No. 16-898

In the Supreme Court of the United States

PATRICK J. WERNER, PETITIONER,

v.

EDWARD F. WALL, ET AL.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the Seventh Circuit's fact-bound holding that certain Wisconsin Court of Appeals decisions did not "clearly establish" that state officials were precluded from adopting a policy that permitted repeat sex offenders to avoid revocation of their supervised release, while still protecting the community.

2. Whether state officials violated the Eighth Amendment or the procedural aspects of the Due Process Clause when they adopted a supervisory policy that permitted repeat sex offenders to avoid revocation of their supervised release, while still protecting the community.

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INTRODUCTION

Wisconsin officials adopted a policy addressing a difficult situation: certain repeat sex offenders (known as SBN offenders) that were eligible for supervised release under state law were, as a practical matter, not able to comply with a critical condition of supervision; namely, obtaining housing consistent with the goal of public safety. Under this policy, SBN offenders could retain their supervised-release status and avoid revocation proceedings while they searched for housing during the day. But, in order to protect the public, these SBN offenders would need to spend their evenings in county jails. In 2015, state officials repealed that policy and replaced it with a different approach to this difficult situation.

Through his present petition, Petitioner seeks to resuscitate his 42 U.S.C. § 1983 damages action against the state officials who adopted and enforced this policy before 2015. Petitioner's entire submission to this Court is that the Seventh Circuit below incorrectly decided that certain decisions from the Wisconsin Court of Appeals—dealing with a different situation where inmates are not released from prison into supervisory status—did not "clearly establish[ ]" the illegality of the pre-2015 policy, for purposes of a qualified-immunity analysis. Notably, Petitioner does not argue that the caselaw from any other jurisdiction, including this Court or the Seventh Circuit, clearly established the illegality of the program or any program like it. Nor would such an argument have

been valid, as the legality of the program of the sort Wisconsin had implemented appears to be a question of first impression.

Given that Petitioner is seeking only splitless error correction relating to a program that has already been repealed, based entirely upon a contested understanding of certain Wisconsin state-court decisions, his Petition should be denied.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Seventh Circuit (Appendix A) is available at 836 F.3d 751. The opinion of the United States District Court for the Eastern District of Wisconsin (Appendix B) is unreported, but is electronically available at 2014 WL 1271760. The screening order of the United States District Court for the Eastern District of Wisconsin (Appendix C) is not publicly available.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 1, 2016. App. 1. The Court of Appeals denied a timely petition for rehearing en banc on October 20, 2016. App. 83–84. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. State Law Background

1. Convicted criminals in Wisconsin are commonly granted community supervision in lieu of incarceration, at least for part of their sentences,[1] under the supervision of the Wisconsin Department of Corrections (DOC). *See* Wis. Admin. Code § DOC 328.03(10); *see also* DOC, Probation and Parole, http://doc.wi.gov/community-resources/probation-parole (noting that there are over 68,000 offenders currently under community supervision). Criminals under community supervision are subject to certain mandatory conditions and may have their supervision revoked if they violate those conditions. *See e.g.*, Wis. Stat. § 304.06(3). When DOC learns that an individual on community supervision may have violated the conditions of supervision, DOC can take custody of that person in preparation for revocation proceedings. Wis. Admin. Code § DOC 328.27(2). DOC must hold a preliminary hearing on the alleged violation within 15 working days of taking custody of the individual and a final hearing within 50 days. Wis. Stat. § 302.335(2)(a)–(b).

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[1] "Community supervision" encompasses probation, parole, and other forms of extended supervision. *See* Wis. Admin. Code § DOC 328.03(10).

When DOC learns that an individual may have violated the terms of supervision, DOC will investigate and then make a recommendation. *See* Wis. Admin. Code § DOC 331.03. DOC will then notify the individual of the results of the investigation and recommendation, as well as the individual's rights to a hearing. *Id.* § DOC 331.04. If revocation is recommended, a magistrate will conduct an initial hearing to determine whether there is probable cause to believe that a violation has occurred. *Id.* § DOC 331.05. If the magistrate finds probable cause, the division of hearings and appeals will hold a final revocation hearing. *Id.* § DOC 331.06; *id.* ch. HA 2. If the hearing examiner determines that supervision should be revoked, the individual will be incarcerated. *See* Wis. Stat. § 304.06(3).

