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Richard Ortega, Plaintiff-Appellant, v. United States Immigration and Customs Enforcement, et al., Defendants-Appellants: Petition for a Writ of Certiorari

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Repository Citation
Roberts, Patricia E.; Breckenridge, Tillman J.; and Ports, Thomas W. Jr., "Richard Ortega, Plaintiff-Appellant, v. United States Immigration and Customs Enforcement, et al., Defendants-Appellants: Petition for a Writ of Certiorari" (2014). *Appellate and Supreme Court Clinic*. 11.
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No. 13-_____

IN THE

Supreme Court of the United States

RICHARD ORTEGA,

Petitioner,

v.

UNITED STATES IMMIGRATION & CUSTOMS ENFORCEMENT, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The qualified immunity defense insulates federal and state officials from monetary damages unless they have violated clearly established rights. To determine whether a right is "clearly established," courts compare the facts at issue to the legal analysis of an official's actions in factually similar scenarios. Because the Court has not articulated a single approach, the circuits employ conflicting standards over the degree of similarity required and substantially disagree over which sources of authority are used to show that the law is clearly established.

The question presented is:

Whether a right is clearly established in a case with a novel fact pattern when a consensus of several circuits' precedents have recognized the right at a level of specificity such that any further distinction lacks legal significance.

PARTIES TO THE PROCEEDING

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

Respondents, who were defendants in the district court and appellees in the court of appeals are Mark Bolton, William Skaggs, Lori Eppler, Louisville/Jefferson County Metro Government (collectively "Metro Respondents"), and John T. Cloyd, an Immigrations & Customs Enforcement (ICE) agent.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONTINUED)

Page

TABLE OF CONTENTS
(CONTINUED)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

Statutes

TABLE OF AUTHORITIES (CONTINUED)

Other Authorities

TABLE OF AUTHORITIES (CONTINUED)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Ortega respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 737 F.3d 435 and reproduced at page 1a of the

appendix to this petition ("App."). The unpublished order of the District Court is reproduced at App. 18a.

JURISDICTION

The judgment of the Sixth Circuit was entered on December 10, 2013. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY & REGULATORY PROVISIONS INVOLVED

The text of relevant statutes and regulations are set forth in the appendix to this petition. App. 29a.

INTRODUCTION

This case presents a question of extreme importance on the nature of proof required to establish that a right is clearly established. Nearly thirty years ago, this Court recognized that the "clearly established" inquiry turns on how specifically a court articulates the rule at issue. *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). The Court expressed concern that the qualified immunity doctrine would become meaningless if rights were defined at improper levels of generality. *Id.*

Fifteen years after *Anderson*, the Court provided contradictory guidance as to how lower courts should conduct the clearly established inquiry. In *Hope* v. *Pelzer*, the Court held that a right could be generally defined, contrary to the Court's holding in *Anderson* that a right must be specifically defined. 536 U.S. 730, 741 (2002) (citing *United States* v. *Lanier*, 520 U.S. 259 (1997)). More recently, the Court has suggested that the appropriate level of specificity falls somewhere between the two cases, but the Court has not provided explicit guidance. *See*

Ashcroft v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011); *Brosseau* v. *Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam). This doctrinal uncertainty has plagued courts' ability to consistently render the clearly established analysis, among and within the circuits. As the Fifth Circuit recently recognized, this Court's "admonition in *al–Kidd* that [lower courts] should not define clearly established law at a high level of generality sits in tension with its earlier statement in *Hope* v. *Pelzer* that general statements of the law are not *inherently* incapable of giving fair and clear warning, at least in a certain category of obvious cases." *Morgan* v. *Swanson*, 659 F.3d 359, 373 (5th Cir. 2011) (en banc) (internal quotation marks omitted).

As a result of this tension, the circuits are inexorably divided among myriad regimes on the precedential weight of prior opinions based on their nature, type, and circuit of origin. This leads to substantial disuniformity; a right may be considered clearly established in one circuit but not another despite the exact same precedential profile. For instance, whereas the facts of this case would very likely lead to finding the officers in this case were not entitled to qualified immunity under the Third, Seventh, Eighth, and Ninth Circuits' standards, the Second, Fourth, and Eleventh Circuits would likely disagree.

The test adopted by the panel majority here, according to Judge Keith's dissent, "allows an officer to blatantly violate the Fourth, Fifth, and Fourteenth Amendment rights of an American citizen—so long as it was done in a manner that neither this Court nor the Supreme Court has directly opined on before—with impunity." App. 16a.

(Keith, J., dissenting). The Sixth Circuit committed a fundamental error, the immediate effect of which distorts this Court's holdings and contravenes the decisions of other circuits. Certiorari is warranted for two main reasons.

First, the Sixth Circuit deepened a conflict among the circuits, and incorrectly applied the analysis regarding whether a right is clearly established. The panel majority adopted a far-too limited definition of the term "clearly established," defying the holdings of this Court and other circuits. The panel majority contravened this Court's precedent when determining whether unlawfulness was apparent by failing to evaluate whether the factual circumstances of this case were contextually similar to prior cases. This case highlights the myriad differences among the circuits in how they determine whether a right is clearly established. They differ on what types of authorities may be used to prove a right is clearly established, and they differ on the level of factual similarity required between cases to prove a right is clearly established. Only this Court's guidance can remedy these inconsistent regimes.

Second, this case presents an issue of extreme importance. Qualified immunity is asserted in nearly every case involving a claim against a government official in his or her individual capacity for damages. Properly applying this standard is of exceptional importance because the approach that a court takes in articulating and assessing whether the law is clearly established is often outcome-determinative. Absent this Court's direct guidance, lower courts will continue to disparately assess qualified immunity, generating avoidable

uncertainty. Review is also warranted because circuit and district courts routinely struggle with applying the doctrine. Non-uniform qualified immunity standards lead to unjust results, and inconsistent standards hamper certainty and predictability for litigants, government officials, and the courts.

For these reasons and those that follow, the Court should grant the petition and reverse the judgment below.

STATEMENT OF THE CASE

Factual Background. A Kentucky court sentenced Petitioner Richard Ortega, a third generation United States citizen, to fourteen days of home confinement after his conviction for driving under the influence. App. 3a. Individuals participating in Kentucky's home confinement program are required to wear an electronic monitoring device at all times, and must satisfy certain agreed upon conditions to remain in the program. App. 3; *see also* App. 35a. Under his term of home confinement, Ortega was allowed to go to work, to medical appointments, and to church if he received prior approval. App. 3a. It is undisputed that, at all times, Ortega complied with the requirements of the home confinement program and the home confinement agreement he had signed.

While Ortega was under home confinement, ICE agent John Cloyd issued an immigration detainer naming Ortega as a suspected illegal alien. App. 3a. ICE purportedly served the detainer because Ortega had a similar name and birthdate to an illegal alien who had previously been deported. App. 3a.

After receiving the detainer, the local corrections department removed Ortega from home confinement and took him to jail. App. 3a-4a. When the authorities arrived to remove Ortega, they refused to allow him to show them any forms of identification or proof of his United States citizenship. They refused to allow him to produce his driver's license or Social Security card. App. 4a; *see also* App. 13a. The corrections department then took Ortega to jail, affording him no process whatsoever. *See* App. 4a; 13a. Ortega remained there for four days until the corrections officials discovered that Ortega was, as he claimed, a United States citizen. App. 3a.

Proceedings Below. Ortega sued Cloyd, the Louisville Department of Corrections, and the officers who jailed him, claiming that removal from home confinement to institutional confinement without any warrant or process violated the Fourth, Fifth, and Fourteenth Amendments. App. 4. He brought a *Bivens* claim against ICE agent Cloyd for violating his right to be free from unreasonable seizures and his right to due process, based on Cloyd's issuance of an unlawful ICE detainer. App. 4. He also brought § 1983 claims against the local corrections officials for violating his right to be free from unreasonable seizure and his right to due process of law, based on removing him from home confinement and taking him to jail. App. 4.

The district court granted the defendants' motion to dismiss based on qualified immunity. App. 19a. Ortega appealed the decision, arguing there is a liberty interest in remaining in non-institutional confinement and that some process is required to be removed from non-institutional confinement and placed in jail or prison. App. 4a-5a. Ortega cited a

case from the Seventh Circuit which held, on very similar facts, that there is a liberty interest in home confinement once it has been ordered. Br. of Appellant at 16, *Ortega* v. *United States Immigration & Customs Enforcement, et al.*, (No. 12-6608). Additionally, he cited cases from the First, Second, Eighth, and Tenth Circuits that held there is a liberty interest in remaining in other non-institutional forms of confinement. *Id.* at 15-16. He argued these precedents were based on this Court's precedents that stated there is a fundamental difference between being confined at home and being confined to an institution. *Id.* at 18-19.

The Sixth Circuit agreed there is a liberty interest in remaining in home confinement once ordered. App. 6a-8a. It held the change between home confinement and institutional confinement was a "sufficiently severe change in conditions to implicate due process." App. 7a.

The panel majority held, though, that this right was not clearly established. App. 8a-10a. The court ruled that the myriad precedents it relied on to recognize the right were not sufficient to clearly establish the right. App. 10a. The court declined to give weight to analogous cases with similar facts, saying that they were not similar enough to establish the right. *See* App. 9a-10a.

