No. _____

In the Supreme Court of the United States

ANGEL ORTIZ,

Petitioner,

v.

DENNIS BRESLIN, SUPERINTENDENT OF QUEENSBORO CORR. FACILITY, AND THE NEW YORK STATE DEP'T OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has established that the liberty interests of parolees, albeit not unfettered, is protected by Due Process, *Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972); that their liberty and freedom should be "very different" from prison, *id.*; and that it would be "fundamentally unfair" to "automatically" revoke parolees' liberty based on failure to pay a fine "through no fault" of their own. *Bearden v. Georgia*, 461 U.S. 660, 669 (1983). Yet, in New York, indigent individuals granted release after serving sentences for sex offense convictions are kept in prison based on housing restrictions they can never hope to satisfy except through homeless shelter placement. New York City is legally obligated to provide such compliant shelter, but the State keeps these individuals incarcerated during their terms of supervision because of claimed, yet unsubstantiated, doubts that the City will live up to its obligations. Indeed, petitioner spent 25 months of his "community" supervision behind bars due to his homelessness—akin to a cruel and unusual punishment on the basis of "status" or "chronic condition." *Robinson v. California*, 370 U.S. 660, 666 (1962).

The questions presented are:

1) Does the Fourteenth Amendment prohibit prison authorities from indefinitely detaining supervisees based on an assumption that a municipality will not provide legally-mandated compliant housing?

2) Does the Eighth Amendment bar prison authorities from extending incarceration for individuals based on their homelessness and indigence?

RELATED PROCEEDINGS

People ex rel. Ortiz v. Breslin, S.P. No. 113-2018 (Sup. Ct. Queens Co. Sept. 5, 2018)

People ex rel. Ortiz v. Breslin, 32 N.Y.3d 1073 (2018)

People ex rel. Ortiz v. Breslin, 183 A.D.3d 577 (2d Dep't 2020)

People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility, 36 N.Y.3d 187 (2020)

People ex rel. Ortiz v. Breslin, No. 2021-133, 2021 N.Y. Slip Op. 64058, 2021 WL 1218538 (N.Y. Apr. 1, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Angel Ortiz respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals of the State of New York appears at Appendix A and is reported at *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187 (2020) (consolidating *People ex rel. Johnson* and *People ex rel. Ortiz*). The Court of Appeals denied reargument on April 1, 2020, and that order appears at Appendix D. The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department appears at Appendix B and is reported at *People ex rel. Ortiz v. Breslin*, 183 A.D.3d 577 (2d Dep't 2020). The oral rulings of the Supreme Court of the State of New York, County of Queens (Latella, J.), denying the state writ of habeas corpus appear at Appendix C.

JURISDICTION

The New York Court of Appeals rendered its opinion on November 23, 2020. (App'x A.) On March 19, 2020, this Court entered a standing order that has the effect of extending the time within which to file a petition for a writ of certiorari in this case to April 23, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in relevant part, "nor shall any State deprive any person of . . . liberty, . . . without due process of law[.]"

The relevant statutory provisions are reproduced at Appendix E.

INTRODUCTION

This year alone at least 250 individuals, (70a), in New York will remain incarcerated after earning their release. The State prison authorities have decided to keep them imprisoned and release them on the State's own terms—10 at a time, once a month, (65a)—rather than take them to New York City's shelter intake where they can access the compliant housing to which they are legally entitled. (75a; *see also* 35a-37a.) Indeed, this has been New York's strategy since 2015, with thousands of individuals incarcerated beyond their sentences as a result. (79a n.13.) New York's denial of these individuals' right to liberty during their periods of post-release supervision sets a dangerous precedent for all parolees, and it stands in stark contrast to the Second Circuit's recent and explicit recognition that "freedom from unlawful confinement" is protected by substantive due process and the Eighth Amendment. *See generally*

Hurd v. Fredenburgh, 984 F.3d 1075 (2d Cir. 2021). Moreover, New York's situation mirrors similar schemes of indefinite detention in place throughout the country where expansive and inflexible sex offender housing restrictions prevent poor and homeless individuals who have served their time from reentering society.

This case, thus, presents a critical opportunity for the Court to examine the degree to which longstanding protections for parolees, *see Morrissey v. Brewer*, 408 U.S. 471 (1972); *Bearden v. Georgia*, 461 U.S. 660 (1983), and the limitations placed on States' ability to punish individuals for their status, *Robinson v. California*, 370 U.S. 660 (1962), prevent a State's prison authorities from imposing a scheme that transforms post-release supervision ("PRS") into indefinite incarceration simply because the parolee (or supervisee) is indigent and cannot access shelter housing that they are reliant upon in order to comply with a specialized housing requirement attached as a mandatory condition of supervision. Moreover, this case is unencumbered by extraneous considerations, namely AEDPA deference and qualified immunity, making it an ideal vehicle for addressing these questions.

Petitioner's story is just one example of the freedom irredeemably lost due to New York's practices. Angel Ortiz spent 25 months of his earned liberty in prison, prohibited from presenting himself to New York City's shelter intake system, because respondents unilaterally decided that the City's shelter system would not, as it is legally obligated to do, provide him with housing that was compliant with the State's regulations governing where certain sex offenders

may reside. *See* Executive Law § 259-c(14) (barring certain individuals on supervision from entering within 1,000 feet of school grounds ("Sexual Assault Reform Act" or "SARA")). Instead, DOCCS requires those like Mr. Ortiz to obtain specialized housing *in advance* of release.

