No. 25-746

IN THE
Supreme Court of the United States

CARVIN L. THOMAS, ET AL.,

Petitioners,

v.

ROBERTA NEVIL KUSTOFF, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do Tennessee inmates have a statutorily created liberty interest in parole where the statutes make parole discretionary?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners (plaintiff-appellants below) are Carvin Thomas and Terrell Lawrence.

Respondents (defendants-appellees below) are Roberta Nevil Kustoff, Zane Duncan, Gary Faulcon, Tim Gobble, Mae Beavers, Barrett Rich, and Robert Waggoner—all sued in their official capacities as the Chair and Members of the Tennessee Board of Parole.

The petition substituted Roberta Nevil Kustoff as the lead party because she replaced Richard Montgomery as Chair of the Tennessee Board of Parole during the litigation.

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INTRODUCTION

This case is not certworthy. Petitioners are two Tennessee inmates who were denied parole. Upset by their denials, the inmates sued the individual members of the Tennessee Board of Parole under the Fourteenth Amendment's Due Process Clause, arguing that they have a liberty interest in parole. But, as the Sixth Circuit held, there is no federal constitutional right to parole, *see Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam), and Tennessee has not created a liberty interest in parole, either.

Petitioners disagree. They argue that Tennessee's parole statutes are "similar to" the parole statutes at issue in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), and *Board of Pardons v. Allen*, 482 U.S. 369 (1987), where this Court found a constitutionally protected liberty interest. Pet. 1. And they argue that this similarity dictated a different result here.

This request for error correction does not warrant the Court's review. Petitioners identify no conflicts or unresolved issues of federal law. Instead, they contend only that the Sixth Circuit got it wrong. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law." Sup. Ct. R. 10. And, in all events, the Sixth Circuit did not err.

The unanimous Sixth Circuit panel faithfully applied *Greenholtz* and *Allen*. In those decisions, this Court found a constitutionally protected liberty interest in parole because the statutes at issue "use[d] man-

datory language ('shall')," which "created an 'expectancy of release.'" *Allen*, 482 U.S. at 371, 377-78 (quoting *Greenholtz*, 442 U.S. at 12). Here, by contrast, Tennessee's parole statutes provide that if an inmate satisfies all relevant parole release criteria, then the inmate "*may* be paroled." Tenn. Code Ann. § 40-28-117(a)(1) (emphasis added). Under the *Greenholtz* and *Allen* "mandatory language" framework, *Allen*, 482 U.S. at 377-78, "statutes … that provide that a parole board 'may' release an inmate on parole *do not give rise to a protected liberty interest*," *id.* at 378 n.10 (emphasis added). The Sixth Circuit thus held that Tennessee has not created a liberty interest in parole.

The Sixth Circuit's decision is correct. It follows from this Court's explicit holding in *Allen* that discretionary "may" language does not give rise to a liberty interest in parole. *Id.* And it reaches the same result as every other federal and state court decision addressing similarly worded parole statutes. Not surprisingly, then, this Court has routinely denied certiorari in similar cases where courts have held that state parole statutes providing that an inmate "may" be paroled do not create a liberty interest.

This Court answered Petitioners' question nearly 40 years ago in *Allen*. It doesn't need to answer it again.

The Court should deny the petition.

STATEMENT OF THE CASE

A. Legal Background

Petitioners' claim arises under the Fourteenth Amendment's Due Process Clause. That "[c]lause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

Due Process protections only apply to "protectible right[s]." *Greenholtz*, 442 U.S. at 7. A right is not protectible if a person merely has "an abstract need or desire" or "a unilateral expectation of it." *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). But a right is protectible if a person has "a legitimate claim of entitlement to it." *Id.* (quoting *Roth*, 408 U.S. at 577).

"There is no constitutional or inherent right" to parole. *Id.*; *Swarthout*, 562 U.S. at 220. And "States are under no duty to offer parole to their prisoners." *Swarthout*, 562 U.S. at 220; *Allen*, 482 U.S. at 377 n.8. Yet States can create a protectable liberty interest in parole under the Due Process Clause through statutes or regulations.[1] *See Allen*, 482 U.S. at 378 n.9.

This Court has twice examined whether state statutes created a liberty interest in parole. *See Allen*, 482 U.S. at 373-81; *Greenholtz*, 442 U.S. at 11-16; *see also* Pet. App. 16a-18a. The Court first confronted the

[1] Petitioners have not alleged that Tennessee's parole regulations created a liberty interest in parole. The focus is on Tennessee's parole statutes.

question in *Greenholtz*, which established the framework for determining whether a State has created a liberty interest in parole. There, Nebraska inmates alleged that the Nebraska Board of Parole had unconstitutionally denied them parole. *Greenholtz*, 442 U.S. at 3-4. The inmates argued that they had a constitutionally protected liberty interest in parole because (1) "a reasonable entitlement" to parole "is created whenever a state provides for the *possibility* of parole," and (2) Nebraska statutorily "create[d] a legitimate expectation of parole, invoking due process protections." *Id.* at 8-9.