Judge Keith dissented, finding Ortega's liberty interest in home confinement clearly established. App. 10. Judge Keith found Ortega's claims to be based on "core constitutional principles." App. 14a. He also considered the Supreme Court precedent and analogous cases to be relevant and decisive. App. 15a. He wrote that "[a]t a minimum, those decisions

firmly establish that an individual serving a sentence outside of prison is entitled to some minimum amount of process before being arrested and taken to jail." App. 15a.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT DEEPENED A CONFLICT AMONG THE CIRCUITS REGARDING HOW TO PROVE THAT A RIGHT IS CLEARLY ESTABLISHED

Qualified immunity affords government officials immunity from civil damages unless (1) "the official violated a statutory or constitutional right" and (2) the right "was clearly established at the time of the challenged conduct." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). This petition focuses solely on the second inquiry. This Court explained that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. The circuits are divided on how to determine the clarity of a right's contours in at least two ways.

First, they are divided on what sources of authority clearly establish a right. This Court has not expressly stated what authority makes a right clearly established, although it has suggested support for different standards. *Compare al-Kidd*, 131 S. Ct. at 2083-84 (supporting a narrow standard), *with Anderson*, 483 U.S. at 646 (supporting a broad standard by recognizing that qualified immunity protects officials from personal liability "as long as their actions are reasonable in the light of current American law").

Second, when looking to the appropriate authority, a court must determine whether

sufficiently comparable situations exist because, "in light of pre-existing law[,] the unlawfulness [of the government action] must be apparent." *Anderson*, 483 U.S. at 640. This Court later clarified, however, that "officials can still be on notice that their conduct violates clearly established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. In other words, courts must look beyond the exact factual circumstances of the previously recognized right. *See id.* The circuits' approaches to novel fact patterns differ measurably.

A. The Circuits Employ Significantly Different Standards Regarding What Sources of Authority Clearly Establish A Right

1. Broad Standards

The Third, Seventh, Eighth, and Ninth Circuits employ the broadest standards.

The Ninth Circuit first looks to Supreme Court and Ninth Circuit precedent. *Boyd* v. *Benton Cnty.*, 374 F.3d 773, 781 (9th Cir. 2004). If no binding precedent exists, the Ninth Circuit considers available "decisional law" from sister circuits, federal district courts, and state courts. *Drummond* v. *City of Anaheim*, 343 F.3d 1052, 1061 (9th Cir. 2003) (quoting *Malik* v. *Brown*, 71 F.3d 724, 727 (9th Cir. 1995)). If no binding or on-point case law exists, the court will determine the likelihood of the Supreme Court or the Ninth Circuit reaching the same result by comparing the legal analysis of sister circuits with the Ninth Circuit's analysis in related, but factually distinct scenarios. *Boyd*, 374 F.3d at 781 (citing *Capoeman* v. *Reed*, 754 F.2d 1512, 1514-15 (1985)). The Ninth Circuit stated that it is not necessary "to

find closely analogous case law to show that a right is clearly established." *Bryan* v. *McPherson*, 630 F.3d 805, 833 (9th Cir. 2010). Finally, the court allows the use of unpublished dispositions to establish a right. *McCloud* v. *Testa*, 97 F.3d 1536, 1555 n.28 (9th Cir. 1996).

The Seventh Circuit employs a standard that is equally broad. Like the Ninth Circuit, the Seventh Circuit first looks to see whether the Supreme Court or the Seventh Circuit has issued "controlling precedent." *Estate of Escobedo* v. *Bender*, 600 F.3d 770, 781 (7th Cir. 2010). If such precedent cannot be found, the Seventh Circuit will "broaden [its] survey to include *all* relevant case law in order to determine whether there was such a clear trend in the case law that [the Seventh Circuit] can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Id.* (emphasis added) (internal quotation marks omitted) (quoting *Jacobs* v. *City of Chi.*, 215 F.3d 758, 766 (7th Cir. 2000).

The Eighth Circuit has explicitly embraced the "broad view of the concept of clearly established law." *Vaughn* v. *Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001). Absent binding Supreme Court or Eighth Circuit precedent, the Eighth Circuit "look[s] to all available decisional law, including decisions from other courts, federal and state." *Id.*

The Third Circuit is somewhat inconsistent. Its opinions show a broad use of available precedent to determine whether a right is clearly established. *See, e.g.*, *Brown* v. *Muhlenberg Twp.*, 269 F.3d 205, 211 n.4 (3d Cir. 2001) ("If the unlawfulness of the defendant's conduct would have been apparent to a

reasonable official based on the current state of the law, it is not necessary that there be binding precedent from this circuit so advising."); *Rivas* v. *City of Passaic*, 365 F.3d 181, 198-200 (3d Cir. 2004) (taking into account a Third Circuit case and two Seventh Circuit cases in declaring that the law was clearly established). Federal district court opinions can also help clearly establish a right in the Third Circuit. *Williams* v. *Bitner*, 455 F.3d 186, 193 n.7 (3d Cir. 2006).

2. Narrow Standards

The Second, Fourth, and Eleventh Circuits implement a narrow standard for determining clearly established law.

The Eleventh Circuit articulated that "only binding precedent can clearly establish a right for qualified immunity purposes." *Gilmore* v. *Hodges*, 738 F.3d 266, 279 (11th Cir. 2013). Thus, a right can only be clearly established by the Supreme Court, the Eleventh Circuit, or the highest court of the relevant state. *See id.*

The Fourth Circuit similarly confines the analysis of precedent to the law of the relevant jurisdiction. *Occupy Columbia* v. *Haley*, 738 F.3d 107, 124 (4th Cir. 2013); *Edwards* v. *City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) ("[C]ourts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.") (alteration in original and internal quotation marks omitted). The Second Circuit also uses a narrow standard but frames the analysis differently. The Second Circuit determines whether the Supreme Court or the Second Circuit

"had affirmed the existence of the right." *Townes* v. *City of New York*, 176 F.3d 138, 144 (2d Cir. 1999). In the absence of binding precedent, the Second Circuit determines whether the state of the law was sufficient to put a reasonable government official within the Second Circuit on notice of the constitutional right. *See Gonzalez* v. *City of Schenectady*, 728 F.3d 149, 161 (2d Cir. 2013); *see also Young* v. *Cnty. of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998) ("The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in a defendant's position should know about the constitutionality of the conduct."). Additionally, federal district court opinions cannot clearly establish a right. *Hawkins* v. *Steingut*, 829 F.2d 317, 321 (2d Cir. 1987).

Unsurprisingly, the Second, Fourth, and Eleventh Circuits do not allow unpublished opinions to contribute to their determinations. *See, e.g.*, *Cerrone* v. *Brown*, 246 F.3d 194, 202 (2d Cir. 2001); *Hogan* v. *Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996); *Gilmore*, 738 F.3d at 279.

3. Semi-Narrow Standards

The First, Fifth, Tenth, and D.C. Circuits use standards between broad and narrow.

For a right to be clearly established in the Tenth Circuit, "there must be a Supreme Court or Tenth Circuit decision on point, *or* the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Schwartz* v. *Booker*, 702 F.3d 573, 587-88 (10th Cir. 2012) (emphasis added) (quoting *Walker* v. *City of Orem*, 451 F.3d 1139, 1151 (10th Cir. 2006)).

The Fifth Circuit uses a similar standard, although it narrows the scope of on-point authority. A right is clearly established if the Fifth Circuit can "point to a controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." *Morgan* v. *Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011) (internal quotation marks and footnote omitted).

The D.C. Circuit requires its own binding precedent to clearly establish a right. *Youngbey* v. *March*, 676 F.3d 1114, 1117 (D.C. Cir. 2012). In the absence of controlling precedent, the D.C. Circuit will consider whether persuasive authority has come to a consensus on the matter. *Id.*

Although less explicit about the terms of its analysis, the First Circuit also uses a semi-narrow standard. The First Circuit recognizes a right as clearly established if the Supreme Court or First Circuit has issued on-point precedent, or if a "clear consensus" has developed among the other circuits regarding the right. *See Walden* v. *City of Providence*, 596 F.3d 38, 53-54 (1st Cir. 2010); *Whitfield* v. *Melendez-Rivera*, 431 F.3d 1, 8 (1st Cir. 2005).

4. The Panel Applied a Narrow Standard in This Case

The Sixth Circuit panel majority here applied an unclear narrow standard. In his briefs, Ortega established that the First, Second, Seventh, Eighth, and Tenth Circuits "recognized that being removed from custodial confinement outside the prison system and being placed in institutional confinement triggered a constitutionally protected liberty

interest," which in turn required some amount of process. Br. of Appellant at 16, *Ortega* v. *United States Immigration & Customs Enforcement, et al.*, (No. 12-6608); *see also* App. at 15a (Keith, J., dissenting). Yet the panel majority only considered the law of two other circuits rather than the full breadth of circuits Ortega put before the court. Underscoring the point, the panel majority stated that "Ortega points to three cases" and then discussed only those cases, which were from two other circuits and ignored the numerous other cases in additional circuits that were also on point. App. at 9a-10a (majority opinion). The panel majority did not state on what standard it excluded the other cited authority from consideration.

B. The Circuits Employ Significantly Different Standards on the Needed Level of Factual Similarity to Establish Apparent Unlawfulness

The circuits also articulate different analytical frameworks for determining the apparent unlawfulness of official conduct in novel factual circumstances.

The Fourth and Eleventh Circuits have held that the law can be clearly established in novel factual circumstances, even without a body of specific case law. The Eleventh Circuit allows broad principles to control novel factual situations. *Keating* v. *City of Miami*, 598 F.3d 753, 766 (11th Cir. 2010) (holding that in novel cases a "broader, clearly established principal" may control or in obvious cases that prior case law may be unnecessary). The Fourth Circuit likewise has held that case law need not address the right in a "specific context before such right may be

held 'clearly established.'" *Meyers* v. *Balt. Cnty.*, 713 F.3d 723, 734 (4th Cir. 2013).