But because the right to shelter in New York City, established through a consent decree in the 1980s, (*see* 35a-37a; 55a-58a),[1] is triggered only when someone who is homeless presents himself to the City's shelter intake center, (75a-77a), Mr. Ortiz was suspended in a Kafkaesque trap: he was told by his captor that he must find housing in order to be set free but then also told that he cannot do the one thing he needs to do to secure that housing because of his imprisonment. (79a-80a.) Instead, he was left to rely on the State to eventually release him to that same housing, but only after surviving an excruciatingly slow and arbitrary waitlist. (5a; 41a; 70a.)

In the end, after he spent 17 months in the same state prison cell despite earning his conditional release, and 8 months in a prison called a "residential treatment facility," (27a), respondents transported him to the City's shelter system, (5a), where he received the housing to which he was always entitled.

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[1] A copy of the consent decree is available on the website for the Coalition for the Homeless, which monitors the City's compliance with their legal obligations. *See Callahan* Consent Decree (1981), *available at* https://www.coalitionforthehomeless.org/wp-content/uploads/2014/06/CallahanConsentDecree.pdf (last visited Apr. 21, 2021).

During his continued detention, Mr. Ortiz sought release through a state writ of habeas corpus on the grounds that this extended incarceration violated his substantive due process rights to liberty—to be free from confinement as a community supervisee—and his right not to be punished for his status, *i.e.*, homelessness. He specifically alleged that the State "short-circuit[ed] one of the few benefits available" to him by "preemptively detain[ing]" him such that he could not "even attempt to exercise his right" to demand shelter from the City. (138a-139a.) At each stage, the New York courts denied relief.

Ultimately, New York's highest court, the Court of Appeals, held that the Constitution did not protect Mr. Ortiz's liberty from being extinguished due to his indigence and homelessness. (App'x A at 15a-17a (due process analysis), 18a-21a (Eighth Amendment analysis).)[2] Judges Rivera and Wilson were unsatisfied with that conclusion, however. Both would have held, for slightly different reasons, that Mr. Ortiz's liberty could not, under the circumstances, be extinguished by the State.

Judge Rivera interpreted New York's "automatic parole" statute as mandatorily granting Mr. Ortiz protected liberty at his conditional release. (33a); *see also Hurd*, 984 F.3d at 1085 (the Second Circuit confirmed this interpretation shortly thereafter, holding that once an individual meets the "statutory requirements for conditional release," then "release from prison [is] mandatory under state law"). Therefore,

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[2] The majority decided this matter solely on principles of federal constitutional law. (9a n.7.)

Judge Rivera included all 25 months of petitioner's unnecessary (and unlawful) incarceration in her analysis of the asserted constitutional violations—and would have decided the constitutional questions in his favor.

In the same vein, focusing on the existence of shelter housing for these individuals, Judge Wilson summarized the flaw in the majority's logic as follows:

> Convicted sex offenders who have served their time and are entitled to release, supervised or otherwise, cannot constitutionally be detained by one arm of government because another arm of government might be held to its court-ordered responsibilities. . . . We make a mockery of the writ when we justify the unlawful detention by letting two executives point the finger at each other, or one justify its actions because it believes the other will violate the law. (81a.)

A parolee is supposed to be able to "be gainfully employed and [] free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 481-82. "Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." *Id.* Thus, as the Second Circuit held less than two months after the New York Court of Appeals ruling in petitioner's case, the supervisee's liberty—and "[f]reedom from unlawful restraint"—is "rooted in the principles of ordered liberty" and entitled to protection under

substantive due process and the Eighth Amendment. *Hurd*, 984 F.3d at 1088; *id.* at 1085 ("unauthorized detention of just one day past an inmate's mandatory release date qualifies as a harm of constitutional magnitude under . . . the Eighth Amendment").

If incarceration can be extended on the basis of homelessness, and if parolees' liberty can be quashed preemptively for any attenuated rationale, then the promise of *Morrissey* rings hollow. This Court should, therefore, grant the petition, given the broad implications of the Court of Appeals' misinterpretation of these constitutional rights, the split between New York and the Second Circuit on that interpretation, *see* Supreme Court Rule 10(b), and the nationwide importance of resolving these recurring issues for all sex offenders who have served their time and who find themselves at the intersection of indigence, homelessness, and housing restrictions.

STATEMENT OF THE CASE

1. After serving the period of incarceration to which he was sentenced, accounting for good time credits that he earned, Mr. Ortiz was found to be eligible for conditional release in September 2016. Nevertheless, prison authorities held him in the same prison for another 17 months because he was indigent and reliant on NYC's shelter system for housing. (27a; 174a-176a.) During this time, he was never given an opportunity to present to the City's shelter intake system. When he reached the maximum expiration date of his sentence of incarceration in March

2018,[3] he was transferred to a "residential treatment facility" ("RTF"), where he could no longer visit with his daughter, (27a; 174a), where he received no "treatment" because his ailment was lack of money, (51a-52a; 175a-176a), where he could not secure employment to get around his indigence, and where he was confined for another 8 months during his supervision until prison authorities finally released him to the shelter to which he had, all along, been entitled.

In the interim, fearing he might spend his entire term of post-release supervision at the RTF, Mr. Ortiz filed a state writ of habeas corpus pursuant to New York's C.P.L.R., Article 70. (68a.) He alleged that the State was "short-circuit[ing]" his ability to demand shelter from the City, (138a-139a), and that he was trapped in conditions that were no different than prison. (174a-176a.) Moreover, he explicitly noted the interference with his familial rights that his placement at the RTF had brought about, (68a; 174a), and his fear that the prison authorities would never release him. (68a; 121a-122a; 176a.)

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[3] In New York, conditional release is a form of "automatic parole" that is granted after enough good time credits are accumulated. *See* Penal Law § 70.40; DOCCS, *Community Supervision Handbook, Serving a Sentence* ("Conditional Release is a statutory type of release that the Board of Parole does not have discretion to grant or deny."), *available at* https://doccs.ny.gov/community-supervision-handbook/serving-sentence (last visited Apr. 21, 2021). In comparison, the maximum expiration of a sentence of incarceration is the total amount of incarceratory time someone could potentially serve prior to being released (with or without supervision).