Under the first argument, the inmates contended that parole release decisions "should be accorded the same constitutional protection" as parole revocation decisions because "the ultimate interest at stake" in both "is conditional liberty." *Id.* at 9. This Court rejected that argument because of the "crucial distinction between being deprived of a liberty one has … and being denied a conditional liberty that one desires." *Id.* Thus, this Court held that "the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Id.* at 11. And that "hope … is not protected by due process." *Id.*

But this Court agreed with the inmates' second argument, holding "that the Nebraska statutory language itself create[d]" a liberty interest in parole. *Id.* The relevant language provided:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall order his release* unless it is of the opinion

> that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Id. (quoting Neb. Rev. Stat. § 83-1,114(1) (1976)) (emphasis added). The Court noted "that the structure of the provision together with the use of the word 'shall'" created "a legitimate expectation of release" that "entitled" the inmates "to some measure of constitutional protection." *Id.* at 11-12.

Though the statute created a liberty interest in parole, the Court ultimately held that Nebraska's parole procedures provided all "the process that [was] due." *Id.* at 16. The parole board afforded inmates with "an opportunity to be heard" and informed those denied parole "what respects [they fell] short of qualifying for parole." *Id.* "The Constitution," this Court held, "does not require more." *Id.*

Eight years later, this Court decided *Allen*. There, a class of Montana inmates sued the Montana Board

of Pardons, alleging that Montana had statutorily created a liberty interest in parole. *Allen*, 482 U.S. at 371. The relevant Montana statute provided:

> (1) Subject to the following restrictions, the board *shall* release on parole ... any person confined in the Montana state prison or the women's correction center ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]
>
> (2) A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

Id. at 376-77 (quoting Mont. Code Ann. § 46-23-201 (1985)).

After scrutinizing the Montana statute "under the standards set forth in *Greenholtz*," the Court held that the statute created "a liberty interest protected by the Due Process Clause." *Id.* at 373, 381.

The Court found it particularly "[s]ignificant[]" that "the Montana statute, like the Nebraska statute, uses mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made." *Id.* at 377-78 (quoting *Greenholtz*, 442 U.S. at 12). The Court also noted that "[t]he discretion" to grant parole "is equivalent in Montana and Nebraska," *id.* at 380, and that whereas

the parole board had previously enjoyed absolute discretion, a statutory amendment in 1955 "place[d] significant limits on the discretion of the Board," *id.* at 380-81.

Significantly, the Court distinguished between parole statutes that mandate parole—and thus create a liberty interest—and those that do not. Although "statutes or regulatory provisions … phrased in mandatory terms" create "a liberty interest," *id.* at 378 n.10, "statutes or regulations that provide that a parole board 'may' release an inmate on parole do not give rise to a protected liberty interest," *id.* (citing *Dace v. Mickelson*, 797 F.2d 574, 576 (8th Cir. 1986) (South Dakota statute); *Parker v. Corrothers*, 750 F.2d 653, 657 (8th Cir. 1984) (Arkansas statute); *Gale v. Moore*, 763 F.2d 341, 343 (8th Cir. 1985) (amended Missouri statute); *Dock v. Latimer*, 729 F.2d 1287, 1288 (10th Cir. 1984) (Utah statute); *Irving v. Thigpen*, 732 F.2d 1215, 1216 (5th Cir. 1984) (Mississippi statute); *Candelaria v. Griffin*, 641 F.2d 868, 869 (10th Cir. 1981) (New Mexico statute); *Williams v. Briscoe*, 641 F.2d 274, 276 (5th Cir.) (Texas statute), *cert. denied*, 454 U.S. 854 (1981); *Schuemann v. Colo. State Bd. of Adult Parole*, 624 F.2d 172, 174 (10th Cir. 1980) (Colorado statute); *Shirley v. Chestnut*, 603 F.2d 805, 806-07 (10th Cir. 1979) (Oklahoma statute); *Wagner v. Gilligan*, 609 F.2d 866, 867 (6th Cir. 1979) (Ohio statute)).