The First, Second, Seventh, and Eighth Circuits instead focus on a narrower notice-based analysis. They evaluate the reasonableness of a government official's ability to recognize the unconstitutionality of the actions at issue. *Winslow* v. *Smith*, 696 F.3d 716, 738 (8th Cir. 2012); *Martinez-Rodriguez* v. *Guevara*, 597 F.3d 414, 419 (1st Cir. 2010); *Estate of Escobedo* v. *Bender*, 600 F.3d 770, 781 (7th Cir. 2010); *Pena* v. *DePrisco*, 432 F.3d 98, 114-15 (2d Cir. 2005). Under these circuits' analyses the law can be clearly established even when there are notable factual distinctions, if prior decisions give officials reasonable warning of the unconstitutionality of their actions. *Estate of Escobedo*, 600 F.3d at 781.

The Third, Fifth, and Tenth Circuits place more emphasis on the specific facts of the case and the ability of the official to apply established law. The Third Circuit only considers "broad principles" in "extraordinary cases," and assesses "whether the official should have related this established law to the instant circumstance." *Schneyder* v. *Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (quoting *Burns* v. *Pa. Dep't of Corr.*, 642 F.3d 163, 177 (3d Cir. 2011)). The Tenth Circuit adopts a similar approach. *See Gomes* v. *Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006) ("[G]overnment officials [should] make 'reasonable applications of the prevailing law to their own circumstances." (quoting *Currier* v. *Doran*, 242 F.3d 905, 923 (10th Cir. 2001)). The Fifth Circuit, however, requires a more fact-intensive analysis to establish applicable precedent. *Kinney* v. *Weaver*, 367 F.3d 337, 387-88 (5th Cir. 2004).

C. This Case Presents an Ideal Vehicle for Clarifying the Proper Approach to Determine Whether a Right Is Clearly Established

This case stands at the intersection of what law should be considered to determine whether a right is clearly established both as it relates to the source of the law and as it relates to the level of generality at which the right is stated. There is tension between the Court's analyses in *Hope*, which declared "that there need not be a case on point to overcome qualified immunity," and *Brosseau*, which denied "qualified immunity based on the lack of a case on point." Erwin Chemerinsky, Federal Jurisdiction § 8.6, at 555 (5th ed. 2007); *see Hope*, 536 U.S. 730; *Brosseau*, 543 U.S. at 198-99. With no clear guidance from this Court, the circuits have created widely divergent standards.

The circuits' different standards vary so widely that results are contrary even with similar facts. For example, had Ortega's case arisen in the Ninth Circuit (broad standard) rather than the Sixth Circuit (semi-narrow standard), the Ninth Circuit would likely have considered the similar cases in the First, Second, Seventh, Eighth, and Tenth Circuits as clearly establishing the constitutional right. This result stands in direct opposition to the Sixth Circuit's determination.

Similarly, the very narrow view of the right at issue that the majority took—highlighted by Judge Keith's dissent—stands in contrast with several circuits and this Court. The Court has repeatedly explained that contextually similar factual situations—not only "the very act in question"—can

clearly establish a right. *Anderson*, 483 U.S. at 640; *see also Safford Unified School Dist. No. 1* v. *Redding*, 557 U.S. 364, 377-78 (2009); *Hope*, 536 U.S. at 741; *Wilson* v. *Layne*, 526 U.S. 603, 604 (1999). Circuits have come to differing conclusions on what this means.

In this case, the panel majority demanded nearly identical facts by either not considering cases involving contextually similar facts, or dismissing such cases as insufficient. This was error. Ortega pointed to multiple circuit holdings to clearly establish his liberty interest in non-institutional confinement. The Tenth Circuit found a liberty interest in a pre-parole program, saying that there was a "fundamental change in the *kind* of confinement." *Harper* v. *Young*, 64 F.3d 563, 566 (10th Cir. 1995). Additionally, the Second and Eighth Circuits recognized a liberty interest in a prison work release program that triggered due process rights. *Kim* v. *Hurston*, 182 F.3d 113, 118-20 (2d Cir. 1999); *Edwards* v. *Lockhart*, 908 F.2d 299, 301-02 (8th Cir. 1990). The First Circuit, in a case involving a home incarceration program, held that "the Due Process Clause is particularly protective of individuals participating in non-institutional forms of confinement." *Gonzales-Fuentes* v. *Molina*, 607 F.3d 864, 890 (1st Cir. 2010). Finally, on nearly identical facts, the Seventh Circuit held that being removed from home confinement and taken to jail is a "sufficient reduction" in liberty to be subject to some amount of due process. *Paige* v. *Hudson*, 341 F.3d 642, 643 (7th Cir. 2003).

The panel majority defined the issue as whether there was a liberty interest in being left in home confinement rather than being taken to jail. App. 4a.

Under the standards espoused by some circuits—such as the Fourth and the Eleventh—the issue would have been more properly defined as whether it was clearly established that there is a liberty interest in remaining outside the walls of institutional confinement.

Judge Keith, dissenting, considered analogous precedent from other circuits sufficient to proclaim the law clearly established. By taking into account a broader array of precedent, Judge Keith reached the opposite conclusion from the panel majority. (Keith, J., dissenting). He highlighted the majority's error when he explained that the majority's holding "allows an officer to blatantly violate the Fourth, Fifth, and Fourteenth Amendment rights of an American citizen—so long as it was done in a manner that neither [the Sixth Circuit] nor the Supreme Court has directly opined on before—with impunity." App. 16a. (Keith, J., dissenting).

This case highlights the inconsistent application of qualified immunity's "clearly established" analysis between the circuits. Depending upon what judicial authority a court will consult, and whether a court will consider contextually similar—but not identical—factual situations, courts arrive at utterly opposed conclusions. In this case, the clear establishment of the right at issue is completely dependent upon the analysis used. This case is thus a particularly effective vehicle for clarifying the standard for determining when a right is already clearly established.

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

The extraordinary importance of qualified immunity to constitutional tort litigation is undeniable. A damages remedy against overzealous government officials is, in many cases, the only realistic way citizens can safeguard their constitutional guarantees. *See Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) ("For people in Bivens' shoes it is damages or nothing."). Weighing against that interest is the court-derived qualified immunity doctrine, which admirably reduces frivolous lawsuits but also reduces the deterrent effect of the damages remedy on official decision making. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). Striking the proper equilibrium between vindicating individual rights and preventing interference with effective governance is an essential judicial function, and one that this Court has endeavored to provide for the lower courts with sufficient clarity on an ongoing basis.

But doctrinal uncertainty has plagued courts' ability to consistently render the analysis, among and within the circuits. Nearly thirty years ago, this Court recognized that the clearly established inquiry will turn on how specifically a court articulates the rule at issue. *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) ("The operation of this standard . . . depends substantially upon the level of generality at which the relevant legal rule is to be identified." (internal quotation marks omitted)). Fifteen years after *Anderson*, in *Hope* v. *Pelzer*, this Court provided contradictory guidance to lower courts about how they should conduct the clearly

established inquiry. 546 U.S. 730, 741 (2002) (holding that a right could be generally defined, contrary to *Anderson*'s holding that a right must be specifically defined). More recently, this Court has suggested that the appropriate level of specificity falls somewhere between the two cases but has not provided explicit guidance. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011); *Brosseau* v. *Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam); *see also Morgan* v. *Swanson*, 659 F.3d 359, 373 (5th Cir. 2011) (en banc) (recognizing *al-Kidd* sits in tension with *Hope* v. *Pelzer*).

Consequently, conspicuous differences in how circuit courts are defining and applying the term clearly established are distorting the operation of the qualified immunity doctrine as this Court intended. Absent this Court's direct guidance, the qualified immunity doctrine will remain substantially disparate among the lower courts and continue generating avoidable uncertainty.

1. Although the "clearly established" inquiry appears straightforward on its face, appellate and district courts routinely struggle when applying the doctrine. *See, e.g.*, *Thomson* v. *Salt Lake Cnty.*, 584 F.3d 1304, 1327 & n.1 (10th Cir. 2009) (Holmes, J., concurring) ("Courts and litigants alike often have difficulty analyzing whether summary judgment on the basis of qualified immunity is appropriate."); *see also* Michael M. Rosen, *A Qualified Defense: In Support of the Doctrine of Qualified Immunity in Excessive Force Cases, With Some Suggestions for Its Improvement*, 35 GOLDEN GATE U.L. REV. 139, 173 (2005) ("[T]his seemingly simple qualified immunity standard actually contains great complexity. . . . [T]he definition of clear establishment is as murky as

it is crucial."). Importantly, the approach that a court takes in articulating and assessing whether the law is clearly established is often outcome-determinative. *See* Amelia A. Friedman, *Qualified Immunity in the Fifth Circuit: Identifying the "Obvious" Hole in Clearly Established Law*, 90 TEX. L. REV. 1283, 1286 (2012) (explaining that broadly defined rights tend to defeat immunity claims whereas specifically defined rights shield more government defendants with immunity).

In light of the "clearly established" inquiry's often dispositive nature, the circuits have cast rights with varying standards, producing persistent and pronounced instability. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010); *see* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U.L. REV. 1, 4-5 (1997) ("While the qualified immunity defense has long been recognized, its application and administration continue to perplex courts and provoke a substantial amount of scholarly commentary."). These perplexities have not subsided over time; indeed, the fractured state of the "clearly established" analysis has been a constant source of the doctrine's shortcoming. *Compare, e.g.*, *Casey* v. *City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) ("The difficult part of this inquiry is identifying the level of generality at which the constitutional right must be clearly established." (internal quotation marks omitted)), *with Gooden* v. *Howard Cnty.*, 917 F.2d 1355, 1365 (4th Cir. 1990) (Wilkinson, J., dissenting) ("[T]he majority defines "clearly established" law at a level of generality so broad as to discard qualified immunity. . . . [T]he

cumulative effect of which is to leave the defense of qualified immunity in a rubbled state."), *opinion superseded on reh'g*, 954 F.2d 960 (4th Cir. 1992).

