No. 20-7846

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Despite the need to resolve the split between the Second Circuit and New York to ensure equal application of core constitutional protections, the State urges this Court to deny review. Its primary argument is based on a fundamental misapprehension of the liberty to which someone on supervision is entitled; its secondary view is that this is not the best case to decide these issues. Neither argument is persuasive, however, given the inability to justify Mr. Ortiz's extinguished liberty when viewed through the Second Circuit's fundamental right lens or his prolonged confinement in light of the constitutional prohibitions against punishment based on status and poverty.

Moreover, respondents do not (and cannot) contest the national importance of resolving the Questions Presented. Mr. Ortiz was incarcerated for years beyond his mandatory release dates despite having served his time. His extended incarceration was exclusively a function of his inability to afford housing—or to access New York City's shelter system—to comply with the SARA condition of supervision that prohibited him from being within 1,000 feet of a school. In short, his status as homeless and indigent is the reason that he, and hundreds like him, continue to be incarcerated after their release dates.

I. The Opinion Below is in Direct Conflict with the Second Circuit.

Respondents accept that the Second Circuit treats a putative parolee's liberty interest in mandatory release as fundamental and protected by substantive

due process, *see* Opp'n at 9-10;[1] *Hurd v. Fredenburgh*, 984 F.3d 1075, 1088 (2d Cir. 2021), *cert. pending*, No. 20-1752.[2] Nevertheless, they contend that *Hurd* does not conflict with the holdings below.

To be clear, the majority of New York's high court held that an individual's "interest in being released to parole," even after parole is granted, does "not constitute a fundamental liberty interest," *People ex rel. Johnson v. Superintendent*, 36 N.Y.3d 187, 199 (2020), and ignored the significance of Mr. Ortiz's passed-over conditional release date. With relation to "his confinement to an RTF in prison-like conditions[] after the maximum expiration date" of his incarceratory sentence, *id.* at 200, the majority concluded that "[r]equiring an individual who has not satisfied SARA's housing restrictions to remain in an RTF until SARA-compliant housing is identified does not violate a fundamental liberty interest." *Id.* at 201.

The court declared that "treat[ing] [Mr.] Ortiz's claimed right to release as a fundamental constitutional liberty interest would be self-defeating," *id.* at 200, because of the State's prospective claim that he would eventually violate the SARA condition of his supervision based on his inability to find housing. This conclusion, which puts the cart before the horse by assuming that the potential for a parole violation

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[1] Respondents' Brief in Opposition to Certiorari is referenced as "Opp'n" and the opening petition as "Pet."

[2] The plaintiff in *Hurd* also seeks this Court's attention, given that "[t]he right against prolonged, unauthorized incarceration . . . has been clearly established for centuries." *Hurd*, No. 20-1752, Petition for Certiorari, at 12.

can diminish the fundamental nature of the right, directly conflicts with the holding in *Hurd*.

There, the Second Circuit explained that conditional release—early release to supervision—was not only mandatory under New York law, *Hurd*, 984 F.3d at 1085, but was also a fundamental liberty interest deserving of substantive protection. *Id.* at 1088. Indeed, it is "[b]ecause New York's conditional release scheme is mandatory [that] there is no meaningful difference in [someone's] liberty interest in release from prison" at either the end of the entire incarceratory term or the point of conditional release. *Id.* And, as if in direct response to this case, the circuit explained that "the State's right to impose some form of punishment through supervision or other conditions of release (if any) does not justify a punishment of *imprisonment* that is unauthorized by law." *Id.* at 1086 n.5. In other words, "conditional liberty" that is "dependent on observance of special parole restrictions," *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), is still a fundamental liberty interest.

Thus, the Second Circuit—in line with *Morrissey*'s conception of the "valuable" liberty possessed by the parolee, *id.* at 482—recognizes that the liberty interest in freedom from confinement at the point of mandatory release to supervision is fundamental, while New York relegates that liberty to lower standing and commensurately less protection.[3]

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[3] Contrary to respondents' claim that New York has not had the "opportunity to consider" the implications of *Hurd* on their

II. The State's Confinement of Mr. Ortiz Cannot Be Reconciled with a Fundamental Rights Approach.

Respondents' reframing of the Questions Presented illustrates their misapprehension of how the State deprived Mr. Ortiz of his fundamental right to liberty. They claim that, "[u]nder New York law, certain sex offenders are *not eligible* for release into the community until they can establish a residence that is not within 1,000 feet of a school[.]" Opp'n at 1 (emphasis added), 3. Yet they cite no legislation or other authority supporting their position that SARA is more than a traditional condition of supervision, or that it modifies the Penal Law to change the nature of imposed sentences.