In short, *Greenholtz* and *Allen* looked to whether a state statute describes the parole board's authority to release inmates on parole in mandatory or discretionary terms. If a statute uses mandatory language (e.g., "shall"), then it has created a liberty interest in parole

that is entitled to protection under the Due Process Clause. *Id.* If a statute uses discretionary language (e.g., "may"), then it has not created a liberty interest. *Id.*[2]

B. Tennessee's Parole Statutes

As "a matter of legislative grace," *Hughes v. Tenn. Bd. of Prob. and Parole*, 514 S.W.3d 707, 720 (Tenn. 2017), Tennessee has maintained a system of parole for nearly a century, *see Historical Timeline*, Tennessee Board of Parole, https://tinyurl.com/2jdbvdun (last visited Feb. 4, 2026) (Tennessee's first parole system was established in 1929).

Tennessee Code Annotated §§ 40-28-101 to -610 and §§ 40-35-501 to -506 provide the statutory framework for probation and parole in Tennessee. Under this framework, Tennessee's parole system is governed by a seven-member Board of Parole. Pet. App. 7a (citing Tenn. Code Ann. § 40-28-103(a)). The Board evaluates "inmates' fitness for parole." Pet. App. 8a

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[2] In *Sandin v. Conner*, 515 U.S. 472 (1995), this "Court retreated somewhat from the view that statutory and regulatory entitlements are necessary or sufficient to create protected liberty interests." *Neese v. Utah Bd. of Pardons & Parole*, 416 P.3d 663, 675 (Utah 2017). Yet "*Sandin* was decided only in the context of prison conditions, not *parole eligibility*," *Straley v. Utah Bd. of Pardons*, 582 F.3d 1208, 1214 (10th Cir. 2009); *Sass v. Cal. Bd. of Prison Terms*, 461 F.3d 1123, 1127 n.3 (9th Cir. 2006), and it did not overrule *Greenholtz* or *Allen*, *see Neese*, 416 P.3d at 675-76 (citing *McQuillion v. Duncan*, 306 F.3d 895, 903 (9th Cir. 2002)). So *Greenholtz* and *Allen*—and the mandatory versus discretionary language framework they created—still "directly control[]" this case. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

(citing Tenn. Code Ann. § 40-28-118(c)). Inmates become eligible for parole by serving "half of their prison sentence (for determinate sentences)" or by serving "their minimum sentence (for indeterminate sentences involving a range)." Pet. App. 8a (citing Tenn. Code Ann. § 40-28-115(a), (b)(1)).

Once an inmate becomes parole-eligible, the "Department of Correction notifies the Board … and the Board compiles and distributes a list of inmates who shall have a hearing." Pet. App. 8a (citing Tenn. Comp. R. & Regs. 1100-01-01-.08(1)). Hearing officers then "conduct hearings, take testimony and make proposed findings of fact and recommendations to the board regarding a grant [or] denial … of parole." Tenn. Code Ann. § 40-28-105(d)(2). The Parole Board will then "adopt, modify or reject" the hearing officer's recommendation. *Id.* If the inmate is not paroled, he is provided with the reason(s) why he did not qualify for parole. *Id.* § 40-35-503(j). The discretion to grant or deny parole is "vested exclusively in the Board." *York v. Tenn. Bd. of Parole*, 502 S.W.3d 783, 788 (Tenn. Ct. App. 2016) (citing *Doyle v. Hampton*, 340 S.W.2d 891, 893 (Tenn. 1960)).

The three relevant statutes for evaluating whether Tennessee has created a liberty interest in parole are Tenn. Code Ann. §§ 40-28-101(a), 40-28-117(a)(1), and 40-35-503. *See* Pet. 3-5.

Section 40-28-101(a) broadly describes the purpose of the Tennessee Code pertaining to the State's "system of probation and paroles." Tenn. Code Ann. § 40-28-101(a). It provides that probation and parole decisions "shall take into consideration … individual characteristics, circumstances, needs and potentialities,"

and persons who are released on probation or parole "shall be dealt with in the community by a uniformly organized system of constructive rehabilitation under probation supervision … or under parole supervision." *Id.*

Section 40-35-503(b), in turn, creates a presumption against parole, with few exceptions.[3] The statute provides that "[r]elease on parole is a privilege and not a right," Tenn. Code Ann. § 40-35-503(b); *see also id.* § 40-28-117(a)(1), and then establishes that:

> no inmate … shall be granted parole if the board finds that:
>
> (1) There is a substantial risk that the incarcerated individual will not conform to the conditions of the release program;
>
> (2)(A) The release from custody at the time would depreciate the seriousness of the crime of which the incarcerated individual stands convicted or promote disrespect for the law …;
>
> (3) The release from custody at the time would have a substantially adverse effect on institutional discipline; or
>
> (4) The incarcerated individual's continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance the

[3] The presumption against parole does not apply in several narrow contexts. *See, e.g.*, Tenn. Code Ann. § 40-35-503(h)-(i). But Petitioners have not alleged that any of those contexts apply to them.

> incarcerated individual's capacity to lead a law-abiding life when given release status at a later time.