Doctrinal disuniformity conspicuously manifests itself in two important ways. First, judges within the same circuit arrive at opposing conclusions as to whether the law has been clearly established at the proper level of specificity.[1] Second, the circuits differ in their willingness to look to factually analogous cases in determining if the law has been clearly established.[2] They also differ regarding whether

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[1] *See, e.g.*, *Gravelet-Blondin* v. *Shelton*, 728 F.3d 1086, 1089 n.1 (9th Cir. 2013) ("We disagree with the dissent's concern that we are undertaking this constitutional inquiry at too high a level of generality."); *Henry* v. *Purnell*, 619 F.3d 323, 342 (4th Cir. 2010) (Gregory, J., dissenting) (criticizing the panel majority from improperly framing the clearly established inquiry), *rev'd en banc*, 652 F.3d 524 (4th Cir. 2011); *Green* v. *New Jersey State Police*, 246 F. App'x 158, 164 (3d Cir. 2007) (Garth, J., dissenting) ("I believe that the majority has conceived of the right here at issue at too high [a] level of generality to be useful in a case that presents this entirely novel fact pattern." (alteration in original) (internal quotation marks omitted)); *Perez* v. *Oakland Cnty.*, 466 F.3d 416, 436-37 (6th Cir. 2006) (Moore, J., dissenting) ("I do not believe that the grant of qualified immunity [] is justified in this case. . . . I do not agree with the characterization of the issue in this case."); *Medina* v. *Cram*, 252 F.3d 1124, 1129 (10th Cir. 2001) ("The dissent therefore reads *Crawford–El* too broadly and fails to apply Supreme Court precedent emphasizing the unique nature of a qualified immunity defense.").

[2] *See, e.g.*, *Panagoulakos* v. *Yazzie*, No. 13-2003, 2013 WL 6698134, at *5 (10th Cir. Dec. 20, 2013) (Holloway, J., dissenting) ("The majority's holding that the officer is entitled

they will consider case law developed in other circuits. *See* Friedman, *supra*, at 1289-90 (collecting cases and explaining "[t]he Second and Eleventh Circuits limit the analysis to case law from within each circuit. The Eighth and Ninth Circuits are willing to consider all available decisional law. The Fourth and Sixth Circuits only look to extra-circuit case law in limited circumstances and as such are practically as restrictive as the Eleventh Circuit. . . . [T]he Fifth Circuit's approach more closely resembles the restrictive practice in the Fourth and Sixth Circuit[s]").

Simply put, federal circuits have developed different approaches to describing and assessing whether law is clearly established. *Id.* at 1284. These variations have been the subject of significant academic commentary and debate, especially because definitional challenges in qualified immunity doctrine are one of the most philosophically and

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to qualified immunity for her mistake of law is contrary to our precedents."); *Newman* v. *Guedry*, 703 F.3d 757, 769 (5th Cir. 2012) (Barskdale, J., dissenting) ("To hold [that the officers are not shielded by qualified immunity] is to turn a blind eye to the material facts at hand (which are not disputed) and the controlling law."), *cert. denied*, 134 S. Ct. 162 (2013); *Scozzari* v. *Miedzianowski*, 454 F. App'x 455, 470-71 (6th Cir. 2012) (McKeague, J., dissenting) ("Not only does *Owensby* fail to provide the clearly established law here, no other case in this Circuit or the Supreme Court provides guidance on how an officer must proceed after he has already called for emergency medical services beyond the general admonition not to unreasonably delay access to medical treatment in the face of a serious need.").

conceptually challenging tasks routinely faced by the federal judiciary. Circuit Judge Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). Without further command from this Court, lower courts will continue to wrestle with recurring issues that muddle qualified immunity determinations in constitutional tort actions.

2. Non-uniform qualified immunity standards also lead to unjust results and a sense of injustice. The resulting effect is that lower courts conduct their qualified immunity analysis in "an ad hoc manner, giving the entire process a rather arbitrary feel." Michael S. Catlett, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1035-36 (2005). Though "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative," *Harlow*, 457 U.S. at 813-14, blatant differences in the protections of constitutional rights should not be struck merely based on geography.

Maintaining consistency across the country is critical to ensuring the doctrine operates properly. *See, e.g.*, *Casey* v. *City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) ("The difficult part of this inquiry is identifying the level of generality at which the constitutional right must be clearly established."); *Thompson* v. *Upshur Cnty.*, 245 F.3d 447, 457 (5th Cir. 2001) ("To ensure that qualified immunity serves its intended purpose, it is of paramount import, during step two, to define 'clearly established law' at the proper level of generality.").

In addition, the power of the "clearly established requirement" cannot be left unstated—government officials can violate a constitutional right and yet be immune from liability. One commentator has found it "disturbing" and "somewhat bizarre" that some courts of appeals have contorted their application of the doctrine to the point that qualified immunity will apply unless the Supreme Court itself has held the precise, identical conduct at issue unlawful. Karen M. Blum, *Qualified Immunity: Further Developments in the Post*-Pearson *Era*, 27 TOURO L. REV. 243, 253 (2011). More importantly, the sense of injustice manufactured by disparate application of constitutional principles is problematic. This is an especially salient consideration in the context of suits that seek to remedy alleged constitutional violations.

Moreover, establishing that the Constitution has been violated is itself a difficult task, and to further erect substantial barriers to vindicating constitutional violations should not change depending on the happenstance location of where wrongdoing occurred. *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 479 (2011). Were that the case, plaintiffs (and defendants) would have perverse incentives to procure the most favorable substantive law through forum shopping. This is a realistic strategic consideration when federal officials perform their own duties or work with other officials involved across multiple circuits, or when there are joint claims against state and federal officials operating in different locales. In other contexts, this Court has denounced the creation of opportunities for forum shopping. *See Atl. Marine Constr. Co., Inc.* v. *U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581-82

& n.7 (2013) (discussing that change of venue statute should not create or multiply opportunities for forum shopping). The underlying concern about gamesmanship applies with equal force here, and this Court should not allow such behavior to flourish by failing to provide a workable standard.

3. The issue is also of critical importance to the numerous government officials who may invoke qualified immunity as a defense to litigation. Inconsistent standards hamper certainty and predictability for litigants, government officials, and the courts. They also undercut the entire function of the clearly established prong: to provide reasonable notice to officials regarding the permissible bounds of their actions.

This Court has previously recognized the important benefits of disposing unmeritorious claims as quickly as possible. *Will* v. *Hallock*, 546 U.S. 345, 354 (2006) (noting that quick resolution of qualified immunity claims are "essential"). To protect government officials against frivolous lawsuits, the Court has sought to fashion a qualified immunity standard that quickly disposes of such lawsuits. *See Pearson* v. *Callahan*, 555 U.S. 223, 237 (2009) (noting that parties should not endure the costs and delays of litigating constitutional questions if not necessary). Accordingly, district court orders rejecting absolute immunity and qualified immunity are immediately appealable under the collateral order doctrine. 28 U.S.C. § 1291; *Hallock*, 546 U.S. at 350.

The government has also confirmed the importance of qualified immunity in suits against government officials. Recognizing the need for

skilled litigators to defend against "complex" and "cutting-edge questions of constitutional law," in *Bivens* cases, the Justice Department created the Constitutional and Specialized Tort Litigation section.[3] The Section aims to "avoid[] unnecessary discovery and the burdens and distractions on federal officials normally associated with taking cases against them to trial." The Section's existence indicates the importance of qualified immunity to the government as a whole and the individual federal officials it represents.

Moreover, a lack of clarity increases the costs of judicial decision making. When this Court removed the mandatory nature of the two-step inquiry in adjudicating qualified immunity, it grounded its concerns in the fair and efficient disposition of constitutional tort cases. *Pearson*, 555 U.S. at 821. These concerns are relevant here too; without clear standards, courts will continue to struggle with undertaking the clearly established inquiry.

* * *

An essential function of federal courts is preserving the "landmarks" of civil liberties, which are the foundational tenets of American democracy. Courts encounter qualified immunity in the vast majority of civil rights cases because the doctrine, when applicable, completely bars suit. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). In light of its recurrence in the vast majority of cases seeking damages against government officials, the vexing

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[3] Civil Torts, U.S. DEP'T OF JUSTICE, http://www.justice.gov/civil/torts/cstls/t-cstl.html (last visited Mar. 3, 2014).

issue of what constitutes clearly established law is of such extraordinary importance that it warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 12-6608

RICHARD ORTEGA,
Plaintiff-Appellant,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Kentucky at Louisville. No. 3:11-cv-00429—John G. Heyburn II, District Judge.

Argued: October 8, 2013
Decided and Filed: December 10, 2013

Before: KEITH and SUTTON, Circuit Judges; BLACK, District Judge.*

COUNSEL

ARGUED: Brittany Sadler, WILLIAM & MARY LAW SCHOOL, Williamsburg, Virginia, for Appellant. J. Max Weintraub, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees. Stephen P. Durham,

* The Honorable Timothy S. Black, United States District Court Judge for the Southern District of Ohio, sitting by designation.

JEFFERSON COUNTY ATTORNEY'S OFFICE, Louisville, Kentucky, for Louisville/Jefferson County Appellees. **ON BRIEF:** Tillman J. Breckenridge, REED SMITH LLP, Washington, D.C., for Appellant. J. Max Weintraub, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees. Stephen P. Durham, JEFFERSON COUNTY ATTORNEY'S OFFICE, Louisville, Kentucky, for Louisville/Jefferson County Appellees.

SUTTON, J., delivered the opinion of the court, in which BLACK, D. J., joined. KEITH, J. (pp. 10–13), delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge.