As he swore in his writ: "If I was wealthy, then I would gladly pay whatever I could to remain in housing that is acceptable to DOCCS. . . . But I can never hope to find housing, or to pay for such housing, if I am confined at [a prison] earning $10 a day." (176a.) Petitioner argued, therefore, that the prison officials had restricted his protected liberty interest in freedom from unlawful confinement—a fundamental right—in violation of substantive due process, because the State had not narrowly tailored the infringement when they denied him access to NYC's shelter system, where he was entitled to housing, and instead imprisoned him indefinitely. (*See, e.g.*, 125a-140a; 158a-160a.) He also argued that the State was punishing him—converting post-release supervision into incarceration—for his indigence and homelessness in contravention of the Eighth Amendment. (*See, e.g.*, 140a-143a; 162a, 167a.) Relatedly, petitioner argued that his extended incarceration beyond the terms of his incarceratory sentence was also cruel and unusual. (*Id.*)

2. The writ court denied Mr. Ortiz's release. (App'x C (Justice John B. Latella).) The intermediate appellate court affirmed that denial, finding that imprisonment at the RTF was "temporary" housing, authorized by state law, (App'x B at 84a); *see also* Correction Law § 73(10), and the indefinite confinement violated neither source of constitutional protection because the state had a rational interest in ensuring that those convicted of sex offenses did not reside within 1,000 feet of schools. (85a.)

3. Before the matter was considered by the New York Court of Appeals, a related habeas action was brought on behalf of another individual facing similar

indefinite incarceration. In those proceedings, a witness from the Department of Homeless Services (DHS, the agency that administers the City's shelter system), confirmed in her sworn testimony that DHS would abide by its legal obligations for those that present themselves at intake. The court in that action ordered the individual released to shelter housing, explaining that the petitioner had "established that if he was brought to DHS, DHS will find him SARA compliant housing." (104a (and "[t]here was no testimony that DOCCS is prohibited from bringing more than 10 individuals per month to DHS").)[4]

4. New York's high court, however, decided the constitutional questions against petitioner on November 23, 2020. (App'x A.) Writing for the majority, Judge Fahey explained, with regard to substantive due process protections for supervisees, and Mr. Ortiz specifically, that "an alleged right that [] PRS conditions may not be equivalent to an extended incarceratory sentence" is not fundamental—particularly because his liberty was "restricted" and "grounded" in New York's penal scheme. (14a, 11a.) As for protection under the Eighth Amendment, the majority concluded that his "confinement in an RTF did not constitute status punishment" and "did not constitute deliberate indifference" on the part of the State "to his plight as a sex offender who is subject to SARA." (18a, 21a.)

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[4] The decision in *People ex rel. Bonilla*, and the testimony accompanying it, are public record; the majority of the Court of Appeals, however, opted to strike the testimony from its consideration. (19a n.13.)

5. Shortly after the court decided petitioner's case, the Second Circuit issued its opinion in *Hurd v. Fredenburgh*, where the panel concluded that substantive due process and the Eighth Amendment protect against New York infringing a parolee's liberty at a mandatory release date—specifically at conditional release. *Hurd*, 984 F.3d at 1089 n.7 ("Our conclusion that Hurd also alleged a harm of constitutional magnitude under the Eighth Amendment does not deprive him of a liberty interest in his mandatory conditional release" protected by the Fourteenth Amendment).

The Court of Appeals denied a request for reargument based on the conflict between New York and the Second Circuit. *People ex rel. Ortiz v. Breslin*, No. 2021-133, 2021 WL 1218538 (N.Y. Apr. 1, 2021) (declining to consider request, which was delayed since the Second Circuit decision issued after the usual 30-day window for reargument, and dismissing it as untimely).

Petitioner now asks this Court to review these claims to settle the degree of constitutional protection to which these individuals are entitled, given that their conditions of supervision—conditions that prison authorities are preventing them from satisfying—have been used to convert their qualified liberty into imprisonment, and to resolve what is now an untenable divergence between New York courts and the Second Circuit.

REASONS FOR GRANTING THE PETITION

If New York's analysis of supervisees' liberty interests—and the ability of the State to punish those that are homeless—is permitted to stand, it will have

far-reaching consequences for individuals who are seeking to reintegrate with the community post-conviction. Not only will those serving sentences for sex offenses be held well beyond their release dates, but the State will be free to do the same to other groups of individuals so long as it proffers some articulated connection between the requirement and the public interest. The split between the Second Circuit and the New York state courts on the contours of the applicable constitutional protections will only exacerbate the problem: those able to bring suit in federal court through a Section 1983 action, perhaps seeking damages, will be entitled to more robust retrospective protections than those pursuing their immediate freedom through state writs of habeas corpus.[5] Added to the already complicated national landscape, where other States either recently or previously condoned the indefinite incarceration of sex offenders, these issues are ready for resolution.

This Court should provide guidance to the States making clear that core constitutional limitations apply to a State's ability to indefinitely detain indigent individuals convicted of sex offenses because they lack financial means to meet state housing restrictions.

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[5] At this time, New York denies all of these individuals the conditional release that the *Hurd* court called "mandatory," *Hurd*, 984 F.3d at 1085, and holds them in prison conditions for at least 8 months into their terms of supervision (but often for longer). *See, e.g.*, *People ex rel. Johnson*, 36 N.Y.3d at 209 (Rivera, J., dissenting) (describing Mr. Ortiz's additional 25 months of incarceration *after* reaching his conditional release date—8 months of which came after his "release" to supervision).