Id. § 40-35-503(b). The Board also considers other factors, such as whether "the inmate has attempted to improve" his "educational, vocational, or employment skills" while incarcerated; whether, if the inmate was convicted of a sex crime, a psychiatrist or licensed psychologist has "certified that … the inmate does not pose the likelihood of committing sexual assaults upon release from confinement"; and whether, if the inmate "was convicted of a homicide, … the offender obstructed or continues to obstruct the ability of law enforcement to recover the remains of the victim." *Id.* § 40-35-503(c), (g)(1)-(2).

Even if a parole-eligible inmate checks all the right boxes, § 40-28-117(a)(1) provides that the Board retains unfettered discretion to deny the inmate parole:

> Parole being a privilege and not a right, no prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board is of the opinion that there is reasonable probability that the prisoner, if released, will live and remain at liberty without violating the law, and that the prisoner's release is not incompatible with the welfare of society. If the board so determines, the prisoner *may be paroled* ….

Tenn. Code Ann. § 40-28-117(a)(1) (emphasis added).

In 1984, the Sixth Circuit evaluated Tennessee's parole statutory and regulatory scheme and held that while Tennessee's parole statutes did not confer a liberty interest in parole, a parole board rule had created a liberty interest. *See Mayes v. Trammell*, 751 F.2d 175, 178 (6th Cir. 1984). The pertinent rule provided: "The Board operates under the *presumption* that each resident who is eligible for parole is a worthy candidate and thus the Board presumes that he *will be released* on parole when he is first eligible." *Id.* (quoting Tenn. Bd. of Parole Rule 1100-1-1-.06). Tennessee amended the rule the following year to instead provide, in relevant part: "Before granting or denying parole, the Board shall apply the following factors to each eligible resident to assist it in determining whether such resident will live and remain at liberty without violating the law or the conditions of his parole." *Wright v. Trammell*, 810 F.2d 589, 590-91 (6th Cir. 1987) (quoting Tenn. Bd. of Parole Rule 1100-1-1-.06). And the Sixth Circuit found no liberty interest conferred by that revised rule. *Id.* at 591.

Since *Wright*, state and federal courts have unanimously held that Tennessee has not conferred a liberty interest in parole. *See, e.g.*, Pet. App. 7a-26a; *Hester v. Chester County*, 162 F.4th 780, 785 (6th Cir. 2025) ("[T]here is no liberty interest in parole under Tennessee law."); *Wortman v. Bd. of Parole*, No. 20-5718, 2021 WL 9528123, at *3 (6th Cir. Sept. 23, 2021) (same); *Hughes*, 514 S.W.3d at 719-20 (same); *State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005) (same); *Seagroves v. Tenn. Bd. of Probation & Parole*, 86 F. App'x 45, 48 (6th Cir. 2003) (same).

C. Factual and Procedural Background

The facts underlying this case are simple. Thomas and Lawrence are Tennessee inmates. Pet. App. 10a. Upon reaching their parole eligibility dates, both inmates received a parole hearing. Pet. App. 11a-12a. Following their hearings, the Board denied them both parole. Pet. App. 12a.

The inmates took umbrage with the denials—particularly the officers' reliance, at least in part, on a risk assessment computer program that allegedly "has produced inaccurate results" in the past. Pet. App. 9a; *see also* Pet. App. 50a-53a. They sued under 42 U.S.C. § 1983, alleging the denial of procedural due process and seeking declaratory and injunctive relief. D. Ct. Doc. 1 ¶ 77; *id.*, *Prayer for Relief*. The Parole Board filed a motion to dismiss, *see* D. Ct. Doc. 11; D. Ct. Doc. 11-1, and the inmates filed an Amended Complaint revising their request for injunctive relief, *see* Pet. App. 41a-69a. The inmates had originally asked for "release … on parole," but they amended that request to instead seek "a new and prompt parole hearing." *Compare* D. Ct. Doc. 1, *Prayer for Relief with* Pet. App. 67a. The Board filed a renewed motion to dismiss. D. Ct. Doc. 14; D. Ct. Doc. 14-1.

The district court granted the Board's renewed motion to dismiss. Pet. App. 33a-39a. First, the district court held that under *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the inmates' demand for a declaration "based on past parole decisions" was not "a cognizable Section 1983 remedy." Pet. App. 36a-37a. And while their requested injunctive relief was cognizable under *Heck* and *Wilkinson*, it failed on the merits because "[t]here

is no constitutional right to parole," Tennessee has not created a right to parole, and "Tennessee inmates do not have a constitutionally protected liberty interest in parole." Pet. App. 37a.

Regardless, because the inmates both participated in a parole hearing and were informed of the basis for the parole denial, the district court held that the minimal "due process requirements afforded to parole hearings were followed." Pet. App. 38a.