The United States Immigration and Customs Enforcement agency mistakenly issued a detainer for Richard Ortega. Sent to the Louisville Metro Department of Corrections, the detainer informed the local prison authorities that the immigration agency was investigating whether Ortega, then serving a home-confinement sentence, could be removed from the United States. Based on the detainer, the department moved Ortega to a local prison. Ortega, who happened to be a United States citizen, sued, claiming due process and unreasonable seizure violations. The defendants moved to dismiss on qualified immunity grounds, and the district court granted the motions. We affirm.

I.

Ortega began serving an eleven-day sentence of home confinement for driving under the influence on

March 18, 2011. Under the terms of his sentence, he had to wear an electronic monitoring device at all times. With prior approval, he could go to work, the doctor and church. Otherwise he had to stay at home.

Soon after he began serving the sentence, the corrections department received a detainer for Ortega from federal immigration authorities. "A detainer is a request filed . . . with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." *Carchman v. Nash*, 473 U.S. 716, 719 (1985). In the normal course, the immigration agency receives notice of state and federal criminal convictions, after which it investigates to determine whether the individual entered the country legally. If the individual has violated the immigration laws, the agency usually begins removal proceedings.

Immigration agent John Cloyd issued Ortega's detainer after seeing his DUI conviction and after noticing that Ortega's name and birth date resembled, though they did not exactly match, those of an unlawful alien. The detainer informed the corrections department that the immigration agency was investigating whether Ortega entered the country legally.

As a matter of policy, the local corrections department incarcerates any individual with an immigration detainer. On March 19, officers Lori Eppler and William Skaggs took Ortega to the local jail, where he remained until his release on March 22. The corrections department did not conduct its own investigation of Ortega's citizenship before

taking him to jail. This Richard Ortega, as it turns out, is a United States citizen, subject to Kentucky's drinking-and-driving laws but not subject to deportation under federal law.

Ortega filed this lawsuit, raising a host of constitutional claims under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Only two remain. Ortega claims that the city's officers (Eppler and Skaggs) violated his rights against deprivations of liberty without due process and against unreasonable seizures when they carried out the federal detainer and that the federal immigration agent (Cloyd) caused those violations by issuing the detainer. The district court dismissed both sets of claims on qualified immunity grounds.

(On appeal, Ortega occasionally references other defendants and claims mentioned in his complaint. As the defendants point out, Ortega has forfeited these theories of relief because he did not develop them. See *United States v. Sandridge*, 385 F.3d 1032, 1035–36 (6th Cir. 2004).)

II.

Ortega's appeal implicates two old qualified immunity questions: (1) Did the state and federal officials violate Ortega's constitutional rights? (2) If so, were those rights clearly established at the time of the transfer? See *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

Ortega's appeal also implicates two new constitutional law questions: (1) Does an individual serving a sentence through home confinement have a liberty interest protected by the Due Process Clause in not being moved to a traditional prison setting?

(2) Does that same individual have a right protected by the Fourth Amendment in not being moved to a traditional prison setting in the absence of probable cause?

Before turning to these questions, it may help to explain how detainers traditionally work and why in the normal course they do not violate these constitutional guarantees. Faced with limited resources, federal immigration authorities understandably pay attention to illegal immigrants who break other laws. *See, e.g.*, U.S. Gov't Accountability Office, GAO-12-708, Secure Communities 6–13 (2012). Using a computer database, they determine whether individuals convicted of violating other local, state and federal laws have entered the country illegally. If so, they issue a detainer to the law enforcement authority holding the individual, asking the institution to keep custody of the prisoner for the agency or to let the agency know when the prisoner is about to be released. *See* 8 C.F.R. § 287.7.

Federal detainers do not raise constitutional problems in the normal course. If a local prison keeps tabs on someone until his release, even if it moves him from one prison setting to another, it is difficult to see how that continued custody is any business of the Due Process Clause or for that matter the Fourth Amendment. *See Sandin v. Conner*, 515 U.S. 472 (1995). The same is true if 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.

What happens, however, in other settings? Say a

State authorizes the arrest of any person, in custody or not, subject to a federal immigration detainer. *See Buquer v. City of Indianapolis*, No. 1:11-cv-708-SEB, 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013). Or say a State refuses to release a person who has posted bail because of an immigration detainer. *See Galarza v. Szalczyk*, No. 10-cv-6815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012). Or say a State keeps a person serving a sentence of weekend confinement in jail because of an immigration detainer. *See Rodriguez v. Aitken*, No. 13-551-SC, 2013 WL 3337766 (N.D. Cal. July 1, 2013). Or say, as in our case, the individual is on home confinement, and the local officials move him to a traditional prison setting based on the federal detainer. In these other settings, including most pertinently ours, the matter is more complicated.

Due Process. When an individual violates a criminal law and receives a sentence, he usually cannot be heard to complain about the deprivations of liberty that result. Although "prisoners do not shed all constitutional rights at the prison gate, . . . lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Sandin*, 515 U.S. at 485. That is why, when prison authorities move an inmate from one cell to another, even to a cell with far fewer privileges, the increased deprivation generally does not implicate a protected liberty interest under the Due Process Clause. "The Constitution does not . . . guarantee that the convicted prisoner will be placed in any particular prison." *Meacham v. Fano*, 427 U.S. 215, 224 (1976).

And the Constitution does not prevent a prison

transfer to a more restrictive setting unless the change would work an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

While this line of authority works against Ortega's claim, it does not defeat it. A transfer from home confinement to prison confinement, it seems to us, amounts to a sufficiently severe change in conditions to implicate due process. Yes, both settings involve confinement, a reality confirmed by the fact that Ortega must wear an electronic monitoring device at all times, by the fact that he must obtain permission to leave the home and may do so only for discrete reasons and by the fact he would be prosecuted for escape if he did not comply. Ky. Rev. Stat. § 532.200(2). But the two settings of confinement still amount to significant differences in kind, not degree. A prison cot is not the same as a bed, a cell not the same as a home, from every vantage point: privacy, companionship, comfort. And the privileges available in each are worlds apart—from eating prison food in a cell to eating one's own food at home, from working in a prison job to working in one's current job, from attending religious services in the prison to attending one's own church, from watching television with other inmates in a common area to watching television with one's family and friends at home, from visiting a prison doctor to visiting one's own doctor. *See* Ky. Rev. Stat. § 532.200(1). These marked disparities between individual liberty in the one setting as opposed to the other suffice to trigger due process.

What process is due will vary from setting to setting and may well turn on the notice given to the individual before he was allowed to serve a prison

sentence at home. Happily for us, we need not answer these more difficult questions today. In a qualified immunity case, a court may reject the constitutional claim on either of two grounds—either because no such constitutional right existed or because the constitutional right was not clearly established at the time of the incident. As the Supreme Court has acknowledged, lower courts are free to resolve (and it is often more efficient to resolve) qualified-immunity cases based on the second prong—that the contours of the constitutional right were not clearly established at the time. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Just so here.

A clearly established constitutional violation requires on-point, controlling authority or a "robust consensus of cases of persuasive authority." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quotation omitted). As of March 2011, no controlling authority or consensus of persuasive authority established that Ortega had a liberty interest in remaining on home confinement.

The relevant Supreme Court precedent at the time dealt only with traditional confinement and probation or parole. *See Young v. Harper*, 520 U.S. 143, 147–53 (1997); *Sandin*, supra; *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Ortega's case falls somewhere between traditional confinement and probation/parole, and the Supreme Court has not addressed such a case.

The Sixth Circuit has not addressed an in-between case like Ortega's either. The closest case, *Ganem v. U.S. Immigration and Naturalization*

Serv., 825 F.2d 410 (6th Cir. 1987) (per curiam) (unpublished), hurts rather than helps Ortega's cause. It involved a federal prisoner whose prison classification changed because of an immigration detainer. The court 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 410. Even then, *Ganem* does not speak to the question here—whether a home confinee should be thought of as a prisoner without a liberty interest in avoiding a transfer to prison or as a probationer/parolee with such a liberty interest.

In the absence of Supreme Court or Sixth Circuit authority, Ortega points to three cases as evidence of a "robust consensus" of persuasive authority establishing a liberty interest in home confinement. In one, a probationer challenged the revocation of his probation, the first six months of which were to be served on home confinement. *Paige v. Hudson*, 341 F.3d 642 (7th Cir. 2003). The Seventh Circuit (in dicta) stated that the probationer had a constitutionally protected liberty interest in remaining on home confinement. *Id.* at 643–44. In another, the same court dealt with the imprisonment of a person serving a sentence that included a short time in jail followed by home confinement. *See Domka v. Portage Cnty.*, 523 F.3d 776 (7th Cir. 2008). There the court stated (again in dicta) that Paige was not "necessarily controlling" because "Domka was not a probationer but instead a prisoner serving his time outside the jail." *Id.* In the third case, a group of prisoners released into home confinement challenged their reimprisonment. *Gonzalez-Fuentes v. Molina*, 607 F.3d 864 (1st Cir. 2010). The First Circuit concluded (here too in dicta)

that home confinement sufficiently resembles probation and parole to create a protected liberty interest in remaining on home confinement. *Id.* at 890.

These three cases are neither robust in their relevant analyses nor evidence of an on-point consensus. The decisions from both circuits undermine the central premise of Ortega's claims by noting that today's question—whether initial home confinement gives rise to a protected liberty interest—is an open one. *See Gonzalez-Fuentes*, 607 F.3d at 887 ("How the Due Process Clause should apply to the liberty interests of prisoners serving sentences in alternative forms of confinement remains an open question."); *Domka*, 523 F.3d at 781 (describing the "law in a case such as this, where the convict is not technically 'imprisoned,' [as] still evolving"). True, both courts concluded that a person released from prison into home confinement has a protected liberty interest in remaining on home confinement. But Ortega's case is different, since he can "appropriately be characterized as a prisoner serving a portion of his confinement in a different location from prison." *Domka*, 523 F.3d at 781 & n.3. That difference explains why the Seventh Circuit suggested that someone in Ortega's position might not have a protected liberty interest in remaining on home confinement. *See id.* The officers could have reasonably thought the same thing, meaning their actions at worst reflected a "reasonable but mistaken judgment[] about [an] open legal question[]." *Al-Kidd*, 131 S. Ct. at 2085. The point of qualified immunity is to protect just such judgments.