2. Wisconsin law understandably treats repeat sex offenders under community supervision with special precaution. When such an offender is released to community supervision, DOC must "notify the police chief of any community and the sheriff of any county in which [an individual who has been convicted of two or more sex crimes] will be residing, employed, or attending school and through or to which the person will be regularly traveling." Wis. Stat. § 301.46(2m)(am)(1). These offenders are known as "Special Bulletin Notification" or "SBN" offenders. Dkt. 94 ¶ 5; App. 46. Many sex offenders on community supervision are also required to register and to submit to GPS monitoring. *See* Wis. Stat. §§ 301.45 & 301.48.

Most important for this case, repeat sex offenders on community supervision must secure appropriate housing. App. 86. This housing requirement is reasonable given the high risk of SBN offender recidivism. App. 4. An offender's residence must be approved by the offender's parole agent, must comply with all local ordinances and rules pertaining to sex offenders, and must contain the infrastructure necessary for supervision such as a landline for charging GPS tracking. *See* Dkt. 94 ¶¶ 16–18; App. 4–5, 49.

3. In 2002, the Division of Community Corrections (DCC), a division of the DOC, promulgated an Administrative Directive, AD #02-10, "Procedures for SBN Offenders Lacking Approved Residences," which created a program for SBN offenders who could not comply with the housing condition of their community supervision. App. 85–91. Realizing that the procurement of approved housing would be difficult for some SBN offenders, DCC created AD #02-10 to help these individuals avoid violating the terms of their supervision and thereby being subjected to immediate revocation proceedings. App. 87; *see* Wis. Admin. Code § DOC 328.27(2)(d) (formerly Wis. Admin. Code § DOC 328.22(2)9(d)).

The program operated entirely after SBN offenders had been released from prison to supervised release. App. 86. For SBN offenders who failed to obtain approved housing by 5:00 p.m. on the day of their release from prison, they were required to return to the county jail overnight, to "be released from

custody the next workday to continue to search for an approved residence." App. 87. During the day, AD #02-10 permitted these offenders to conduct an "unfettered" search for housing, during which they were monitored only by a chaperone, not a parole agent, and could leave the physical presence of the chaperone so long as they remained within electronic-monitoring range. App. 87; App. 51–52. DCC staff made it a "high priority" to assist the offenders with their housing search, giving the offenders "priority consideration for any of DCC's contracted residential services in the county of release." App. 88.

SBN offenders subject to AD #02-10's terms were not state prisoners. They wore street clothes, met with potential landlords, made phone calls, and conducted personal errands, such as visits to family, the job center, Goodwill, the pharmacy, and the bank. Dkt. 94 ¶ 23; *see* App. 51–52. Of course, like all SBN offenders, individuals subject to AD #02-10 faced severe restrictions on their movement, including supervision by a chaperone, activity requests for anything outside of a housing or job search, as well as required treatment and polygraph tests. Dkt. 93 ¶ 25; Dkt. 94 ¶ 25. Unlike SBN offenders who already had obtained adequate housing, offenders under AD #02-10 typically lacked employment. Dkt. 93 ¶ 24; Dkt. 94 ¶ 24. However, nothing precluded them from updating their resumes or attending job interviews during work hours. Dkt. 93 ¶ 24; Dkt. 94 ¶ 24.

If offenders governed by AD #02-10 took issue with the evening detainment, they could simply refuse to cooperate and then be subject to revocation proceedings, as with any person who chooses not to cooperate with their terms of supervision. *See State ex rel. Riesch v. Schwarz*, 692 N.W.2d 219, 221 (Wis. 2005). In the wake of such a violation, DOC officials would investigate whether the violation could be substantiated and whether revocation should be recommended. Wis. Admin. Code § DOC 331.03. Under AD #02-10, offenders were also permitted to voluntarily return to prison at any time to continue the search for housing, with the promise of release on community supervision following procurement of housing (assuming they met all other conditions of supervision). App. 88.

Importantly, AD #02-10 governs offenders only for the length of the term to which they were sentenced upon conviction. Once that term expires, SBN offenders—like all other convicted criminals in Wisconsin—are entirely discharged from DOC custody. *See* Wis. Admin. Code § DOC 328.16; *Grobarchik v. Wisconsin*, 307 N.W.2d 170, 174–75 (Wis. 1981). If the State believes that some SBN offenders still continue to pose a risk to the public after the end of their terms, its only option is to initiate civil confinement proceedings. *See* Wis. Stat. ch. 980.