The court also held that the inmates were not without remedy because Tennessee law allows for inmates "to seek review of decisions made by parole boards." Pet. App. 38a. Both inmates, in fact, "availed themselves of that review process" by filing suit in state court. Pet. App. 39a (citing Ch. Ct. Filings, D. Ct. Doc. 23). This left the inmates without a claim for relief under federal law, and the court dismissed the case. Order, D. Ct. Doc. 27 at 238.

A unanimous Sixth Circuit panel affirmed in an opinion by Judge Cole. Relying on the framework established in *Greenholtz* and *Allen*, the Sixth Circuit held that Tennessee had not created a liberty interest in parole. Pet. App. 16a-18a, 23a.

The court explained that by using discretionary language—"may" instead of "shall"—Tennessee's statutory scheme did not constrain the Board's discretion to deny parole to the extent necessary to provide inmates with "a constitutionally recognized expectation of receiving parole." Pet. App. 16a, 23a. And although Tennessee's law uses the same considerations to disqualify inmates seeking release as the law at issue in *Greenholtz*, Tennessee's law uses those considerations

as "grounds for mandatory *denial* of parole, not the mandatory *grant* of parole." Pet. App. at 23a-24a (emphasis added).

Petitioners sought rehearing en banc, which the Sixth Circuit denied. Pet. App. 29a-30a.

REASONS FOR DENYING THE PETITION

Petitioners never suggest that the decision below "conflict[s] with the decision of another United States court of appeals on the same important matter" or "conflicts with a decision by a state court of last resort." Sup. Ct. R. 10. Nor do they argue that the court below "decided an important question of federal law that has not been, but should be, settled by this Court." *Id.*

Petitioners instead contend that the Sixth Circuit misapplied governing law. Pet. 9-15. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law." Sup. Ct. R. 10. And regardless, the Sixth Circuit did not err. It faithfully applied this Court's precedent, and other federal and state courts addressing similarly worded parole statutes have applied the same approach as the Sixth Circuit below.

This Court has denied at least a half dozen petitions involving analogous state parole statutes. This Court should follow suit here and deny the petition.

I. The Sixth Circuit's Decision Does Not Conflict With This Court's Precedent.

With no split or important question of federal law to point to, Petitioners hang their hat on the characterization that the decision below "wrongly disregarded" this Court's precedent in *Greenholtz* and *Allen*. Pet. 9-15. The Sixth Circuit did no such thing.

A. Tennessee's parole statutes do not create a liberty interest under *Greenholtz*.

Petitioners argue that Tennessee's parole laws "[r]esembl[e]" the law in *Greenholtz*, which this Court held created a protected liberty interest. Pet. 9. But the statutes are dispositively dissimilar.

Petitioners' argument centers on the four factors the *Greenholtz* statute required the Nebraska Board of Parole to consider. There, the statute required the Board of Parole to release an offender eligible for parole unless any of the following required deferral of release: "(1) Likelihood of violating parole, (2) Depreciating the seriousness of the offense, (3) Prison disciplinary problems, or (4) Need for further treatment or training in prison." Pet. 9-10 (citing *Greenholtz*, 442 U.S. at 11). Petitioners argue that because "Tennessee law lays out the same four disqualifiers," it also "compels[] a finding of a liberty interest." Pet. 10 (citing Tenn. Code Ann. § 40-35-503(b)). But Petitioners fail to appreciate the key differences between the statute in *Greenholtz* and § 40-35-503(b).

Start with the statutory baseline. In *Greenholtz*, the statute specified that the parole board "*shall order* [an inmate's] release *unless*" one of the four disqualifiers were met. 442 U.S. at 11 (emphasis added). Here,

instead of a presumption that parole "shall" be granted "unless" an inmate is disqualified for one of the four listed reasons, *id.*, the statute provides that "no inmate convicted shall be granted parole if the board finds that" one of the four disqualifiers are satisfied, Tenn. Code Ann. § 40-35-503(b). This means that an inmate must satisfy certain conditions before they can be released on parole—but "[i]t does *not* mean that release is required once" those "necessary condition[s are] met." *Bussiere v. Cunningham*, 571 A.2d 908, 911-12 (N.H. 1990) (collecting cases). And that distinction is the difference between a presumption in *favor* of parole that can create a liberty interest, à la *Greenholtz* and *Allen*, and "a presumption *against* parole," which doesn't. *Sultenfuss v. Snow*, 35 F.3d 1494, 1502 (11th Cir. 1994) (en banc).

