No. **25-746**

In the Supreme Court of the United States

CARVIN 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

REPLY BRIEF FOR THE PETITIONERS

Paul Andrew Justice III
1902 Cypress Drive
Murfreesboro, TN 37130
(615) 419-4994
drew@justicelawoffice.com
Counsel for Petitioners

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REBUTTAL ARGUMENT

Mainly, the Board rests its whole argument on a misstatement of a statute. Falsely, it claims that the statute Tenn. Code Ann. § 40-28-101 only imposes guidance for how to treat inmates *after* release. In truth, the statute squarely says that inmates "shall" be released "whenever" the criteria from *Board of Pardons v. Allen* are met. *See* 482 U.S. 369, 376-77 (1987). Once we recognize that point, the Board's position simply fails. Also, the Board now cites *Jago v. Van Curen*, 454 U.S. 14 (1981), to say that no liberty interest can ever derive from a standard practice. Although the Petitioners haven't primarily based their argument on practice, anyway, they submit that the Board is misapplying the precedent beyond its intended scope.

To start, though, the Board simply never disputes that it always applies the statutes just as the Petitioners want. Namely, it only denies parole based on the four grounds from *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979). Granted, the Board offers one to three other grounds as possible disqualifiers, too. (*See* Brief in Opp., p. 11, 18-19), *citing* Tenn. Code Ann. § 40-35-503(c) and (g). But the Complaint already addressed those other grounds, explaining that the Board simply views them as *subcategories* of the original four, even labeling them as one of the four. (Pet. Appx. 45-46a, Am. Complaint ¶ 10 n. 2). Regardless, even if the Board really had seven disqualifiers instead of four, it would hardly change the constitutional rule. If

anything, having more specific criteria would only create more of a liberty interest, not less.

1. Liberty Interest by Standard Practice, or by Implication

According to the Board, the case of *Jago* precludes any liberty interest from arising by common understanding. *See* 454 U.S. 14; (Brief in Opp., p. 19). To be clear, the Board never cited this case in arguments below, thereby giving the Petitioners no occasion to address it until now. Simply put, *Jago* involved no widespread custom, nor any agreed reading of a statute. Instead, the "mutually explicit understanding" in *Jago* arose only from a single parole decision that was rescindable until finalized, and that got rescinded. *Id.*, at 20-21. Since state law allowed for rescission, the Court found no liberty interest — despite a common understanding that the release process had begun. *Id.* If a one-off promise could create a liberty interest in this way (similar to a contract, but without consideration), then any "myriad" of correctional decisions could only be countermanded by full hearing. *See id.*, at 19. It would make for an unworkable rule. *Id.*

In contrast, here the Board's widespread agreement with the Petitioner's statutory reading should count for something. Practically speaking, the situation is little different from *Mayes v. Trammell*, where the Board formally imposed on itself the four

Greenholtz criteria and the Sixth Circuit found a liberty interest. *See* 751 F.2d 175 (6th Cir. 1984). Even without a formal public regulation, still a standard practice can be analogous to policy. "Although not authorized by written law, . . . practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Monell v. New York City Dept. of Children's Services*, 436 U.S. 658, 691 (1978), *citing* 42 U.S.C. § 1983. Simply put, to adopt a statutory interpretation — for everyone — differs greatly from making "myriad" other promises that affect only a single inmate. *Cf. Jago*, 454 U.S. 14, at 19.

Legislative history objectively alludes to the Board's agreement on how to read the law. The Board has cited *Connecticut Board of Pardons v. Dumschat*, saying that only statutes should matter, not practices. *See* 452 U.S. 458, 467 (1981); (Brief in Opp., p. 19-20). Here, we have statutes that, at minimum, allude to a practice. In *Dumschat*, the court found no right to due process where the statutes "expressly" gave the board "unfettered dis]cretion" on clemency, even though the board actually awarded clemency for life sentences about three-forths of the time. *Id.*, at 460 and 465-66. Here, in contrast, the statutes do not "expressly" say what the Board wants.