Indeed, SARA's non-punitive supervisory condition about staying away from schools says nothing about being a separate *pre*-condition that must be satisfied prior to release (or that it serves as some penological proxy that allows for additional punishment). *See* N.Y. Exec. Law § 259-c(14) (mandating that supervisees be required to abide by a 1,000-foot school-zone no trespass rule). Rather, SARA is a condition of post-release supervision that, like any other condition, requires a hearing if the State seeks to revoke the liberty interest attendant to such supervision.

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prior holdings, Opp'n at 11 n.2, petitioner filed a motion for reargument in the Court of Appeals immediately after *Hurd* was decided. And, although the court may grant an untimely motion (untimely here because *Hurd* was decided after the customary 30-day period for requesting reargument), it did not take the opportunity to reconsider the merits. *People ex rel. Ortiz v. Breslin*, 36 N.Y.3d 1087 (2021) (reargument dismissed as untimely).

This is problematic for respondents' argument, since, in the absence of another legislative or judicial penological consideration, "[t]here is *no* penological justification for incarceration beyond a mandatory release date because 'any deterrent and retributive purposes served by [the inmate's] time in jail were fulfilled as of that date.'" *Hurd*, 984 F.3d at 1085 (quoting *Sample v. Diecks*, 885 F.2d 1099, 1108 (3d Cir. 1989)) (modification in original, emphasis added).

In Mr. Ortiz's case, there is no dispute that the court sentenced petitioner to 10 years of incarceration to be followed by five years of PRS with no mention or penological finding that the SARA condition could transform his supervision into additional incarceration (of undefined duration). Thus, these two distinct periods are his sentence "known to the law," *Greene v. United States*, 358 U.S. 326, 329 (1959), which "may not be increased by an administrator's amendment." *Earley v. Murray*, 451 F.3d 71, 75 (2d Cir. 2006); *see also Ex parte Jackson*, 190 P. 608, 609 (Kan. 1920) ("the essential portion of the sentence in a criminal case is the punishment, including the kind . . . and the amount"). Accordingly, Mr. Ortiz should have been released to supervision either after 8½ years (with good behavior) or at the end of his 10-year term.

In September 2016, Mr. Ortiz's good-time credits were certified; he earned his early release. The Board of Parole had determined that further incarceration was no longer required, and Mr. Ortiz *had* to be released back into society to begin his PRS—with the SARA condition imposed. N.Y. Penal Law § 70.40; N.Y. Corr. Law § 206(1); N.Y. Comp. Codes R. & Regs. tit. 9, § 8003.1. "New York chose to make conditional

release mandatory upon the approval of good-time credit and the inmate's request for release." *Hurd*, 984 F.3d at 1085 (citing Penal Law § 70.40(1)(b)). In short, regardless of the SARA condition, the State was required to release him from prison.

But Mr. Ortiz was not released and never given the opportunity to comply with the relevant condition of supervision. *See Young v. Harper*, 520 U.S. 143, 147 (1997) (Thomas, J.) (quoting *Morrissey*, 408 U.S. at 477) ("[t]he essence of parole is release from prison, before the completion of sentence," with the chance to abide by the rules imposed). Instead, he was held in prison for the 17 months following his conditional release date. Respondents did not invoke any procedure to cancel the good-time that triggered his release or to revoke his post-release supervision. *See* Corr. Law § 803(3); N.Y. Comp. Codes R. & Regs. tit. 9, §§ 8004.1, 8004.3. Instead, they simply ignored the mandatory release point—just as they have in their opposition brief. *See* Opp'n at 1.