4. On March 1, 2015, DCC promulgated AD #15-12, which reverses AD #02-10 and permits SBN offenders to remain on community supervision without

securing an approved residence or needing to return to the county jail in the evenings. App. 99–106. AD #15-12 still requires SBN offenders to be monitored by GPS, but this no longer requires a home address. App. 103–04. Offenders must provide their agent with an emergency-contact person, must meet with their agent weekly and provide their agent with "the location(s) in the city and state where [they] ha[ve] been frequenting and sleeping for the previous seven days and plans for the next seven days," which must be verified by the GPS records. App. 104–05.

B. Factual Background

1. In 1999, Petitioner pleaded no contest in the Brown County Circuit Court to second-degree sexual assault of a child and attempted child enticement, for which he was sentenced to ten years in prison, with an additional ten years of consecutive community supervision in the form of probation. Dkt. 91-3; 91-4; App. 3. Petitioner's mandatory release date was set for March 21, 2010. App. 2. Because Petitioner committed more than one sex offense, he was an SBN offender. App. 4; *see* Wis. Stat. § 301.46(2m)(am). That meant that Petitioner was required to be initially placed in his county of conviction—Brown County, Wisconsin. App. 4; *see* Wis. Stat. § 301.03(20)(a). Brown County had over a dozen sex-offender ordinances in effect at the time Petitioner was released. App. 5–6.

As with all SBN offenders, Petitioner's conditions of supervision required that he obtain approved housing. Dkt. 91-7:1–3; Dkt. 94 ¶ 17. Petitioner's DCC agent, Agent Amanda Martin, investigated numerous potential residences; however, none offered the infrastructure necessary to supervise SBN offenders. App. 9–10. Because Petitioner could not find suitable housing, he would have been in immediate violation of the conditions of his supervision on his mandatory release date. Anticipating continued difficulties with locating housing for a heavily supervised SBN offender, Agent Martin notified Petitioner that AD #02-10 may be implicated following his release and explained to Petitioner that, if he was still unable to procure adequate housing after his mandatory release date, AD #02-10 would enable him to remain on supervised release despite his non-compliance with the conditions of his release. App. 48.

On March 16, 2010, DCC transferred Petitioner from prison to the DCC office in Brown County. App. 10. There, he commenced community supervision, signing the rules of supervision and standard sex-offender rules. App. 10. After failing to procure adequate housing by close of business on the day of his release, DCC booked Petitioner into the Brown County Jail, as set forth in AD #02-10, to prevent a violation of his rules of supervision. App. 10, 50. DCC released Petitioner to a chaperone the following morning, on the condition that he return to the Brown County Jail in the evening if he failed to acquire approved housing. App. 10, 51. During the day, DCC

permitted Petitioner to conduct a wide array of personal errands. App. 51–52. Pursuant to AD #02-10, this process continued—subject to one intervening incident in which Petitioner was transferred to Columbia Correctional Institution for 90 days for violating other terms of his release, App. 52—until Petitioner found suitable housing and moved there on July 1, 2011. App. 11, 53–54.

In November 2011, Petitioner again violated the terms of his supervision by, among other misconduct, having sex with an adult female he met on a telephone chat line. App. 11, 54. On April 23, 2012, Petitioner's community supervision was revoked and he was returned to prison. App. 11, 54.

On November 16, 2012, Petitioner was again released to community supervision and placed at a Temporary Living Program (TLP) in Green Bay, Wisconsin. App. 11, 54. This option was now available to Petitioner because, on August 25, 2012, the City of Green Bay implemented revised stipulations to its ordinances allowing for registered sex offenders, like Petitioner, to move directly to a TLP in Green Bay without prior approval from the appeals board. App. 11–12 n.11, 54. Residing in a TLP offered Petitioner a temporary housing arrangement while he sought a permanent residence and exempted him from participation in AD #02-10. Dkt. 92 ¶ 13, 16. Petitioner was placed on GPS monitoring, enrolled in sex-offender treatment, and reported weekly to his agent's office. App. 54–55.