Instead, recent amendments allude to the practice of denying parole only for the four disqualifiers. Most notably, in 2021 the Tennessee

General Assembly added Tenn. Code Ann. § 40-35-503(b)(2)(A).[1] This new law prohibits the Board (for certain crimes) from denying parole only for seriousness of the offense. The seriousness ground comes from *Greenholtz*. Hence, the amendment is acknowledging the Board's practice of denying parole only for those criteria. It is saying that for certain crimes, the Board may only deny for one of the *other* three disqualifiers. Would it make any sense to prohibit denial for seriousness of the offense, if the Board still had "unfettered discretion" to deny for any other ground that it may possibly dream up? *Cf. Dumschat*, 452 U.S. 458, at 460 and 465-66. No, it would not. Instead, this allusion to the *Greenholtz* framework supports the Petitioners' view.

Similarly, the enactment of Tenn. Code Ann. § 40-35-503(j), requiring a written reason for a denial, alludes to the same practice of denying only for the four disqualifiers.[2] On this point, the Board complains that the Petitioners have not explained how the requirement to give a reason could possibly signify any right to due process. (Brief in Opp., p. 18). Maybe the Petition just did not explain it well enough. But this Court has already explained it once before: "A state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds." *Dumschat*, 452 U.S. 458, at 467. If a state need not act on prescribed grounds, then it need not state a reason. Flipping this rule to its contrapositive: *If a state must state a reason, then*

1 2021 Tenn. Pub. Acts Chap. 410 ("Re-Entry Success Act")

2 Enacted as part of the same 2021 bill.

indeed it must act on prescribed grounds. And the prescribed grounds create the liberty interest. Simply put, the requirement to state a reason implies an expectation of parole.

2. Liberty Interest by Statute

Regardless of any custom or implication, the Petitioners' biggest argument is simply based on the statutes. Most notably, the statute Tenn Code Ann. § 40-28-101 uses language similar to *Allen*, 482 U.S. 369. Unfortunately, the Board seems unwilling even to acknowledge the language. (Likewise, the Sixth Circuit failed to address the full language of the statute, just as it failed to articulate the broad rule of *Allen*.) Misleadingly, the Board quotes or summarizes the statute only this way:

> It provides that probation and parole decisions "shall take into account ... individual characteristics, 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."

(Brief in Opp., p. 10) (emphasis added but otherwise unaltered), *citing* Tenn Code Ann. § 40-28-101. Later, the Board expressly denies that the word "shall" is even used for release at all. (*Id.*, at p. 22-23). The problem, though, is that the statute doesn't really

say, "Persons who *are* released shall be dealt with in the community." Nor does it even say anything particularly close.

Instead, the statute says in pertinent part: "[P]ersons convicted of crime . . . *shall* be dealt with in the community . . . *whenever* it appears desirable in light of the needs of public safety and their own welfare." Tenn. Code Ann. § 40-28-101(a) (emphases added). The release is mandatory, conditioned only on the same basic criteria as in *Allen,* 482 U.S. 369, at 376-77. There, the statute mandated release whenever a prisoner could live lawfully, and not harm himself or society. *Id.* Here the mandatory condition is similar. Unfortunately, the Board has now taken a statute that says individuals "shall" be released, "whenever" meritorious, and pretended that it only commands certain treatment of individuals who "are" already released. Granted, the full wording of the statute is convoluted. But the Board has not presented a fair reading.

CONCLUSION

The real statutory language creates a liberty interest. Further, the Board's standard practice of applying the *Greenholtz* framework, as acknowledged by recent statutory amendment, is also relevant to showing a liberty interest. The Court should grant certiorari and reverse.

Respectfully submitted,

Paul Andrew Justice III
Attorney for the Petitioners
1902 Cypress Drive
Murfreesboro, TN 37130
(615) 419-4994
drew@justicelawoffice.com