On top of the differing presumptions, in Tennessee, even if an inmate satisfies all the necessary criteria for parole release, the inmate only "*may* be paroled." Tenn. Code Ann. § 40-28-117(a)(1) (emphasis added). That sharply contrasts with the Nebraska statute in *Greenholtz*, which provided that the board "*shall order*" an inmate's release unless one of four disqualifiers were satisfied. 442 U.S. at 11 (quoting Neb. Rev. Stat. § 83-1,114(1)). That textual distinction makes all the difference. In short, the use of the discretionary "may," along with the structure of Tennessee's parole statutes, "compels" a finding that Tennessee has *not* created a liberty interest. Pet. 10; *see Allen*, 482 U.S. at 378 n.10.

Petitioners next argue that because the Board must "list a reason in writing before denying parole," it has "create[d] a presumption of parole." Pet. 10. To

start, that's procedurally incorrect. The "state in writing" requirement only kicks in *after* the board has "declin[ed] to grant parole" to an inmate. Tenn. Code Ann. § 40-35-503(j). So it does not—and cannot—play a role in whether the initial parole decision is mandatory in certain situations or not.

But even if Petitioners were correct that the Board must "list a reason in writing before denying parole," how does that create a presumption of parole? Pet. 10. Petitioners never say. The requirement that the Board list a reason merely provides inmates with information they can use to better their chances of being paroled in the future. *See* Pet. App. 22a. It says nothing about whether parole itself is mandatory or not; after all, the requirement does not limit the reasons why parole could be denied or mandate that parole must be granted for any reason. This argument gets Petitioners nowhere.

Petitioners also argue, relying on *Perry v. Sindermann*, 408 U.S. 593, 602 (1972), that the Parole Board has an "informal custom" of only denying parole if one of the four *Greenholtz* factors is met. Pet. 10-11. So, the argument goes, because the Board only denies parole based on the four *Greenholtz* factors, then it has created a liberty interest "by custom" of granting parole otherwise. Pet. 10-11. That argument fails for two reasons.

First, it seemingly relies, at least in part, on the proposition that "the Tennessee statutes imply that the four *Greenholtz* disqualifiers are indeed the *only* reasons that may justify denying parole." Pet. 10. But that's wrong on its face. Tennessee's parole statutes explicitly provide several justifications, apart from the

specific *Greenholtz* factors, that may serve as grounds for denying parole. *Supra* 11.

Second, *even if* Petitioners were right that the Board had an "informal custom" of denying parole based solely on the *Greenholtz* factors, this Court established over four decades ago that "custom" cannot create a liberty interest in parole. Pet. 11. In *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981), this court distinguished the property interests at issue in *Perry* with the liberty interest at issue in parole cases. *Perry* involved "[a] written contract," which was used as evidence to support a teacher's property interest in "continued employment" absent good cause to fire him. 408 U.S. at 601. But this Court held in *Jago* that the property interest principle from *Perry* does not "so readily lend [itself] to determining the existence of constitutionally protected liberty interests in the setting of prisoner parole." *Jago*, 454 U.S. at 18. Trying to map the property interest framework onto the liberty interest context for parole "would severely restrict the necessary flexibility of … parole authorities" who must make "myriad decisions with respect to individual inmates …." *Id.* at 19. So the Court expressly rejected *Perry*'s application to parole cases and "limited" its application to the property interest context. *Id.* at 17.

Petitioner's custom argument also fails for another reason. *Greenholtz* and *Allen* require "mandatory language" to create a liberty interest, *see Allen*, 482 U.S. at 377, but an informal custom does not—and cannot—constitute "mandatory language," *id.* The Court made this point in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981), when it rejected

the argument that "unspoken understanding between the State Board [of Pardons] and inmates" regarding the frequency of paroled life sentences could create a liberty interest. It held: "A constitutional entitlement cannot be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past." *Id.* at 465 (quotations omitted). So even if the Board did have an informal custom as Petitioners claim, that custom would not create a liberty interest.

In all events, the petition is a poor vehicle for evaluating Petitioners' custom argument because, as the Sixth Circuit determined, Petitioners did "not develop this argument" below "or include plausible allegations of customs that create a legitimate expectation of parole." Pet. App. 25a.

Finally, Petitioners argue that "a close reading" of § 40-35-503(b) and § 40-28-117(a), considered under "the doctrine *in pari materia*," show that Tennessee created a liberty interest in parole. Pet. 11-12. But a close reading of those statutes supports the Board, not Petitioners.

The principle of *in pari materia* instructs that laws "pertain[ing] to the same subject … should … be construed as if they were one law." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (quotations omitted). Here, the statutes (twice) emphasize that parole is a privilege and not a right. *See* Tenn. Code Ann. § 40-28-117(a)(1); *id.* § 40-35-503(b). They then create a presumption *against* parole. *Id.* § 40-35-503(b); *supra* 10. And they also specify that even if all the relevant criteria favor parole, an inmate only "*may* be paroled." Tenn. Code Ann. § 40-28-117(a)(1) (emphasis added).