On February 15, 2013, Petitioner again violated his supervision conditions by, *inter alia*, sending a sexually explicit message to a 16-year-old girl. App. 11–12. The State revoked Petitioner's supervision, and he is currently incarcerated at the Oshkosh Correctional Institution. App. 12. If Petitioner is released from prison, AD #02-10 would not apply to him because it has been replaced by AD #15-12. App. 99–106. Furthermore, due to the recent change in the Green Bay ordinances, the DCC would be able to place Petitioner at the TLP. *See* App. 54–55.

2. On January 31, 2012, Petitioner filed a § 1983 complaint, pro se, in the United States District Court for the Western District of Wisconsin, against state officials who had designed and enforced AD #02-10. Dkt. 1. On March 27, 2014, the district court issued its order granting Respondents' motion for summary judgment and denying Petitioner's motion for summary judgment. App. 43–62. The court found that Petitioner's claims for injunctive relief were moot, as he was no longer subject to AD #02-10 and there was no "realistic probability" that he would be subjected again to any similar program. App. 59. With respect to Petitioner's remaining claims for compensatory damages under the Eighth Amendment and the Due Process Clause, the court held that Respondents were entitled to qualified immunity because, at the time of the alleged violations, "no case law . . . suggested [that AD #02-10] violated the SBN sex offenders' constitutional rights." App. 58.

3. On appeal, the Seventh Circuit upheld the district court's decision, agreeing that the Respondents were entitled to qualified immunity. The court declined to address whether Petitioner had shown facts sufficient to establish a constitutional violation, finding this to be "a difficult question" and describing the law in this area as "shifting sands of present-day case authority." App. 17. The court also believed that Petitioner's claim would be better analyzed under substantive due process, a theory that Petitioner did not assert. App. 20–21. The court rejected the argument that certain Wisconsin Court of Appeals decisions had already clearly predetermined the constitutionality of AD #02-10, by pointing to the Supreme Court of Wisconsin's subsequent decision in *Riesch*, 692 N.W.2d 219, which held that prisoners did not have to be released into the community on their mandatory-release date when they "immediately and simultaneously" violated the terms of their supervision on that date. App. 27 (quoting *Riesch*, 692 N.W.2d at 223). "[T]he Wisconsin Supreme Court was cognizant of the practical difficulties that can arise when release itself conflicts with the 'substantial discretionary authority' that DOC has 'to develop the rules and conditions for releas[ing]' a person to supervision." App. 29 (quoting *Riesch*, 692 N.W.2d at 225). This meant that the law in Wisconsin did not clearly establish that AD #02-10 was unconstitutional, thus entitling the state officials to qualified immunity. App. 30.

Judge Hamilton dissented in part, concluding that the state officials responsible for creating AD #02-10 should not be entitled to qualified immunity because, under his view, decisions from the Wisconsin Court of Appeals had made clear that AD #02-10 was unlawful. App. 31–40. Judge Hamilton read the Wisconsin Supreme Court's decision in *Riesch* more narrowly, explaining that he believed it applied only to offenders who had engaged in misconduct. App. 32.

REASONS FOR DENYING THE PETITION

I. Petitioner's Request For Error Correction Should Be Rejected

Petitioner argues that the Seventh Circuit erred in concluding that the illegality of AD #02-10 was not clearly established, for qualified-immunity purposes, by certain Wisconsin Court of Appeals decisions. Pet. 18–23; *but see infra* pp. 15–22 (explaining why Petitioner is wrong on the merits). Petitioner's own framing demonstrates that the Petition should be denied as a simple request for error correction. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 352 (10th ed. 2013). Indeed, Petitioner concedes that the "Seventh Circuit majority cited [the correct]" rule for determining whether law is clearly established, but he argues that the Seventh Circuit majority misapplied that rule. Pet. 12. As this Court's rules explain, "[a] petition for a writ of certiorari is rarely granted when the asserted error [is] . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Petitioner's argument that this Court should engage in error correction here because this case involves qualified immunity is meritless. In the qualified-immunity context, in order for "a reasonable official [to] understand that what he is doing violates [a] right," the right "must have been 'clearly established' in a [ ] particularized . . . sense." *Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987). This Court has, from time to time, summarily reversed lower-court decisions that dishonored that principle by reading existing law too broadly to find that a rule was "clearly established." *See, e.g.*, *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305, 308–09 (2015) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194, 599 (2004) (per curiam). Nothing in these cases suggests that error correction in the qualified-immunity context should be a common practice. Rather, those cases merely stand for the proposition that courts' repeated failure to require a particularized showing of clearly established law before subjecting state officials to liability undermines the purposes of the qualified-immunity doctrine. *See White*, 137 S. Ct. at 552; *Mullenix*, 136 S. Ct. at 308; *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