I. New York's Failure to Adhere to Core Constitutional Principles, as Demonstrated by Its Divergence from the Second Circuit, Curtails Liberty and Extends Punishment with Far-Reaching Consequences for All Supervisees

Deviating from this Court's longstanding principles and guidelines, New York determined that conditions of supervision can be created and enforced such that the "free[dom] to be with family and friends and to form the other enduring attachments of normal life" is no longer a necessary part of a parolee's experience. *Morrissey*, 408 U.S. at 481-82. Post-*release* supervision effectively becomes a misnomer—with supervisees preemptively and indefinitely kept from release "through no fault of [their] own," *Bearden*, 461 U.S. at 669, because of their "status" or "chronic condition" of indigence and homelessness. *Robinson*, 370 U.S. at 666. By detaining indigent and homeless sex offenders who have served their terms, and preventing them from accessing the City's shelter system, New York has failed to adhere to the core constitutional protections designed to restrict the power of the State to detain and punish.

Indeed, New York's analysis is in stark contrast with the Second Circuit's interpretation, in *Hurd v. Fredenburgh*, of the "liberty interest in freedom from detention" enjoyed by one who reaches a mandatory release date. *Hurd*, 984 F.3d at 1089; *id.* at 1086 (the ability "to impose some form of punishment through supervision . . . does not justify a punishment of *imprisonment* that is unauthorized by law"). As this

case and *Hurd* demonstrate, New York's denial of supervisees' liberty interests means that the protection afforded by these constitutional principles depends on whether an individual can bring suit in federal court or is constrained to seek freedom through the state courts.[6]

A. New York Denies Supervisees' Liberty Interests on the Impermissible Bases of Indigence and Chronic Condition, Conflicting with this Court's Precedent and the Second Circuit's Interpretation of Substantive Due Process and the Eighth Amendment

As this Court held almost fifty years ago:

> [T]he parolee is entitled to retain his liberty as long as he *substantially abides* by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if . . . the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?

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[6] "[T]he Constitution [should not] mean[] one thing in Wisconsin and another in Indiana." *Williams v. Taylor*, 529 U.S. 362, 387 n.13 (2000) (Stevens, J., dissenting).

Morrissey, 408 U.S. at 479-80 (emphasis added).[7]

New York has turned this framework upside-down, concluding that Mr. Ortiz's liberty could be extinguished preemptively and his incarceration could be extended indefinitely, without running afoul of the Eighth and Fourteenth Amendments, simply because he had to rely on shelter housing to which he was independently entitled. (App'x A.) In contrast, less than two months later, the Second Circuit would have allowed an individual to sue for damages after alleging that a state actor had erroneously deprived him of his conditional release—continuing his incarceration for nearly a year—because such an infringement on his conditional liberty violates substantive due process and the prohibition against cruel and unusual punishment. *See generally Hurd*, 984 F.3d 1075.[8] Although petitioner's state habeas petition in this action addressed the full panoply of protections afforded under the Fourteenth and Eighth Amendments, the two aspects that overlap with the claims in *Hurd*—substantive due process and prolonged confinement—could not

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[7] Notably, Iowa's parole code at the time provided that all "paroled prisoners . . . shall be subject, at any time, to be taken into custody," *Morrissey*, 408 U.S. at 493 n.2, much like New York's RTF scheme grants DOCCS the authority "to use any residential treatment facility as a residence for persons who are on community supervision." Correction Law § 73(10).

[8] The panel in *Hurd*, after announcing the applicability of these principles, was constrained to dismiss the case on the basis of qualified immunity. *Hurd*, 984 F.3d at 1089-92.

have been decided in a more diametrically opposed fashion. Accordingly, the Second Circuit's analysis provides a useful lens for highlighting the shortfalls in the approach taken by New York's high court in this case.

1. Substantive Due Process

First, with regard to substantive due process, New York concluded that "[Mr.] Ortiz's claimed right to be free from continued confinement" at the date of the maximum expiration of his sentence did not "amount[] to a fundamental, deeply rooted due process right," making any infringement on that "restricted form of liberty" subject only to rational basis review. *People ex rel. Johnson*, 36 N.Y.3d at 199-202. Moreover, the majority completely excluded Mr. Ortiz's conditional release date from its analysis. *Id.* at 200.

Judge Rivera's dissent, however, recognized that petitioner "was entitled to conditional release under Penal Law § 70.40," once he earned his "good behavior time allowances[.]" *Id.* at 214; *see also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."). And in his dissent, Judge Wilson accepted petitioner's claim that respondents "violated substantive due process by refusing to permit [him] to appear at DHS intake to claim [his] unequivocal right to shelter—in effect, cutting off [his] right to comply with SARA's conditions outside of prison." *Id.* at 243. He concluded that DOCCS' strategy, designed "to allow a different agency to avoid a clearly established legal

obligation," was quintessentially arbitrary and wrongful.[9] *Id.* at 244; *see also Williams v. Illinois*, 399 U.S. 235, 263 (1970) (Harlan, J., concurring) ("this Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free"). Judge Wilson also noted that Mr. Ortiz had raised issues concerning his family rights, which would have implicated this Court's fundamental rights analysis from *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), independently of his initial right to freedom from further incarceration. *Id.* at 243-44 & n.10 ("DOCCS's application of SARA to prevent Mr. Ortiz from living with his daughter and mother—and to prevent contact with his daughter during his confinement in an RTF—curtailed Mr. Ortiz's parental rights and right to familial association.").

The majority, therefore, eschewed this Court's longstanding acknowledgement that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Obergefell v. Hodges*, 576 U.S. 644, 725 (2015) (Thomas, J., dissenting) ("'liberty' [] mean[s] freedom from physical restraint").