Fourth Amendment. A similar problem undermines Ortega's Fourth Amendment claim—

namely, no relevant authority existed at the time of the incident. A Fourth Amendment seizure requires "a governmental termination of freedom of movement through means intentionally applied." *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97 (1989). As of March 2011, no controlling authority established that moving a convict from home confinement to prison confinement resulted in a new seizure within the meaning of the Fourth Amendment.

The few cases to discuss seizure claims by those already confined suggest that the "freedom of movement" and "protected liberty interest" inquiries overlap. *See Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000) ("[B]ecause Plaintiff had no protected liberty interest in not being confined in the SHU, he fails to state a Fourth Amendment claim."); *Leslie v. Doyle*, 125 F.3d 1132, 1135–36 (7th Cir. 1997) ("We see no reason . . . why a prisoner's liberty interest under [the Search and Seizure and Due Process Clauses] would differ."). The open question raised by Ortega's due process claim thus spills over into this claim: Should a home confinee be thought of as a prisoner without freedom of movement or as a probationer/parolee with freedom of movement?

This open question requires a conclusion that "the contours of [a home confinee's right against unreasonable seizures was not] sufficiently clear that a reasonable official would understand that [a transfer from home confinement to jail] violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The individual defendants reasonably could have thought that transferring Ortega 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. Just as qualified immunity applies to Ortega's due process claim, it thus also applies to his illegal-seizure claim.

The dissent agrees with our first assessment (that, for purposes of due process and unreasonable seizure protections, home confinement differs materially from in-prison confinement) but not with our second (that the right was not clearly established at the time of the relevant events). Because qualified immunity protects all but "the plainly incompetent," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), because, as the dissent's own cases reveal, no appellate court holdings had addressed this issue at the time of the detainer, and because no material fact disputes cloud these explanations, the district court properly granted qualified immunity to the defendants.

III.

For these reasons, we affirm.

DISSENT

DAMON J. KEITH, dissenting.

Because I disagree with the majority's view that Ortega did not have a "clearly established" liberty interest in home confinement, I respectfully dissent.

I address Ortega's claims against the Louisville Metro Department of Corrections ("Metro Defendants") and Immigration agent John Cloyd ("Cloyd") separately.

Metro Defendants

The facts of this case are such that the unlawfulness of Metro Defendants' conduct is readily apparent, even in the absence of clarifying case law. Metro Defendants seized Ortega, an American-born, United States citizen, from his home and took him to jail for four days, based upon an improper detainer, without a warrant or any semblance of process. In doing so, Metro Defendants did not allow him to produce any documentation that he was an American citizen. As this Court has recently explained:

> "[O]utrageous conduct will obviously be unconstitutional" without regard to precedent because "the easiest cases don't even arise." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009) (brackets and internal quotation marks omitted). And even in cases involving less than outrageous conduct, "officials can still be on notice that their conduct violates established law in novel factual circumstances." *Id.* at 377–78, 129 S.Ct. 2633 (ellipses and internal quotation marks omitted).

Quigley v. Tuong Vinh Thai, 707 F.3d 675, 684 (6th Cir. 2013).

Not only should the officers have known that removing someone from their home and taking them to jail requires a certain minimum level of process, but in my view, the relevant case law clearly establishes that criminal defendants have a constitutional due process right to remain in home confinement.

Confinement in the home is inherently different

from confinement in jail. The majority concedes this point, holding that the distinction between the two settings of confinement amounts to a "difference[] in kind, not degree." Indeed, the terms of Ortega's plea agreement provided that Ortega would serve his sentence through Kentucky's Home Incarceration Program, a creation of Kentucky law. Under the program, Ortega was allowed to eat foods of his choice, sleep in his own bed, report to work, and attend religious services each day. As the majority correctly points out, "[t]hese marked disparities between the liberty in the one setting as opposed to the other suffice to trigger due process."

Nevertheless, the majority dismisses Ortega's claims based on the second prong of the qualified immunity test, holding that "no controlling authority or consensus of persuasive authority established that Ortega had a liberty interest in remaining on home confinement." This conclusion is untenable. Clearly established rights include not only those specifically adjudicated, but also those that are established by general applications of core constitutional principles. *See, e.g., Quigley*, 707 F.3d at 685 (6th Cir. 2013) ("That there is no federal case directly on point does not undermine [the] conclusion [that] [t]he principle at issue—namely, that a doctor cannot 'consciously expos[e a] patient to an excessive risk of serious harm' while providing medical treatment—is enshrined in our case law.").

Here, the core constitutional principle—that an officer must provide some process before seizing an individual from his home and taking him to jail—is unquestionably enshrined in our case law. Admittedly, the Supreme Court and this Court have only explained this principle in the probation and

parole contexts. *See, e.g.*, *Young v. Harper*, 520 U.S. 143, 147-53 (1997); *Sneed v. Donahue*, 993 F.2d 1239, 1241 (6th Cir. 1993). Surely, however, the test for determining whether a constitutional right was clearly established does not require a plaintiff to demonstrate that "the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635 (1987). Indeed, in this case, the unlawfulness of Metro Defendants' actions clearly was apparent.

The majority's cursory dismissal of analogous cases from the First and Seventh Circuits, *see Gonzales-Fuentes v. Molina*, 607 F.3d 864 (1st Cir. 2010); *Domka v. Portage Cnty.*, 523 F.3d 776 (7th Cir. 2008); and *Paige v. Hudson*, 341 F.3d 642 (7th Cir. 2003), as "neither robust in their relevant analyses nor evidence of an on-point consensus" misses the point. At a minimum, those decisions firmly establish that an individual serving a sentence outside of prison is entitled to some minimum amount of process before being arrested and taken to jail. *See also Kim v. Hurston*, 182 F.3d 113, 118-20 (2d Cir. 1999); *Edwards v. Lockhart*, 908 F.2d 299, 302 (8th Cir. 1990).[1]

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[1] We note further that in 2011, the Eastern District of Pennsylvania evaluated the above-cited cases and decided the precise question in this case in the affirmative, holding that "the Fourteenth Amendment demands some minimal process before a state actor takes someone who is set to serve his sentence at home, on electronic monitoring, and instead puts him in prison or another form of 'institutional confinement.'" *McBride v. Cahoone*, 820 F. Supp. 2d 623, 631 (E.D. Pa. 2011).

The majority's holding allows an officer to blatantly violate the Fourth, Fifth, and Fourteenth Amendment rights of an American citizen—so long as it was done in a manner that neither this Court nor the Supreme Court has directly opined on before—with impunity. This cannot be the intent of the qualified immunity doctrine.

ICE Defendant Cloyd

Although the majority fails to distinguish between Ortega's claims against Metro Defendants and ICE Agent Cloyd, the facts of this case call for a separate analysis as to each Defendant's liability.

It is undisputed that Cloyd improperly issuance a detainer against Ortega. It is also undisputed that Cloyd's actions were a proximate and but-for cause of Ortega's removal from home confinement and subsequent incarceration. Having established that Ortega had a clearly established liberty interest in remaining in home confinement, Cloyd may be liable for violating Ortega's rights. *See Powers v. Hamilton Cnty. Public Defender Com'n*, 501 F.3d 592, 608 (6th Cir. 2007). Accordingly, I believe the district court's dismissal of Ortega's claims against Cloyd was improper.

A complaint may only be dismissed "if it is clear that no violation of a clearly established constitutional right could be found under any set of facts that could be proven consistent with the allegations or pleadings." *Jackson v. Schultz*, 429 F.3d 586, 589 (6th Cir. 2005). In reviewing a motion to dismiss, we "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor

of the plaintiff." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

Ortega alleges that Cloyd improperly issued an immigration detainer against him, despite the fact that he was an American-born United States citizen. Cloyd argues that this erroneous issuance of the detainer was due to the fact that Ortega had a similar, but not identical name and birth date as an individual who had previously been deported. The district court referred to this as "an unfortunate but honest mistake." R. 48 at 343. But the district court could not possibly have assessed the reasonableness of Cloyd's error because the detainer was not part of the record at the motion to dismiss stage. There is simply no way to know how similar the names and birth dates of the two individuals were without analyzing the detainer itself.

Moreover, even taking Cloyd's argument on its face, it is unclear what relationship—beyond a shared ethnic background—Ortega had with an individual who had already been removed from the country. To 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. Because a reasonable factfinder could conclude, after carefully evaluating the detainer, that Cloyd intentionally and improperly issued the detainer against Ortega, I believe dismissal was improper.

For the foregoing reasons, I do not agree that the claims against either of the defendants should have been dismissed. I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:11-CV-00429-H

RICHARD ORTEGA, PLAINTIFF

v.

JOHN T. CLOYD, AGENT IN THE EMPLOY OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DEFENDANTS

and,

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT

and,

MARK BOLTON, DIRECTOR LOUISVILLE/JEFFERSON COUNTY METRO CORRECTIONS

and,

WILLIAM SKAGGS AND LORI EPPLER, OFFICERS IN THE EMPLOY OF LOUISVILLE/ JEFFERSON COUNT METRO CORRECTIONS.