More generally, Petitioner's attempt to equate the errors at issue in the denials-of-qualified-immunity context and the alleged error that the Seventh Circuit made here turns the doctrine of qualified immunity on its head. Petitioner cites no case to support his claim that not only must rules be particularized to be

"clearly established" so as to deny qualified immunity to a government official, the rule must also be particularized if the official is to have the benefit of qualified immunity. Pet. 12–18. To the exact contrary, unless a plaintiff can show a right is "'clearly established' in a [ ] particularized . . . sense," *Anderson*, 483 U.S. at 639–40, qualified immunity is appropriate. Vagueness and generality of the law militate *against* a finding that there is particularized, clearly established law. *Id*. Put another way, when the principles derived from the relevant caselaw do not make it clear that the claimed rule is clearly established—that is, the cases do not "squarely govern[ ]" the disputed issue, *Mullenix*, 136 S. Ct. at 310 (quotation omitted)—qualified immunity protects the state official.

II. AD #02-10 Violates No Clearly Established Law

A. Officials are entitled to qualified immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (citations omitted).

There is no "pre-existing" law that would have made it "apparent," *id.*, to Wisconsin officials that creating and enforcing a program like AD #02-10 would violate the Eighth Amendment or procedural due process, which are Petitioner's only claims that are still live. *See* App. 74–77, 59; Pet. 5. AD #02-10 sought to solve a particular problem: the State requires SBN offenders to obtain adequate housing as a condition of their supervision, but obtaining such housing can be difficult for some. AD #02-10 addresses this dilemma by creating an option under which SBN offenders who would otherwise be in violation of their supervision conditions can avoid revocation by returning to state custody in the evenings, to be released again the following day. During the day, SBN offenders under AD #02-10 have substantial rights, similar in many respects to a typical SBN offender: wearing street clothes, running errands, meeting potential landlords, seeing friends and family, and interviewing for jobs. *See supra* p. 6. While these individuals are closely supervised during the day, the same can be said for SBN offenders in general. *See* Dkt. 94, ¶ 25. Neither Petitioner nor the Seventh Circuit dissent referenced any case, from any court, ruling on the constitutionality of such an accommodating program.

So far as the State has been able to determine based upon its independent search, the closest any state supreme court or federal court of appeals has come to opining on the constitutionality of a program even remotely like AD #02-10 is the Illinois Supreme Court's decision in *Cordrey v. Prisoner Review Bd.*, 21

N.E.3d 423 (Ill. 2014). The program at issue in *Cordrey* is considerably *less* friendly to sex offenders than AD #02-10. While AD #02-10 gives SBN offenders the option of either having their supervisory release revoked or entering a modified program where they can go into the community to look for housing, interact with friends and family, look for a job during the day and return to custody at night, *see supra* pp. 5–6, the Illinois program in *Cordrey* appears to revoke supervised release immediately if the offender cannot find adequate housing at the release date, with no other options given to the offender, 21 N.E.3d at 425–26. Even so, the Illinois Supreme Court held that the constitutionality of that program—which, again, is far more restrictive than AD #02-10—did not involve any issue of "established [ ] clear right[s]." *Id.* at 431–32.[2] This, of course, strongly supports the Seventh Circuit's holding here that there was no clearly established law that AD #02-10 is unconstitutional.

In light of this paucity of caselaw on the difficult issue that Wisconsin state officials faced here—how to deal with repeat sex offenders who are unable to

[2] The Seventh Circuit also discussed Illinois' so-called "turnaround practice" in *Armato v. Grounds*, 766 F.3d 713 (7th Cir. 2014), but did not opine on the constitutionality of that program as applied to individuals who lack housing. Several federal district courts have also discussed this program, without ruling on issues directly relevant to this Petition. *See* App.19 n.24 (collecting cases).

find housing to comply with their conditions of supervision—the Seventh Circuit was entirely correct that those who created and enforced AD #02-10 were entitled to qualified immunity against Petitioner's constitutional challenges to this program.