In contrast, the circuit court in *Hurd*, in an opinion that largely aligned with the dissents of Judges Rivera and Wilson in petitioner's case, engaged in a more fulsome analysis of the substantive due process

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[9] In *Douglas v. Buder*, 412 U.S. 430, 432 (1973), this Court invalidated, under the Fourteenth Amendment, a State finding that the petitioner had violated the terms of his probation where the finding was "devoid of evidentiary support[.]"

protections afforded in this context. First, and critically, the circuit reasoned that "[o]nce [an individual's] good-time credit [is] approved, the expiration date of his maximum term of imprisonment and his 'conditional' release date [are] one and the same for substantive due process purposes." *Hurd*, 984 F.3d at 1088. That is because "New York's conditional release scheme is mandatory," as evidenced by the Legislature's use of the word "shall" when discussing the consequence of requesting such release. *Id.* at 1085 ("It is the mandatory nature of that release, not the label of 'conditional' or 'maximum,' that is dispositive."); Penal Law § 70.40(1)(b) (an individual "shall, if he [] so requests, be conditionally released" given enough good time credits have been accumulated).

In reaching that conclusion, the circuit explained that "[c]onditional release under New York law is not akin to a state-created right of contract; it is a state-created right of mandatory release from prison, preventing unlawful continued physical restraint." *Id.* at 1088. Therefore, it was of no consequence that conditional release is a state-created right, because all State terms of incarceration are ultimately creatures of state law—it is the "nature of the right" that matters. *Id.*

Second, the panel acknowledged that substantive due process "protects rights that are rooted in the principles of ordered liberty." *Id.* at 1088. Without explicitly saying so, the Second Circuit's language tracks this Court's explanation in *Glucksberg*: that "the Due Process Clause specially protects those *fundamental* rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition

and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (emphasis added and internal quotations and citations omitted). And, by linking "[f]reedom from unlawful restraint" at a mandatory release date to those "principles of ordered liberty," the *Hurd* court expressed recognition that the liberty interest at issue is fundamental. *Hurd*, 984 F.3d at 1088.

Thus, because that fundamental right is being restricted by government regulation—here, the policy of the State prison authorities—rather than a rogue state actor, the infringement is subject to strict scrutiny, as argued by petitioner below. (9a); *see also United States v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005) (when "a special condition" of supervision imposed on a sex offender "implicates a fundamental liberty interest," any infringement must be "narrowly tailored to serve a compelling government interest") (Sotomayor, J.). The State has never attempted any less-restrictive alternatives to incarceration, and now it likely will never have to. DOCCS has opted to simply continue imprisoning Mr. Ortiz and the others in his situation, despite the numerous methods available for achieving their 1,000-foot buffer goal, including electronic monitoring.

New York's decision to apply rational basis review to any legislative or regulatory act that strips supervisees of the very liberty, albeit qualified, that they have earned is, thus, contrary to this Court's conception of liberty and to the standards for applying substantive due process protections in this context.

2. Prolonged Confinement

With regard to Mr. Ortiz's prolonged confinement claim, which focuses on the acts of the prison officials and looks to whether they are deliberately indifferent to a claim of overincarceration, New York's high court ignored the unrefuted evidence that the Attorney General's Office was making unfounded claims that the shelter system was unable to house these individuals, *see People ex rel. Johnson*, 36 N.Y.3d at 205-06 & n.13, and that in reality NYC's "DHS will find SARA compliant beds for these individuals even if there were no vacancies." (102a.) Of course, once that countervailing evidence was excluded from consideration, and once the court had glossed over petitioner's uncontroverted allegations that "the City [was] *required* to provide him with shelter that is SARA-compliant," (138a), the court was able to conclude that the State's decision to hold him for another 25 months "did not constitute deliberate indifference to his plight as a sex offender . . . subject to SARA." *People ex rel. Johnson*, 36 N.Y.3d at 206.

Judge Wilson, on the other hand, found Mr. Ortiz's indefinite confinement to be the result of DOCCS, by its actions, allowing DHS to "avoid a clearly established legal obligation," by keeping these individuals from "appearing" at shelter intake. *Id.* at 244. Moreover, "DOCCS's speculation about the shelter system's actual capacity (and its inability to adapt to changing demand) provide[d] no basis for DOCCS to assume that the City would abdicate its legal obligation." *Id.* at 246. "The expectation that Messrs. Johnson and Ortiz would violate the conditions of their release, when the City was legally bound

to secure SARA-compliant beds for them, was not a lawful basis for DOCCS to deny them an immediate opportunity to present themselves at a shelter intake." *Id.* at 248. In his view, "[c]onvicted sex offenders who have served their time and are entitled to release, supervised or otherwise, cannot constitutionally be detained by one arm of government because another arm of government might be held to its court-ordered responsibilities." *Id.* at 249.

Indeed, the Second Circuit in *Hurd* explicitly held that "freedom from unlawful restraint is a right so core to our understanding of liberty that suffering even one day of unlawful detention is a harm recognized by the Constitution" under the Eighth Amendment. *Hurd*, 984 F.3d at 1085 n.4. Certainly the question of deliberate indifference is one that depends on the specific facts at hand, but a lengthy waitlist releasing only 10 individuals per month in the face of the shelter system's legal obligation to find compliant housing for all eligible individuals who present themselves tips decidedly towards unacceptable indifference.[10] Or, per *Hurd*: "[T]he State's right to impose some form of punishment through supervision or other conditions of release (if any) does not justify a

[10] The City has proven its resourcefulness in finding and providing additional housing for homeless New Yorkers during the pandemic. *See* Emma Tucker, *New York Homeless Shelters Prepare for Next Wave of Covid-19*, Wall Street Journal (Nov. 22, 2020), *available at* https://www.wsj.com/articles/new-york-homeless-shelters-prepare-for-next-wave-of-covid-19-11606071600 ("The Department of Homeless Services relocated more than 10,000 New Yorkers experiencing homelessness into more than 60 hotels around the city to combat the spread of the virus in congregate shelters.") (last visited Apr. 21, 2021).

punishment of *imprisonment* that is unauthorized by law." *Id.* at 1086 n.5.