MEMORANDUM OPINION AND ORDER

Plaintiff, Richard Ortega, brought this action against officers and agents of United States Immigration and Customs Enforcement ("ICE") and Louisville Metro Corrections ("Metro Corrections"), for alleged constitutional violations. This case has endured several procedural twists and turns before finally settling in federal court. The Court is now confronted with unusual and unfortunate circumstance which, nevertheless, yield a clear result.

While on home incarceration, Ortega was detained by Metro Corrections Officers based upon the existence of an ICE detainer indicating that Ortega was an illegal alien. As it turned out, the information which justified the detainer was misapplied, as Ortega is a U.S. citizen. Ortega sued the state officials under 42 U.S.C. § 1983 and federal officials under a *Bivens* claim. Both sets of Defendants have each moved separately to dismiss based on failure to state a claim upon which relief can be grated and qualified immunity. For judicial economy purposes, the Court will address both motions in this opinion. For the following reasons, the Court will sustain the motions to dismiss.

I.

On March 18, 2011, Ortega entered a guilty plea and was convicted in Jefferson County District Court of Driving under the Influence, First Offense. State District Court Judge Armstrong entered an order immediately sentencing Ortega to eleven days of home incarceration. The next day, on March 19, 2011, Metro Corrections Officers William Skaggs and

Lori Eppler removed Ortega from his home and placed him in jail based on an ICE-issued detainer. The complaint alleges that ICE Agent John T. Cloyd improperly issued the ICE detainer when he mistakenly confused Ortega with an illegal alien that has a very similar name and birth date. The detainer was invalid, as Ortega is an U.S. citizen. Ortega contends that Metro Corrections has a "longstanding policy to incarcerate any individual who currently had an ICE detainer on him or her." Consequently, Metro Correction officers detained Ortega and he remained in jail until March 22, 2011.[1]

On August 25, 2011, Ortega brought this action asserting constitutional violations pursuant to 42 U.S.C. § 1983 against Metro Corrections and its officers (collectively "Metro Defendants"). He also brought a *Bivens* claim against ICE and its officers (collectively "Federal Defendants").[2] "Both *Bivens*

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[1] Defendant Louisville/Jefferson County Metro Government contends that Ortega remained in custody until March 23, 2011, the date Judge Armstrong ordered his release. The date of release is not material and has no bearing on the Court's analysis.

[2] Ortega initially filed suit against Federal Defendants United States Immigration and Customs Enforcement, ICE's supervisory personnel Richard A. Wong and John Morton, and Unknown Agents and Employees in the Employ of ICE. The Federal Defendants moved to dismiss the claims against them, based on the agency's sovereign immunity, and the qualified immunity of the remaining Defendants. On April 27, 2012, this Court entered an Order dismissing Federal Defendants Morton, Wong and United States Immigration and Customs Enforcement agency from this action, but retained in the action

and § 1983 allow a plaintiff to seek money damages from government officials who have violated" constitutional rights. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Ortega alleged violations of the Fourth, Fifth, Eighth and Fourteenth Amendments.

Metro Defendants have moved to dismiss the claim for failure to state a claim and/or based on qualified immunity. The remaining Federal Defendant, ICE Agent Cloyd, has also moved to dismiss on the same grounds. Given the different position of Defendants, the Court will analyze separately whether Ortega has stated a plausible claim for constitutional violations against each defendant.

II.

Ortega brings this suit under 42 U.S.C. § 1983 against Metro Defendants for violations of the Fourth Amendment, Eighth Amendment, Due Process Clause and Equal Protection Clause. Under 42 U.S.C. § 1983, "an individual may bring a private right of action against anyone who, under color of state law, deprives a person of rights, privileges, or

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the Unknown Agent and Employees in the Employ of ICE. This Court ordered ICE to identify all ICE Agents who were involved in Ortega's ICE detainer. ICE complied, naming Agent Cloyd.

Accordingly, the only Federal Defendant that remains is ICE Agent Cloyd. With respect to Metro Corrections Defendants, Ortega's First Amended Complaint names Louisville/Jefferson County Metro Government, Director of Metro Corrections Mark Bolton in his individual capacity, and Metro Corrections Officers Eppler and Skaggs. All Metro Defendants remain in the action.

immunities secured by the Constitution of conferred by federal statute." *Bletz v. Gribble*, 641 F.3d 743, 749 (6th Cir. 2011). "To state a claim under 42 U.S.C. § 1983, a plaintiff must set forth facts, when construed favorably, establish (1) the deprivation of a right secured by the Constitution of laws of the United States (2) caused by a person acting under the color of state law." *Marvin v. City of Taylor*, 509 F.3d 234, 243 (6th Cir. 2007) (internal quotations omitted). Government officials, however, may be immune from liability for their constitutional violations under the doctrine of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity is designed to shield government officials from actions "insofar as their conduct does not violate a clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The Sixth Circuit uses a two-step inquiry to assess qualified immunity: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." *Colvin v. Caruso*, 605 F.3d 282, 290 (6th Cir. 2010)(internal quotations omitted). For a constitutional right to be "clearly established," the "contours of the right must be sufficiently clear that a reasonable [government official] would understand that what he is doing violates that right." *Harris v. City of Circleville*, 583 F.3d 356, 366-67 (6th Cir. 2009). Therefore, dismissal based on qualified immunity is proper if the official was unaware that his or her conduct was clearly unlawful. *See Bletz*, 641 F.3d at 749.

A court is permitted to consider the two-part test in whatever order is appropriate and may begin with the second inquiry. *Pearson v. Callahan*, 555 U.S.

223, 236 (2009). The Court will address each alleged constitutional violation individually. Under each claim, the facts and law appear to present clearly circumstances under which the Metro Defendants are entitled to qualified immunity.

A.

First, Ortega alleges a violation of the Fourth Amendment, which prohibits unreasonable searches and seizures. Ortega argues that the Metro Defendants violated his Fourth Amendment rights when Metro Corrections Officers Eppler and Skaggs seized Ortega, removed him from his home and transferred him to the Metro Corrections facility. Metro Defendants counter based on qualified immunity by arguing that they would not have reason to know the detainer was faulty and thus moving Ortega from one place of confinement to another was reasonable under the circumstances. This Court agrees.

No evidence suggests that the Metro Defendants had reason to believe ICE's detainer was unlawful. They carried out a rather routine seizure quite unaware that the information used to generate the detainer was misapplied. Thus their action in serving a detainer on Ortega and moving him from one place of confinement to another was reasonable under the circumstances. Accordingly, Metro Defendants are entitled to qualified immunity.

B.

Next, Ortega alleges a violation of the Eighth Amendment which prohibits cruel and unusual punishment. It is unclear which actions Ortega

alleges constitute such a claim. Moreover, other than a conclusory statement that the actions of Metro Defendants amounted to "cruel and unusual punishment within the meaning of the Eighth Amendment," Ortega's complaint is scant with facts supporting a claim for an Eighth Amendment violation. *See Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008)("To move beyond the pleading stage . . ., an inmate must allege that he has been deprived a minimal civilized measure of life's necessities."). Ortega's memoranda never addresses this constitutional violation.

Regardless, the facts in this case fall short of supporting an Eighth Amendment violation. Ortega was detained, albeit in a different location, for a period of imprisonment that was no longer than the sentence imposed by Judge Armstrong. Nothing about the period of his confinement or the conditions of his confinement were disproportionately harsh. Accordingly, Ortega has failed to articulate an Eighth Amendment violation.

C.

Ortega has alleged that Metro Defendants' actions violated the Due Process Clause of the Fourteenth Amendment by transferring him from home incarceration to the Metro Corrections facility during his sentence. The due process clause prohibits a state from depriving a defendant of liberty without due process of law. In the case of a defendant lawfully convicted of a crime, "he loses a significant interest in his liberty for the period of his sentence." *Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991). Even assuming Ortega could establish a liberty interest in home confinement when he has

been so sentenced, the Court concludes that Metro Defendants are entitled to qualified immunity based on the second prong of the qualified immunity analysis, that the right was clearly established.[3] *See Colvin*, 605 F.3d at 290 ("We are free to consider [the two-part test] in whatever order is appropriate in light of the issues before us, and therefore need not decide whether there was a constitutional violation if we determine that an official in [Defendant's] position would reasonably believe that his actions were not in contravention of [Plaintiff's] constitutional rights")(internal quotations omitted).

The relevant inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable agent in the defendant's position that his conduct was unlawful. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Here, Metro Defendants would have to be aware that in transferring Ortega they violated his liberty interest. Metro Defendants acted pursuant to a detainer. The government has a significant interest in detaining certain aliens who are flight risks while the government's removal decisions are pending. *See Demore v. Kim*, 538 U.S. 510, 523-25 (2003). Metro Defendants honored the detainer and had no reason to believe it was incorrect. It was thus reasonable for the Metro Defendants to remove Ortega from home incarceration based upon the policy that aliens

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[3] The Court need not decide whether Ortega has articulated a cognizable liberty interest for purposes of this analysis because qualified immunity is found based on the second prong. Moreover, case law is varied in determining whether changes to an inmate's conditions of confinement implicate a liberty interest. The Court does not intend to add to this issue.

present a risk of evading immigration authorities. In this situation, the Court finds Metro Defendants could have reasonably believed that their conduct was lawful. Accordingly, Metro Defendants are entitled to qualified immunity on this claim as well.

D.

Lastly, Ortega alleges Metro Defendants failed to provide equal protection of the laws to American citizens of Hispanic descent. Ortega's Second Amendment Complaint alleges "it was [Metro] Defendant's long-standing policy to incarcerate any individual who currently has an ICE detainer on him or her." Taking Ortega's allegations as true, he was not treated differently than any other person who is subject to an ICE detainer as Metro Defendants evidently incarcerate every individual subject to a detainer. He was not detained due to his Hispanic ethnicity; rather he was incarcerated because ICE lodged a detainer on him. Ortega has failed to plausibly allege Metro Defendants violated his right to equal protection.