B. Petitioner's entire argument to the contrary is based upon three Wisconsin Court of Appeals decisions. Petitioner does not argue that any decision—either from this Court, the Seventh Circuit, or any other federal court of appeals or state supreme court—clearly established the illegality of a program like AD #02-10. The reason for this lack of authority is that the program complies with all constitutional requirements, as explained *infra* pp. 22–27. And while there is considerable caselaw dealing with the rights of pretrial detainees held in state custody, App. 17 n.20, 20–21 (citing, *inter alia*, *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650 (7th Cir. 2012), and *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015)), and miscalculation of a convict's release date, App. 18 n.23, 20 n.25 (citing, *inter alia*, *Campbell v. Peters*, 256 F.3d 695 (7th Cir. 2001), *Scott v. Baldwin*, 720 F.3d 1034 (8th Cir. 2013), and *Sample v. Diecks*, 885 F.2d 1099 (3d Cir. 1989)), those cases do not govern the different issue that AD #02-10 deals with, and Petitioner does not argue to the contrary.

Petitioner relies entirely upon three Wisconsin Court of Appeals cases, but none "clearly establishes" the illegality of a program such as AD #02-10. These

three cases all deal with whether prisoners are entitled to be *released to supervision*, but were never so released. In *State ex rel. Woods v. Morgan*, 591 N.W.2d 922 (Wis. Ct. App. 1999), the State had transferred an inmate to a "minimum security correctional facility" on his release date. *Id.* at 923. The Wisconsin Court of Appeals held that this violated Wisconsin's statutes because Woods' "*status did not change*" and he "was [still] a prisoner." *Id.* at 925 (emphasis added). Similarly, in *State ex rel. Olson v. Litscher*, 608 N.W.2d 425 (Wis. Ct. App. 2000), a state prisoner had been transferred to a "minimum-security state penal institution" on his mandatory release date because the State "had been unable to locate a residence for [him]." *Id.* at 426–27. The Wisconsin Court of Appeals again held that this violated Wisconsin's statutes. *Id.* Finally, in *Allen v. Guerrero*, 688 N.W.2d 673 (Wis. Ct. App. 2004), the Wisconsin Court of Appeals held that failing to release a prisoner to parole on his mandatory release date violated "clearly established" federal constitutional rights. *Id.* at 690–92. Because the State had not released the offender to parole at all, but instead moved him to a minimum-security prison, the court held that the State had violated clearly established constitutional rights under *Olson* and *Woods*. *Id.* at 692.

The situation that AD #02-10 deals with is different from the statutory issues that *Woods* and *Olson* addressed, or the constitutional issues that *Allen* discussed. In each of those three cases, the infirmity was that the prisoner was *never released to supervision at*

all, but remained in a state prison. In contrast, SBN offenders governed by AD #02-10 *are already released from prison*, *see* App. 75, 76–77, but are—as a practical matter—unable to comply with the mandatory conditions of their supervision. AD #02-10 reasonably and fairly gives released SBN offenders a way to avoid being subjected to immediate revocation proceedings: take part in a modified program where they are in custody at local jails in the evenings until they can find adequate housing. Nothing in *Woods*, *Olson*, or *Allen* clearly establishes, with the necessary particularity to overcome qualified immunity, that providing this choice is unlawful. *White*, 137 S. Ct. at 552–53; *Ashcroft*, 563 U.S. at 743.

If there remained any doubt that *Woods*, *Olson*, or *Allen* do not forbid tailored programs like AD #02-10, the Supreme Court of Wisconsin dispelled that doubt in *Riesch*, 692 N.W.2d 219, as the Seventh Circuit below cogently explained. App. 26–30. There, DOC released the prisoner into supervision, but the prisoner refused to comply with the conditions of his release. *Riesch*, 692 N.W.2d at 221. The court held that DOC's policy of immediately seizing custody of such prisoners was lawful, explaining that "DOC has substantial discretionary authority to develop the rules and conditions for release." *Id.* at 225. The court added that "[w]here inmates violate the [supervised release] terms immediately and simultaneously with their scheduled mandatory release dates, the DOC should be able to maintain continuous custody, *even though that person's status changes . . . to [ ] parolee*." *Id.* at

225–26 (emphasis added). Thus, even though prisoners have a right to release to parole on their mandatory release date under *Woods* and *Olson*, *Riesch* held that those prior cases did not foreclose DOC from developing programs that deal with the difficult situation of prisoners that are released from custody to supervision, but who cannot (at least yet) comply with mandatory conditions of supervision. That is precisely the sort of program that state officials developed when they adopted AD #02-10.