3. Impermissible Status Punishment

Moreover, the Second Circuit's acknowledgement that being held in prison past a mandatory release date can amount to cruel and unusual punishment also supports petitioner's claim that his Eight Amendment rights were violated when his status of homelessness—driven by his indigence—led to his additional incarceration. The very language employed by the circuit, "even one day," *id.* at 1085 n.4, tracks this Court's watershed decision in *Robinson v. California*, 370 U.S. 660, that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667. The decision in *Robinson* pre-dated *Bearden* and placed its textual support in the Eighth Amendment—yet both decisions ultimately reach similar conclusions: our conception of liberty does not allow the State to deprive an individual of his "freedom simply because, *through no fault of his own*, he cannot pay [a] fine[.]" *Bearden*, 461 U.S. at 672-73 (emphasis added); *id.* at 665 (noting that "[d]ue process and equal protection principles converge" in this situation). Indeed, whatever the source,[11] the Constitution does not allow

[11] Scholars have noted "the 'alchemy' of due process and equal protection" that "sustain the *Williams-Tate* line of cases." Judith Resnik, *(Un)constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin"*, 129 Yale L.J. Forum 365, 389 (2020). Perhaps unsurprisingly, Tate's attorney had originally turned to *Robinson* to "characterize[] Tate's indigency as an involuntary quality akin to illness," and

a State to treat poor offenders more severely than those with means.

Contrary to the state court's conclusion in this case that the decision to extend Mr. Ortiz's incarceration was the result of "a broader set of social circumstances," rather than his homelessness, *People ex rel. Johnson*, 36 N.Y.3d at 204, there is simply no dispute that those with means are released from incarceration while those without means sit in prison cells past their release dates. Just as any punishment for the crime of having a cold is cruel and unusual, so is increased incarceration for the crime of poverty. *See also Martin v. City of Boise*, 920 F.3d 584, 615-18 (9th Cir. 2019) (finding a violation of the Eighth Amendment where the city punished the homeless for conduct inseparable from homelessness).

New York has, thus, ignored *Robinson* vis-à-vis the Eighth Amendment and this Court's related admonition that "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." *Smith v. Bennett*, 365 U.S. 708, 714 (1961); *see also United States v. Boustani*, 932 F.3d 79, 82 (2d Cir. 2019) (disapproving of a "two-tiered" bail system favoring wealthy defendants over indigence defendants as violative of the "fundamental principle of fairness" expressed in *Smith v. Bennett*).

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thus argue that his "ninety-day sentence violated the Eighth Amendment[.]" *Id.* at 415 n.99.

B. New York's Derogation of These Core Constitutional Protections Detrimentally Impacts All Supervisees

Implicit in the recounting of this dilemma is the fact that all parolees and supervisees exiting New York's prison system are generally required to find housing.[12] Yet the majority of those who return to New York City with nowhere to go are placed in the City's shelter system, which abides by its consent decree obligations to house them as soon as they appear at an intake center seeking to exercise their right to shelter. This amounts to thousands of individuals every year who transition directly out of prison and into the shelter system.[13]

Under the principles expounded by New York's high court, the supervisee's liberty interest is so ephemeral that any homeless individual could simply be denied release and kept in prison during a term of supervision until managing to find somewhere to live. If the shelter system were to in fact become unavailable, as it was alleged to be for Mr. Ortiz, then New

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[12] *See* DOCCS *Community Supervision Handbook, Overview* ("Placement in . . . a shelter is not a preferred residence program," so parole officers work to find suitable living arrangements for homeless parolees), *available at* https://doccs.ny.gov/community-supervision-handbook/community-supervision (last visited Apr. 21, 2021).

[13] "In 2017, a full 54 percent of the people released to NYC – 4,122 people – entered the shelter system after leaving State prisons." *Today's Video: The New York Prison-to-Shelter Pipeline*, Coalition for the Homeless, *available at* https://www.coalitionforthehomeless.org/todays-video-new-york-prison-shelter-pipeline/ (last visited Apr. 21, 2021).

York would ostensibly continue to incarcerate thousands of individuals for being homeless. Despite other jurisdictions' recognition that the inability of a homeless sex offender to provide an address is "involuntary conduct that [is] inseparable from his status of homelessness," and therefore should not result in punishment, *see, e.g.*, *State v. Adams*, 91 So. 3d 724, 754 (Ala. Crim. App. 2010), New York sees no limit to the State's ability to condition release on nearly impossible to meet prerequisites.

Indeed, by applying only rational basis review to the State's pre-release enforcement of these onerous conditions, parolees—who for the most part have no resources when they come out of prison—are placed in the absurd situation of trying to find housing, or hypothetically employment,[14] from behind prison walls. Judge Wilson previously described this as "a game of real-estate Battleship," where supervisees[15]

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[14] What if New York—or its parole authority—decides that *employment* should also be a requirement of supervision that is preemptively enforced? It is not a far-fetched proposition, given the existing community supervision programs designed around abundant research demonstrating a correlation between gainful employment and a reduction in recidivism. *See, e.g.*, Rizer & Tolman, *Seeking Success: Reforming America's Community Supervision System*, 21 Federalist Soc'y Rev. 142, 142 (2020) ("The goal of community supervision is to reduce recidivism and reintegrate those who have been convicted back into society, helping them to break cycles of addiction, access employment, and develop pro-social habits and mindsets."); *see also Morrissey*, 408 U.S. at 474 (Iowa revoked co-petitioner Booher's parole in part because he had failed "to keep himself in gainful employment").