In March 2018, Mr. Ortiz reached the end of his 10-year sentence. Respondents were required to release him (belatedly) to his five-year period of supervision. He should have been given an opportunity to identify compliant housing through the City's legal obligations to provide such housing in its shelter system. (*See infra* III.) And, any preemptive revocation of Mr. Ortiz's liberty would require the State to initiate the revocation process. *See* Exec. Law § 259-i(3).

None of these things happened. The State never acknowledged his right to release and never held a hearing to assess compliance or consider Mr. Ortiz's

indigence. Instead, respondents invoked Correction Law § 73(10) to merely move him to a new prison, incarcerating Mr. Ortiz at correctional facility called a "residential treatment facility" where he languished under prison conditions for eight more months.

As a direct result of the State ignoring his conditional release and the end of his incarceratory sentence, Mr. Ortiz was incarcerated an extra 25 months without the State considering any alternatives to incarceration (*e.g.*, more frequent check-ins or electronic monitoring). Moreover, his term of PRS was extended by a year and a half—as acknowledged by respondents. Opp'n at 3 (only when "petitioner finished serving his 10-year prison term," was he "formally placed on his five-year term" of supervision). Prison officials effectively merged distinct periods of incarceration and supervision into one lump sum of prison time and, in so doing, displaced the penological parameters set at sentencing.

Far from "turn[ing] square corners" in their dealings with petitioner, *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (Gorsuch, J.), respondents have implemented an "extraconstitutional arrangement" that "restrict[s] the liberty" of the indigent members of this "disfavored group[]" indefinitely, in violation of New York penal and parole law, and in extreme fashion—via imprisonment. *Gundy v. United States*, 139 S. Ct. 2116, 2131, 2144 (2019) (Gorsuch, J., dissenting);[4] *see also Dep't of Homeland Sec. v. Regents of the*

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[4] Justice Gorsuch's concerns regarding the abuse of power by agency officials to restrict citizens' liberty in the nondelegation context are equally relevant to these abuses of State power.

Univ. of California, 140 S. Ct. 1891, 1909 (2020) (Roberts, C.J.) ("[T]he Government should turn square corners in dealing with the people.") (citation omitted). The harm he suffered (and continues to suffer)[5] by the State ignoring his right to be released is incompatible with the principles expounded in *Hurd*, this Court's conception of a parolee's protected liberty, and long-standing precedent regarding the incarceration of those who are too poor to avoid violating a condition of supervision.

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[5] The constitutional mischief of New York's ruling is demonstrated by the danger it poses to Mr. Ortiz, who remains under post-release supervision. The opinion suggests a government official is authorized to preemptively revoke supervision if, in the official's estimation, Mr. Ortiz would inevitably violate a condition of parole that "reflects a broader set of social circumstances." *See People ex rel. Johnson*, 36 N.Y.3d at 204. But it is unclear what the contours of such "circumstances" are, or what potential violations would render his conditional liberty interests "self-defeating." Thus, he could easily find himself in this situation again. And the duration of the unlawful incarceration that comes with traversing respondents' waitlists is just short enough to render these violations capable of repetition yet evading review. *Id.* at 196; *see also Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (sometimes unconstitutional "detention is by [its] nature temporary," such that it is "distinctly 'capable of repetition, yet evading review'") (citation omitted).

III. Even Without the City's Legal Obligation to Provide Shelter, *Bearden* and *Robinson* Prohibit Extended Incarceration on the Basis of Indigence and Homelessness.

To justify Mr. Ortiz's 25 months of extended incarceration, absent any penological justification, respondents rely on their familiar position that the availability of shelter space is too uncertain to guarantee that Mr. Ortiz would receive a SARA-compliant bed. Opp'n at 13-14. They insist that there is a wait-list kept by some prison official and that by keeping such a list, with nothing more, these state officials can extend incarceration an indefinite amount of time. But respondents cannot depend on unsupported speculation—or their self-generated secret priority list—to avoid confronting the fundamental constitutional concerns raised in Mr. Ortiz's petition.

First, New York state law and the *Callahan* consent decree create an enforceable obligation to provide appropriate housing, (58a); N.Y. Comp. Codes R. & Regs., tit. 18, § 352.36(a)(4)(iv), (b), as asserted in Mr. Ortiz's state petition for habeas release. (138a-139a.) While respondents contend that there are factual and legal disputes regarding this unequivocal right, they fail to identify the material content of those disputes. In their briefs to the state courts, they simply claimed that compliant housing is scarce.