Construing these parole statutes as one law demonstrates that parole in Tennessee is discretionary, not mandatory.

Under *Greenholtz*, Tennessee's parole statutes do not create a liberty interest that implicates the Due Process Clause.

B. Tennessee's parole statutes do not create a liberty interest under *Allen*.

Allen only makes Petitioners' position more untenable.[4] In *Allen*, which relied on the "control[ling] … principles established in … *Greenholtz*," the Court found a liberty interest in parole because "the Montana statute, like the Nebraska statute, uses mandatory language ('shall')." 482 U.S. at 371, 377. By contrast, Tennessee's parole statutes do not. *Supra* 11.

But, Petitioners argue, even if Tennessee's parole statutes are not identical to the statute in *Allen*, they "are functionally the same." Pet. 13. That's wrong. Again, whether a statute mandates parole in certain circumstances (instead of merely permitting parole), is dispositive. *See Greenholtz*, 442 U.S. at 11-12; *Allen*, 482 U.S. at 377-78. And again, the statute in *Allen*, like the one in *Greenholtz*, used mandatory language, whereas Tennessee's statutes use permissive language. *Supra* 11.

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[4] Petitioners assert that "the Sixth Circuit has never squarely addressed" the "rule of law" in *Allen*. Pet. 12. That's wrong. *See, e.g.*, Pet. App. 16a-18a; *Crump v. Lafler*, 657 F.3d 393, 398-99 (6th Cir. 2011); *Newell v. Brown*, 981 F.2d 880, 884-85 (6th Cir. 1992).

Petitioners try to bolster their "functionally the same" argument by pointing to the following portion of Tenn. Code Ann. § 40-28-117(a)(1):

> [N]o prisoner shall be released merely as a reward for good conduct …, but only if the board is of the opinion that there is reasonable probability that the prisoner, if released, will live and remain at liberty without violating the law, and that the prisoner's release is not incompatible with the welfare of society.

Pet. 13-14 (quoting Tenn. Code Ann. § 40-28-117(a)(1)). But immediately following that quoted portion, the statute goes on to say: "If the board so determines, the prisoner *may be paroled* and *if paroled* shall be allowed to go upon parole outside of prison walls and enclosure upon the terms and conditions as the board shall prescribe …." *Id.* (emphasis added). The full statutory context belies Petitioners' assertion that the statute in *Allen* and Tennessee's statute "are functionally the same": one statute mandates parole if certain conditions are met, and the other does not. Pet. 13.

Petitioners next point to Tenn. Code Ann. § 40-28-101(a), which broadly describes the purpose of the Tennessee code dealing with probation and parole. Petitioners argue that the use of "shall" in that statute means "that every worthy inmate must be released." Pet. 14. But that's not what the statute says. "[C]ontext matters," and § 40-28-101(a) never mandates that inmates "shall" be released. *Caraco Pharm. Labs, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 414 (2012). Instead, after broadly providing that "[t]he purpose of

this chapter is to provide a system of probation and paroles," it provides that parole and probation boards "shall take into consideration" certain personal information when making their decisions, and then, if individuals are released on parole or probation, they "shall be dealt with" in a "uniform[]" manner. Tenn. Code Ann. § 40-28-101(a). But unlike the statutes in *Greenholtz* and *Allen*, this statute never mandates parole under any particular circumstance. While the statute may mandate certain procedures, "none of those procedures impose any substantive restriction on the Board's ultimate decision." *Marlow v. Mont. Bd. of Pardons & Parole*, 39 F.3d 1187, at *2 (9th Cir. Oct. 27, 1994).

Petitioners also argue that because Tennessee "invokes the same criteria from *Allen*—law-abiding character, and societal welfare"—it has created a liberty interest. Pet. 14. But the presence or absence of certain evaluation criteria—on its own—is wholly irrelevant. Instead, what matters is whether a parole board's discretion has been "significant[ly] limit[ed]." *Allen*, 482 U.S. at 380. If a board "shall" parole an inmate based on certain criteria, then the State has created a liberty interest. *Id.* at 377. But if, as here, the board "may" release an inmate based on those same criteria, then the State has not created a liberty interest. *Id.* at 378 n.10. Tennessee's statutory scheme does not limit the Board's discretion like the statutes in Montana and Nebraska. And whereas this Court in *Allen* pointed to changes in the statute that "place[d] significant limits on the discretion of the Board," Petitioners have pointed to no similar changes here. *Id.* at 380.