Petitioner argues that *Riesch* is distinguishable from this case because the offender there "'stubbornly refuse[d]' to comply with his rules of supervision." Pet. 11 (quoting 692 N.W.2d at 224). But the Supreme Court of Wisconsin did not hold that its decision was premised on purposeful misconduct; rather, the court recognized DOC's "substantial discretionary authority to develop the rules and conditions for release" "[w]here inmates violate these terms immediately and simultaneously with their scheduled mandatory release dates." *Riesch*, 692 N.W.2d at 225–26. While the court did observe that DOC is "not free to hold inmates *indefinitely* for such problems as failure to find suitable housing on its part," *id.* at 225 (emphasis added), it did not hold or even suggest that DOC lacked discretion to develop reasonable rules such as AD #02-10, which are specifically designed to help the SBN offender obtain housing so that they can avoid revocation proceedings. At the very minimum, in light of *Riesch*, it was not "clearly established" in

Wisconsin that an accommodation like AD #02-10 is constitutionally forbidden.

III. AD #02-10 Comports With The Eighth Amendment And The Procedural Aspects Of The Due Process Clause

Even putting the "clearly established" question aside, there was no constitutional violation here. While he does not address these issues specifically in his Petition, Petitioner below raised claims under the Eighth Amendment and the procedural aspect of the Due Process Clause of the Fourteenth Amendment. These arguments are meritless.

A. AD #02-10 comports with the Eighth Amendment. That Amendment protects against "tortures and other barbarous methods of punishment" and "punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citations omitted). This includes "penalties that are grossly disproportionate to the offense." *Hutto v. Finney*, 437 U.S. 678, 685 (1978). "Confinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment." *Id*. Yet, AD #02-10 does not involve any grossly disproportionate or otherwise inhumane punishment. It merely offers SBN offenders who cannot comply with their terms of supervision with a way to avoid violation and possible revocation. There is nothing "incompatible with the evolving standards of decency" about offering

offenders that additional option. *See Estelle*, 429 U.S. at 102.

Relatedly, some of the federal courts of appeals have applied Eighth Amendment concepts when adjudicating claims that a prisoner's constitutional rights were violated when they were kept in prison past their mandatory release date, such as with miscalculation of good-time credits or misinterpretation of sentencing orders. *See Campbell*, 256 F.3d at 700; *Moore v. Tartler*, 986 F.2d 682, 685–86 (3d Cir. 1993). However, this caselaw does not apply to Petitioner's claim, as Petitioner *was* released to community supervision by his mandatory release date. *See* App. 75, 76–77. The fact that AD #02-10 permitted Petitioner to avoid violating his terms of supervision by returning to a local jail in the evenings is not at all analogous to a convict whose miscalculated good-time credits kept him in prison beyond his term.

B. In deciding whether a regulation violates procedural due process, a court must consider three factors: "[1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Application of these factors to Petitioner's case results in the conclusion that AD #02-10 complies with procedural due process.

First, AD #02-10 did not prejudice Petitioner's private interests in any respect. Petitioner was entitled only to the conditional liberty of a convict on supervised release—and to that only so long as he "substantially abide[d] by the conditions of his" terms of supervision. *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972). Petitioner was released from prison on his mandatory release date, subject to certain conditions. *See* App. 50. One of those conditions was that Petitioner have suitable housing, as the State had determined that any sex offender "[l]acking a residence is unacceptable as a supervision strategy." App. 94. Designating the acquisition of appropriate housing as a condition of supervised release is entirely within the State's purview. *Bd. of Pardons v. Allen*, 482 U.S. 369, 377 n.8 (1987). Since Petitioner failed to comply with that condition, he was lawfully subject to immediate supervision-revocation proceedings. *See* Wis. Admin. Code § DOC 331.03; *accord Riesch*, 692 N.W.2d at 225–26. That AD #02-10 provided Petitioner with a reasonable option to avoid such revocation proceedings—all while being able to look for housing, interact with friends and family, and interview for jobs—benefits, rather than harms, Petitioner's legitimate interests.