[15] In New York, the State "releases" these individuals to parole or supervision by sending them to a different prison and

propose individual addresses to the prison authorities and wait to see if the housing might satisfy the restrictions. *Gonzalez v. Annucci*, 32 N.Y.3d 461, 476 (2018); *see also id.* at 475 (majority concluding that rejection of 58 proposed addresses over the span of almost two years, with eventual release to NYC's shelter system, was "adequate" assistance by the State).

"The guessing game continues; another address is rejected; the inmate, already approved for release or parole, spends months or years of additional time in confinement." *People ex rel. Johnson*, 36 N.Y.3d at 235 (Wilson, J., dissenting). Those who are fairly surveying this situation recognize that this means those without means who are convicted of sex offenses "will remain incarcerated." Allison Frankel, *Pushed Out and Locked in: The Catch-22 for New York's Disabled, Homeless Sex-Offender Registrants*, 129 Yale L.J. Forum 279, 286, 316 (2019) ("Given the abundance of schools and population density in New York City, the one-thousand-foot restriction puts most of the City . . . off-limits to registrants."). And, of course, keeping parolees imprisoned indefinitely means the State further impedes their ability to secure employment that could assist in paying for housing.

By derogating these core constitutional protections, New York allows the prison system to ignore one's ability to actually satisfy a condition of release—transforming what should be separate and distinct periods of incarceration and supervision into one

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then, in Orwellian fashion, renaming them supervisees. They are even assigned parole officers while they remain incarcerated. (*See, e.g.*, 174a ¶ 10.)

lump-sum of potential imprisonment. *See Bearden*, 461 U.S. at 668 ("Both *Williams* [*v. Illinois*] and *Tate* [*v. Short*] carefully distinguished this substantive limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine.").

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At a time when decarceration and increased opportunities for community reunification are driving the national lens of criminal justice reform, New York's draconian view of parole and dismissive interpretation of freedom from detention are out of place. Its divergence in interpreting the constitutional protections afforded to parolees and supervisees, who are supposed to be able to "be gainfully employed and [] free to be with family and friends and to form the other enduring attachments of normal life," *Morrissey*, 408 U.S. at 481-82, requires this Court's intervention. Otherwise, forum selection will dictate the strength of a supervisee's liberty interest. *Cf. Haywood v. Drown*, 556 U.S. 729, 735 (2009) ("state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights").

II. This Court Should Also Grant Review to Provide Guidance to the Other Jurisdictions Facing These Recurring Issues

New York is not alone in this constitutional quandary. The well-documented situations in Illinois and Wisconsin serve as two additional examples of the struggles States face to implement supervisory

schemes that accommodate the use of housing restrictions (in an effort to protect children) and simultaneously promote the rehabilitation of homeless individuals who have finished their carceral sentences for a sex offense. Tellingly, neither jurisdiction initially implemented a scheme that—in reviewing courts' views—gave proper consideration to the supervisees' constitutionally protected liberty.

In Illinois, for example, which had a scheme that closely resembles New York's, individuals convicted of sex offenses were subject to a lengthy term of supervised release—and they were required to satisfy a "host-site" requirement before they could leave prison and begin that supervised released. *See Murphy v. Raoul*, 380 F. Supp. 3d 731, 739 (N.D. Ill. 2019). The host-site approval process was complicated, involving both the discretion of parole officials and the use of a 500-foot buffer around schools and day care centers. Unsurprisingly, many individuals were unable to propose addresses that "pass[ed] muster." *Id.* at 739-42. This meant that individuals ready for release "remain[ed] indefinitely confined," *id.* at 739, and were in fact held for years past their terms of incarceration. *Id.* at 743-48. These practices continued until a class of such supervisees brought a federal Section 1983 action in the Northern District of Illinois.

The federal court held that Illinois' scheme implicated "the substantive limitations on what the government may criminalize and therefore punish." *Id.* at 763 (citing generally *Powell v. Texas*, 392 U.S. 514 (1968), and *Robinson v. California*, 370 U.S. 660) ("The relevant distinction lies in applying criminal laws to punish conduct, which is constitutionally

proper, and applying criminal laws to punish status, which is constitutionally improper."). Responding to the State's counter-argument that Illinois was "not charging the plaintiffs with a crime of being homeless," the court held it was "a distinction without a difference." *Id.* at 764. "All the Eighth Amendment calls for is punishment," and "[p]rolonged incarceration is indeed punishment[.]" *Id.* (Similarly, in its equal protection analysis, the court explained that there is no difference between inability to pay a fine and inability to pay rent. *Id.* at 755-56.)

Applying this reasoning to Illinois' host-site requirement, the *Murphy* court concluded that the requirement was "impossible to obey because the probationer has no power of volition and hence cannot abide by the condition"; the plaintiffs' "failure to procure a host site is 'not voluntary conduct merely related to, or derivative of, the status of homelessness, but [is] entirely involuntary conduct that [is] inseparable from [their] status of homelessness.'" *Id.* at 764-65 (quoting *Adams*, 91 So.3d at 754). Because Illinois was extending incarceration for involuntary homelessness, "the host-site requirement constitute[d] cruel and unusual punishment." *Id.*; *see also Barnes v. Jeffreys*, No. 20 C 2137, 2021 WL 1165088, at *7 (N.D. Ill. Mar. 26, 2021) (extending the same reasoning to Illinois' "One-Per-Address Statute" since it "operates to keep indigent and homeless sex offenders incarcerated beyond their term of imprisonment").

The situation in Wisconsin was similar, though to its credit the State discontinued its indefinite incarceration policy voluntarily in March 2015. *See generally Werner v. Wall*, 836 F.3d 751 (7th Cir. 2016).