But bald assertions or presumptions do not create factual or legal disputes. And, because respondents' prolonged incarceration has never given the City the chance to fail to honor Mr. Ortiz's enforceable right to

shelter, there is no question of fact to resolve nor need to litigate against the City. That is why a petition for habeas corpus is directed at the party with custody over the individual—not at some third-party that has not acted to constrain the individual's freedom. *See* N.Y. C.P.L.R. § 7005.

Second, the protections set forth in *Bearden v. Georgia*, 460 U.S. 660 (1983), and *Robinson v. California*, 370 U.S. 660 (1962), were triggered precisely when the State decided Mr. Ortiz was unable to satisfy the housing condition due to his homelessness. At that point, New York could not preemptively find Mr. Ortiz and those like him in violation of the terms of their PRS simply on the basis of their homelessness, *Robinson*, 370 U.S. at 666-67, and imprison them "solely because [they] lack the resources to pay" for specialized housing, *Bearden*, 460 U.S. at 667-68.

Respondents' conclusory contention that Mr. Ortiz's extended incarceration was the result of his offense and conviction, rather than their policies of criminalizing his status of homelessness, fails to pass analytic muster. Mr. Ortiz was not sentenced to indefinite confinement, nor was the potential for the SARA-condition to transform his supervision into additional incarceration mentioned at sentencing.[6]

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[6] Respondents also misleadingly imply that Mr. Ortiz was subjected to a rigorous civil commitment process, Opp'n at 11-12, when he was merely rated under the State's sex offender registration scheme. None of the procedural and substantive safeguards this Court has required, *see Kansas v. Hendricks*, 521 U.S. 346, 357 (1997), were ever involved in Mr. Ortiz's case. *See also* N.Y. Mental Hygiene Law, Article 10.

Given respondents' inability to provide any penological interest served by its scheme of indefinite detention, Opp'n at 10, they pivot to claiming that the SARA condition itself "reflects a legislative determination that, where an inmate has been unable to obtain SARA-compliant housing, *there are no* 'alternative measures' adequate to meet to the State's penological and public safety interests short of continued custodial confinement until such housing may be obtained." *Id.* at 12 (emphasis added). As noted above, there is not a shred of legislation (or even legislative history) that supports that proposition—which is why respondents cite none.

Wealthy sex offenders are able to obtain SARA-compliant housing and leave prison as soon as they have completed the incarceratory portions of their sentences. The poor are incarcerated indefinitely. New York's policy is, thus, in direct conflict with the *Williams-Bearden* line of cases: although "the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it [has nevertheless] subject[ed] a certain class of convicted defendants to a period of imprisonment beyond the [] maximum solely by reason of their indigency." *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970).

"Ignorance and alibis by a jailer should not vitiate the rights of a man entitled to his freedom." *Whirl v. Kern*, 407 F.2d 781, 792 (5th Cir. 1968). As the Second Circuit explained in *Hurd*: "unauthorized detention of just one day past an inmate's mandatory release date qualifies as a harm of constitutional magnitude" under the Cruel and Unusual Punishments

Clause. *Hurd*, 984 F.3d at 1085.[7] Yet respondents overlook that it is the very application of their SARA pre-release policy to those like Mr. Ortiz that creates this constitutional vortex disposing of his liberty and imposing additional punishment in violation of the Fourteenth and Eighth Amendments.

* * *

"[W]ords are how the law constrains power," *Niz-Chavez*, 141 S. Ct. at 1486, and the text of the SARA post-release supervision condition does not provide the necessary authority or justification for respondents' detention of these individuals. The constitutionally imposed limitations on the power of the State should make it uncontroversial that the doors to the jail must open when an individual has served his time. This case, therefore, presents an excellent vehicle for the Court to consider these core constitutional protections in the context of New York's binary choice for such offenders: rehabilitation for those with means and imprisonment for those without.

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[7] *See also* Pet. at 20-22 (arguing this scheme demonstrates deliberate indifference to prolonged incarceration given the decision to completely extinguish these individuals' protected liberty without exploring any alternatives).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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