II. The Sixth Circuit's Approach Accords With All Other Federal and State Courts.

The Sixth Circuit's decision also accords with every other state supreme court and circuit court interpreting similar, permissive parole statutes. For decades, courts have relied on the mandatory/discretionary distinction created in *Greenholtz* and *Allen* to evaluate whether a state statute confers a liberty interest in parole. In cases where a parole statute uses mandatory "shall" language, courts have found a liberty interest in parole. *See, e.g.*, *Bomgaars v. State*, 967 N.W.2d 41, 46-48 (Iowa 2021) (Iowa statute); *In re McCarthy*, 164 P.3d 1283, 1286 (Wash. 2007) (Washington statute); *McQuillion*, 306 F.3d at 901-03 (California statute); *Felce v. Fiedler*, 974 F.2d 1484, 1491-92 (7th Cir. 1992) (Wisconsin's mandatory release statute); *Bermudez v. Duenas*, 936 F.2d 1064, 1067 (9th Cir. 1991) (Guam statute).

And in cases where a parole statute uses permissive "may" language, courts have applied *Greenholtz* and *Allen* to hold that the statute has not created a liberty interest in parole. *See, e.g.*, *Moor v. Palmer*, 603 F.3d 658, 661-62 (9th Cir. 2010) (Nevada statute); *Straley*, 582 F.3d at 1212-13 (Utah statute); *Baker v. Comm'r of Corr.*, 914 A.2d 1034, 1041-43 (Conn. 2007) (Connecticut statute); *Jago v. Ortiz*, 245 F. App'x 794, 796-97 (10th Cir. 2007) (Colorado statute); *Grennier v. Frank*, 453 F.3d 442, 444 (7th Cir. 2006) (Wisconsin statute); *Price v. Barry*, 53 F.3d 369, 370 (D.C. Cir. 1995) (D.C. statute); *Bussiere*, 571 A.2d at 911-12 (New Hampshire statute); *Inmates of Orient Corr. Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 235-36 (6th Cir. 1991) (Ohio statute); *Creel v. Keene*,

928 F.2d 707, 712 (5th Cir. 1991) (Texas statute); *Scales v. Miss. State Parole Bd.*, 831 F.2d 565, 565-66 (5th Cir. 1987) (per curiam) (Mississippi statute); *cf. Bosworth v. Whitley*, 627 So.2d 629, 633 (La. 1993) (Louisiana statute); *Monroe v. Thigpen*, 932 F.2d 1437, 1441 (11th Cir. 1991) (Alabama statute); *Gilmore v. Kan. Parole Bd.*, 756 P.2d 410, 414-15 (Kan. 1988) (Kansas statute). The same is true here.

The Board is unaware of a single state or federal court since *Allen*—and Petitioners certainly haven't provided one—that has found a liberty interest in a state parole statutory scheme that uses discretionary "may" language like Tennessee here. This case fits squarely within the holdings of *Greenholtz* and *Allen*.

In short, the Sixth Circuit's decision is simply the latest in an unbroken line of cases dating back 40 years applying *Greenholtz* and *Allen* to find that Tennessee has not created a liberty interest in parole. *Supra* 12. There is no good reason to revisit that decision given the court's faithful adherence to *Greenholtz* and *Allen* and the absence of any contrary approach.

III. This Court Has Oft-Denied Similar Petitions for Decades.

Since *Allen*, this Court has repeatedly denied review in cases where inmates challenge discretionary parole statutes on liberty interest grounds. Petitioners have failed to identify any changed circumstances warranting a different outcome here.

For example, in the wake of *Allen*, this Court denied review in *Sultenfuss*, a case about Georgia's parole system that involved virtually identical issues as

this case. *See* Petition for Writ of Certiorari, *Sultenfuss v. Snow*, 513 U.S. 1191 (1995) (No. 94-1178), 1995 WL 17048530, at *21-23, *26, *30.

And *Sultenfuss* is no outlier: Time and time again since *Allen*, this Court has denied review in cases where state and federal courts held that discretionary language did not create a liberty interest in parole. *See, e.g.*, *Moor*, 603 F.3d at 661-62, *cert. denied*, 562 U.S. 1049 (2010); *Straley*, 582 F.3d at 1212-13, *cert. denied*, 559 U.S. 991 (2010); *Hanrahan v. Williams*, 673 N.E.2d 251, 275-78 (Ill. 1996), *cert. denied*, 522 U.S. 812 (1997); *Sultenfuss*, 35 F.3d at 1503, *cert. denied*, 513 U.S. 1191 (1995); *Creel*, 928 F.2d at 712, *cert. denied*, 501 U.S. 1210 (1991); *Gilmore*, 756 P.2d at 414-15, *cert. denied*, 488 U.S. 930 (1988). Nothing has changed. Denial is warranted here, too.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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