III.

Ortega brings a *Bivens* claim against ICE Agent Cloyd for violating his Fourth and Fifth Amendment rights. ICE Agent Cloyd has moved to dismiss based on Ortega's failure to state a claim upon which relief can be granted and the doctrine of qualified immunity. The qualified immunity analysis is identical in suits under § 1983 and *Bivens*. *Wilson*, 526 U.S. at 609. Because the alleged constitutional violations fail for the same reason, the Court will address the two violations together.

Ortega alleges that ICE Agent Cloyd issued an invalid detainer, "causing an unreasonable seizure of his person and a restraint of his liberty" in violation of the Fourth and Fifth Amendments.[4] According to Ortega's complaint, Agent Cloyd improperly issued the ICE detainer as a result of another illegal alien having a similar name and birth date as Ortega. Qualified immunity shields government officials who make objectively reasonable mistakes in discretionary decisions within the scope of their responsibilities. *Hensley v. Gassman*, 693 F.3d 681, 687 (6th Cir. 2012).

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. As alleged, the illegal alien and Ortega had very similar names and birth dates. It is entirely plausible that ICE Agent Cloyd was unaware that he was issuing an unlawful detainer and thus could have not known that he violated Ortega's "clearly established" right. ICE Agent Cloyd was acting within the scope of his employment when he made an unfortunate but honest mistake and is consequently entitled to qualified immunity. Accordingly, Ortega's claims fail as a matter of law.

The Court recognizes the ongoing confusion regarding proper boundaries and communications between ICE and local law enforcement.

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[4] With respect to the Fourth Amendment claim, this Court previously found ICE issuing a detainer caused Ortega's incarceration. This allowed Ortega to proceed with this Fourth Amendment claim against ICE Agent Cloyd.

Unfortunately, mistakes happen. However, the circumstances in this case do not rise to the level of constitutional violations for which Plaintiff pursue claims.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Federal Defendants' Motion to Dismiss is SUSTAINED.

IT IS FURTHER ORDERED that Metro Defendants' Motion to Dismiss is SUSTAINED.

IT IS FURTHER ORDERED that all of Plaintiff's claims are DISMISSED WITH PREJUDICE.

November 16, 2012

s/ John G. Heyburn II
John G. Heyburn II, Judge
United States District Court

APPENDIX C

UNITED STATES CODE
TITLE 42—THE PUBLIC HEALTH AND WELFARE
CHAPTER 21—CIVIL RIGHTS
SUBCHAPTER I. GENERALLY

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CODE OF FEDERAL REGULATIONS
TITLE 8—ALIENS AND NATIONALITY
CHAPTER I. DEPARTMENT OF HOMELAND SECURITY
SUBCHAPTER B. IMMIGRATION REGULATIONS
PART 287. FIELD OFFICERS; POWERS AND DUTIES

Sec. 287.7 Detainer provisions under section 287(d)(3) of the Act.

(a) Detainers in general. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I–247, Immigration Detainer–Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such 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.
(b) Authority to issue detainers. The following officers are authorized to issue detainers:
(1) Border patrol agents, including aircraft pilots;
(2) Special agents;
(3) Deportation officers;
(4) Immigration inspectors;
(5) Adjudications officers;
(6) Immigration enforcement agents;
(7) Supervisory and managerial personnel who are responsible for supervising the activities of those

officers listed in this paragraph; and
(8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the USCIS.

(c) Availability of records. In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) Temporary detention at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall 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.

(e) Financial responsibility for detention. No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

BALDWIN'S KENTUCKY REVISED STATUTES ANNOTATED

TITLE L—KENTUCKY PENAL CODE
CHAPTER 532—CLASSIFICATION AND DESIGNATION OF OFFENSES; AUTHORIZED DISPOSITION

Sec. 532.200 Definitions for KRS 532.210 to 532.250

As used in KRS 532.210 to 532.250, unless the context otherwise requires:

(1) "Home" means the temporary or permanent residence of a defendant consisting of the actual living area. If more than one (1) residence or family is located on a single piece of property, "home" does not include the residence of any other person who is not part of the social unit formed by the defendant's immediate family. A hospital, nursing care facility, hospice, half-way house, group home, residential treatment facility, or boarding house may serve as a "home" under this section;

(2) "Home incarceration" means the use of a monitoring device approved by the commissioner of the Department of Corrections to facilitate a prisoner's ability to maintain gainful employment or to participate in programs approved as a condition of his or her incarceration, or both, using the person's home for purposes of confinement;

(3) "Violent felony offense" means an offense defined in KRS 507.020 (murder), 507.030 (manslaughter in the first degree), 508.010 (assault in the first degree),

508.020 (assault in the second degree), 509.040 (kidnapping), 510.040 (rape in the first degree), 510.070 (sodomy in the first degree), 510.110 (sexual abuse in the first degree), 511.020 (burglary in the first degree), 513.020 (arson in the first degree), 513.030 (arson in the second degree), 513.040 (arson in the third degree), 515.020 (robbery in the first degree), 515.030 (robbery in the second degree), 520.020 (escape in the first degree), any criminal attempt to commit the offense (KRS 506.010), or conviction as a persistent felony offender (KRS 532.080) when the offender has a felony conviction for any of the above-listed offenses within the five (5) year period preceding the date of the latest conviction;

(4) "Terminal illness" means a medically recognized disease for which the prognosis is death within six (6) months to a reasonable degree of medical certainty; and

(5) "Approved monitoring device" means an electronic device or apparatus which is capable of recording, tracking, or transmitting information as to the prisoner's location or verifying the prisoner's presence or non-presence in the home, or both. The devices shall be minimally intrusive. Devices shall not be used without the prisoner's knowledge to record or transmit:
(a) Visual images other than the defendant's face;
(b) Oral or wire communications or any auditory sound other than the defendant's voice; or
(c) Information as to the prisoner's activities while inside the home.

Sec. 532.210 Petition; Study of Record; Order

(1) Any misdemeanant or a felon who has not been convicted of, pled guilty to, or entered an Alford plea to a violent felony offense may petition the sentencing court for an order directing that all or a portion of a sentence of imprisonment in the county jail be served under conditions of home incarceration. Such petitions may be considered and ruled upon by the sentencing court prior to and throughout the term of the defendant's sentence.

(2) The sentencing judge shall study the record of all persons petitioning for home incarceration and, in his discretion, may:
(a) Cause additional background or character information to be collected or reduced to writing by the county jailer or misdemeanor supervision department;
(b) Conduct hearings on the desirability of granting home incarceration;
(c) Impose on the home incarceree such conditions as are fit, including restitution;
(d) Order that all or a portion of a sentence of imprisonment in the county jail be served under conditions of home incarceration at whatever time or intervals, consecutive or nonconsecutive, as the court shall determine. The time actually spent in home incarceration pursuant to this provision shall not exceed six (6) months or the maximum term of imprisonment assessed pursuant to this chapter whichever is the shorter;
(e) Issue warrants for persons when there is reason to believe they have violated the conditions of home incarceration, conduct hearings on such matters, and order reimprisonment in the county jail upon proof of violation; and

(f) Grant final discharge from incarceration.

(3) All home incarcerees shall execute a written agreement with the court setting forth all of the conditions of home incarceration. The order of home incarceration shall incorporate that agreement and order compliance with its terms. The order and agreement shall be transmitted to the supervising authority and to the appropriate jail official.

(4) Time spent in home incarceration under this subsection shall be credited against the maximum term of imprisonment assessed for the defendant pursuant to this chapter.

(5) Home incarcerees shall be under the supervision of the county jailer except in counties establishing misdemeanor supervision departments, wherein they shall be under the supervision of such departments. Home incarcerees shall be subject to the decisions of such authorities during the period of supervision. Fees for supervision or equipment usage shall be paid directly to the supervising authority

Sec. 523.220 Conditions of home incarceration

The conditions of home incarceration shall include the following:

(1) The home incarceree shall be confined to his home at all times except when:
(a) Working at approved employment or traveling directly to and from such employment;
(b) Seeking employment;
(c) Undergoing available medical, psychiatric, or mental health treatment or approved counseling and after care programs;

(d) Attending an approved educational institution or program;
(e) Attending a regularly scheduled religious service at a place of worship; and
(f) Participating in an approved community work service program;

(2) Violation of subsection (1) of this section may subject the home incarceree to prosecution under KRS 520.030 (escape);

(3) The home incarceree shall conform to a schedule prepared by a designated officer of the supervising authority specifically setting forth the times when he may be absent from the home and the locations where he may be during those times;

(4) The home incarceree shall not commit another offense during the period of time for which he is subject to the conditions of home incarceration;

(5) The home incarceree shall not change the place of home incarceration or the schedule without prior approval of the supervising authority;

(6) The home incarceree shall maintain a telephone or other approved monitoring device in the home or on his person at all times;

(7) Any other reasonable conditions set by the court or the supervising authority including:
(a) Restitution under KRS 533.030;
(b) Supervision fees under KRS 439.315; and
(c) Any of the conditions imposed on persons on probation or conditional discharge under KRS 533.030(2);

(8) A written and notarized consent agreement shall be filed with the court by every adult who will share the offender's home during the term of home incarceration; and

(9) Any supervision fee or other monetary condition, except restitution, shall be paid by the defendant directly to the person or organization specified by the court in a written order, except that any such fees or monetary conditions owed to the Department of Corrections shall be paid through the circuit clerk.

Sec. 532.230 Ineligibility

No person being held under a detainer, warrant, or process issued by some other jurisdiction shall be eligible for home incarceration. No person convicted of a violent felony offense shall be eligible for home incarceration.