Prior to 2015, however, Wisconsin required those serving terms of supervision for sex offenses to search for appropriate housing during the day while staying in the county jail at night. *Id.* at 753. Mr. Werner was one such individual. After proceeding *pro se* and unsuccessfully in the district court, the Seventh Circuit considered his indefinite custody but ultimately affirmed the dismissal of the matter on the basis of qualified immunity. *Id.* at 765.

When considering the constitutional questions presented by Wisconsin's scheme, the majority of the panel explained that "circuits have employed a variety of approaches invoking Eighth Amendment and due process protections" to address "the treatment of a detained person" no longer subject to a sentence of incarceration. *Id.* at 759-61. It went on to conclude that, after this Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015),[16] "substantive due process principles [were] implicated" by the "continued detention of a person beyond the expiration of their prison sentence." *Id.* at 761. Nevertheless, the "contours of the right involved" were not "clearly established," leading to the finding of qualified immunity. *Id.* at 761-65, *cert. denied*, 137 S. Ct. 2213 (2017).

The dissent would have found Wisconsin's policy "unconstitutional as applied to someone [] who had reached his mandatory release date and who, through

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[16] As the late Justice Scalia agreed in dissent, the Fourteenth Amendment applied in *Kingsley* because the case involved a pre-trial detainee, *id.* at 404-05, which is how both the *Werner* majority and dissent viewed those that were presumptively being detained for failure to find suitable housing.

no fault of his own, was unable to find housing that satisfied both local laws and state parole officials." *Id.* at 766. In Judge Hamilton's estimation, which resembles Judge Wilson's dissent in this case, "[e]xecutive branch officials are not authorized to lock people up indefinitely without prior court authorization." *Id.* at 767. Though Mr. Werner's detention went unremedied, Wisconsin did change its regulations so that "sex offenders lacking approved residences are no longer held in jail until they can secure an approved residence," *id.* at 757, instead employing reasonable alternatives like electronic monitoring and more frequent check-ins.

These two examples demonstrate the natural convergence of the constitutional principles at stake here and the States' reticence to respect them. These core protections should be applied to homeless individuals who are losing their liberty and experiencing increased punishment because they cannot hope to afford housing that complies with States' highly restrictive rules governing where sex offenders may live; time and again, however, States ignore them. *See In re Taylor*, 343 P.3d 867, 879 (Cal. 2015) (striking down a 2,000-foot buffer zone in San Diego County, and reasoning that "[t]he parolee is not incarcerated; he is not subjected to a prison regimen [or] to the rigors of prison life[;] . . . [t]he parolee lives among people who are free to come and go when and as they wish. Except for the conditions of parole, he is one of them."); *Vann v. State*, 143 So. 3d 850, 862 (Ala. Crim. App. 2013) (under the revised Alabama law passed in the wake of *State v. Adams*, "the sex offender is not required to provide a specific street or route address of a fixed place to live where mail can be received,

which would be impossible for an indigent homeless offender"); Mark Loudon-Brown, *"They Set Him on A Path Where He's Bound to Get Ill": Why Sex Offender Residency Restrictions Should Be Abandoned*, 62 N.Y.U. Ann. Surv. Am. L. 795, 795 (2007) (discussing similar indefinite incarceration experienced by offenders in Iowa); *see also Doe v. Miami-Dade Cty., Fla.*, 846 F.3d 1180, 1185 (11th Cir. 2017) (describing the "makeshift homeless encampment near 'an active railroad track'" where homeless sex offenders in Miami lived to comply with residency restrictions).[17]

Wisconsin has rectified its mistake,[18] and a federal court has put Illinois on the right path towards designing constitutionally adequate procedures for its supervisees; but other jurisdictions, including New York, are struggling to provide adequate constitutional protections to those in petitioner's situation.

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[17] Sex offender housing restrictions also implicate other fundamental rights, such as the free exercise of religion. *See, e.g.*, *Does v. Wasden*, 982 F.3d 784, 795 (9th Cir. 2020) (plaintiff alleged a substantial burden of his free exercise of religion where he was "restricted from attending his church because of 'the proximity of a school'").

[18] *See also, e.g., People v. Betts*, No. 148981, 2019 WL 638374, at *40 (Mich. Feb. 8, 2019) (amicus brief) (the Attorney General for the State of Michigan stopped defending aspects of these overreaching laws, explaining that the "burdens" stemming from Michigan's SORA scheme "are an affirmative disability or restraint, promote retribution not rehabilitation, are not rationally connected to the Legislature's asserted nonpunitive purpose, and potentially endanger the safety of the community").

Incarceration has been described as "living in suspended animation." Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 Harv. C.R.-C.L. L. Rev. 257, 276 (2013). Those of us who live freely should never underestimate the trauma that comes with each additional day of imprisonment. Nor should we undervalue the controlling principle inherent to our system of criminal justice—that life must begin again for those who have served their time. *Id.* ("Those fortunate enough to leave, as I have been, must discover how to rebuild their lives . . .").

"The methods we employ in the enforcement of our [] law have aptly been called the measures by which the quality of our civilization may be judged." *Coppedge v. United States*, 369 U.S. 438, 449 (1962).[19] Eliminating these constitutional protections for one disfavored group will work a lasting injustice against all individuals who have earned their conditional release. Now that New York is at odds with Second Circuit precedent addressing these protections, and in order to provide constitutional guidance to the other jurisdictions grappling with these issues, this Court should grant the petition.

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[19] Justice Warren was citing Justice Schaefer of the Supreme Court of Illinois, in the 1956 Oliver Wendell Holmes Lecture at the Harvard Law School. *See Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 26 (1956) ("the criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States").

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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