Second, "risk of an erroneous deprivation of such interest through the procedures used" does not support Petitioner's theory. Petitioner could have availed himself of the full panoply of rights available to all those who enter Wisconsin's supervised-release revocation proceedings, *see* Wis. Stat. § 302.335, Wis. Admin. Code §§ DOC 331.03–.06, such as the convict in *Riesch* did, 692 N.W.2d at 221. Petitioner makes no argument that those procedures are inadequate in any constitutional respect. AD #02-10 merely allows Petitioner to avoid these procedures by taking advantage of an offender-friendly accommodation. There is no credible argument that providing this additional option, on top of entirely sufficient procedural safeguards under the supervised-release revocation protocol, in any way increases the risk of erroneous deprivation.

Third, the State's interest in providing SBN offenders a chance to avoid violating their conditions of supervision is substantial. The State has a substantial interest in fashioning the terms and conditions of supervised release, including creating means for satisfying those conditions in appropriate cases. *See Bd. of Pardons*, 482 U.S. at 377 n.8. The State must be accorded "due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner v. Jones*, 529 U.S. 244, 252 (2000). AD #02-10 promotes these substantial interests by providing convicts with a path for avoiding revocation proceedings and assisting them in finding

suitable housing, all while protecting the public's safety.

C. Of course, as the Wisconsin Supreme Court explained in *Riesch*, if the inmate believes that the supervision rules *themselves* are "either arbitrary or unreasonable," the inmate could challenge those rules. *See Riesch*, 692 N.W.2d at 225 n.7. Here, that challenge would presumably have been that requiring repeat sex offenders to obtain housing in order to comply with their conditions of supervised release is unconstitutional, despite AD #02-10. But, as the Seventh Circuit explained, such a challenge would likely sound in *substantive due process*, which is a claim that Petitioner did not bring here. App. 21.

In any event, any substantive due-process challenge would be meritless. There is nothing "arbitrary" or conscience-shocking, *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), about the interests underlying both the residency requirement and AD #02-10, or the means that the residency requirement and AD #02-10 employ to achieve those interests. The State has a considerable interest in ensuring that SBN offenders are not released into the community unless they can be adequately supervised. *See United States v. Knights*, 534 U.S. 112, 120–121 (2001); *Morrissey*, 408 U.S. at 477–79, 483. Hardly arbitrary, AD #02-10 was a conscious and measured attempt to reconcile a need to protect the public with the difficult housing circumstances SBN offenders faced, while still promoting offenders' rehabilitation by permitting

them to retain many of the freedoms of community supervision despite their failure to abide by their housing conditions. *Supra* pp. 5–6.

IV. This Case Is A Poor Vehicle For Deciding The Underlying Constitutional Issues

Petitioner argues that this case is a "perfect opportunity" to address the underlying issue of harsh local-residency restrictions for sex offenders in some parts of the country. Pet. 30. But this case involves a challenge to an already repealed program, the constitutionality of which is a question of first impression, in a qualified-immunity posture. *Supra* pp. 7–8, 15–22. Indeed, Petitioner does not allege that any other State has a program like AD #02-10. So even if this Court wishes to consider the alleged problem of residency restrictions for sex offenders, this case is a poor vehicle for undertaking that analysis. Rather, as Petitioner himself suggests, Pet. 26–27, cases like *In re Taylor*, 343 P.3d 867 (Cal. 2015), which address the constitutionality of residency restrictions themselves, would appear to be a more appropriate target. *See generally* Marjorie A. Shields, Annotation, *Validity of Statutes Imposing Residency Restrictions on Registered Sex Offenders*, 25 A.L.R.6th 227 (2007).

Additionally, both the record and the arguments at issue are underdeveloped, further militating against granting review. *See Ellis v. Dixon*, 349 U.S. 458, 464 (1955). This case comes to this Court on a

grant of summary judgment, Dkt. 120, after the parties engaged in minimal fact-finding, *see* Dkt. 89, 113. And, as the Seventh Circuit pointed out below, App. 20–21, Petitioner did not raise a substantive due-process challenge to AD #02-10 at all, even though that is—at least arguably—the most closely analogous doctrine to deal with the objections that Petitioner raises.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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