application to the relevant controversy is so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional.") (citation and internal quotation marks omitted).

Petitioner argues (Pet. 13-14) that the court of appeals in this case "applied an unclear narrow standard." But he acknowledges that the court examined cases from the First and Seventh Circuits and found that they did not clearly establish the alleged constitutional right. See Pet. 14. Petitioner objects that the court's opinion did not expressly discuss cases from the Second, Eighth, and Tenth Circuits that he had cited in his appellate brief. That was presumably because those cases did not even address home incarceration, but rather parole-like programs. See *Kim* v. *Hurston*, 182 F.3d 113, 118-120 (2d Cir. 1999) (finding work-release program "virtually indistinguishable from * * * traditional parole"); *Harper* v. *Young*,

64 F.3d 563, 566 (10th Cir. 1995) (finding pre-parole program to "closely resemble parole or probation");[4] *Edwards* v. *Lockhart*, 908 F.2d 299, 302 (8th Cir. 1990) (concluding that inmate's "participation in th[e] program is more closely related to parole"). The court of appeals expressly discussed only the cases potentially establishing "evidence of a 'robust consensus' of persuasive authority establishing a liberty interest in *home confinement*." Pet. App. 9a-10a (emphasis added).

In any event, even if the court of appeals had overlooked some of petitioner's citations, that omission would not demonstrate that the Sixth Circuit has deemed out-of-circuit precedent irrelevant to the qualified-immunity analysis. If the circuit adhered to that view, the decision below would not have considered the First and Seventh Circuit precedents either but rather would have dismissed them out of hand.

b. Petitioner also claims (Pet. 14-15) that a conflict exists over how to apply the qualified-immunity standard to novel factual situations. The cases he cites for the conflict, however, merely represent different applications of the necessarily general principles articulated by this Court. As discussed above, this Court's precedents teach that a case need not be "directly on point" for a right to be clearly established. *al-Kidd*, 131 S. Ct. at 2083. But to overcome qualified immunity, the legal principles articulated in the precedent must put the relevant question "beyond debate" such that no reasonable officer could believe

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[4] The Tenth Circuit decision cited by petitioner was affirmed by this Court, which concluded that the program "was a kind of a parole." *Young* v. *Harper*, 520 U.S. 143, 152 (1997); see Pet. C.A. Br. 15-16.

that the challenged conduct is constitutional. *Plumhoff*, 134 S. Ct. at 2023.

Petitioner argues (Pet. 14-15) that the circuits require varying levels of specificity in precedents to find clearly established law. Even the circuits he characterizes as having adopted the most "fact-intensive" approach, however, have made clear, consistent with this Court's instruction, that "[p]revious cases need not be precisely similar to the instant case; officials can be on notice that their conduct violates clearly established law in novel factual scenarios provided that the state of the law gave them 'fair warning that their [conduct] was unconstitutional.'" *Hampton* v. *Oktibbeha Cnty. Sheriff Dep't*, 480 F.3d 358, 363 (5th Cir. 2007) (brackets in original) (quoting *Hope*, 536 U.S. at 741); see *Kelly* v. *Borough of Carlisle*, 622 F.3d 248, 259-260 (3d Cir. 2010) ("In determining whether a right is clearly established, it is not necessary that the exact set of factual circumstances has been considered previously."); *Fancher* v. *Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) ("We cannot find qualified immunity wherever we have a new fact pattern. Indeed, the Supreme Court has warned that officials can still be on notice that their conduct violates established law even in novel factual circumstances.") (citation and internal quotation marks omitted). What petitioner views as a circuit conflict simply reflects different applications of this Court's general guidance to the myriad claims against government officials that federal courts regularly adjudicate.

Even if some tension existed among courts of appeals with respect to the level of factual similarity necessary for a prior precedent to clearly establish a constitutional right, this would not be a suitable vehi-

cle to address it. The decision below did not suggest that an inordinate amount of factual similarity was required to overcome qualified immunity. To the contrary, the Sixth Circuit has held that "we need not find a case in which the very action in question has previously been held unlawful, but, in the light of pre-existing law, the unlawfulness must be apparent." *Quigley* v. *Tuong Vinh Thai*, 707 F.3d 675, 684 (2013) (citations and internal quotation marks omitted). In this case, the court merely found that the standard was not met. For the reasons discussed above, that conclusion was correct. See pp. 11-14, *supra*.

3. Petitioner contends (Pet. 19-28) that this Court's review is necessary to provide guidance to lower courts on the standard for qualified immunity. But this Court issued multiple unanimous opinions just last Term rearticulating the general standards that govern qualified immunity and illustrating their application in concrete factual contexts. See *Lane* v. *Franks*, 134 S. Ct. 2369, 2381-2383 (2014); *Wood* v. *Moss*, 134 S. Ct. 2056, 2066-2070 (2014); *Plumhoff*, 134 S. Ct. at 2022-2024 (unanimous with respect to qualified-immunity discussion and holding); *Stanton* v. *Sims*, 134 S. Ct. 3, 4-7 (2013) (per curiam). In the absence of a circuit conflict relating to the specific constitutional claims asserted by petitioner, a gross misapplication of qualified-immunity principles, or some other compelling reason for further consideration, this Court's review is not warranted simply to again enunciate the general framework governing qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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