No. 16-898

In the Supreme Court of the United States

PATRICK J. WERNER,
Petitioner,
v.

EDWARD F. WALL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY 1

I. Clearly Established Law Required Mr. Werner's Release from Custody, Not Just from Prison 1

II. The Majority's "Aggressive Reading" of *Riesch* Violates This Court's Qualified Immunity Precedent 5

III. The State Violated Mr. Werner's Constitutional Rights 7

IV. This Case is Part of a Larger National Problem that Needs to be Addressed by the Court 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Allen v. Guerrero,
688 N.W.2d 673 (Wis. Ct. App. 2004) . . . 1, 2, 3, 4

Armato v. Grounds,
766 F.3d 713 (7th Cir. 2014) 8

Armstrong v. Squadrito,
152 F.3d 564 (7th Cir. 1998) 9

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 9

Davis v. Hall,
375 F.3d 703 (8th Cir. 2004) 9

Elder v. Holloway,
510 U.S. 510 (1994) 12

Gonzalez v. Annucci, __ N.Y.S. 3d __, No. 521458,
2017 WL 1082949 (N.Y. App. Div. Mar. 23,
2017) 11

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 6

Haygood v. Younger,
769 F.2d 1350 (9th Cir. 1985) 8

Kingsley v. Hendrickson,
135 S. Ct. 2466 (2015) 9

McNeil v. Director, Patuxent Inst.,
407 U.S. 245 (1972) 9

Salazar-Limon v. City of Houston,
__ U.S. __, No. 16-515, 2017 WL 1427676
(Apr. 24, 2017) 6, 7

Sample v. Diecks,
885 F.2d 1099 (3d Cir. 1989) 8

State v. Dinkins,
810 N.W.2d 787 (Wis. 2012) 8, 9

State ex rel. Olson v. Litscher,
608 N.W.2d 425 (Wis. Ct. App. 2000) . . . 1, 2, 3, 4

State ex rel. Riesch v. Schwarz,
692 N.W.2d 219 (Wis. 2005) 2, 4, 5

State ex rel. Woods v. Morgan,
591 N.W.2d 922 (Wis. Ct. App. 1999) . . . 1, 2, 3, 4

Tolan v. Cotton,
134 S. Ct. 1861 (2014) 6

U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993) 10

White v. Pauly,
137 S. Ct. 548 (2017) 5

STATUTES

Wis. Stat. § 301.45(1g)(b) 8

Wis. Stat. § 301.45(2)(f) 8

OTHER AUTHORITIES

Alcantara v. Annucci, No. 002534-16 (Albany Civil Supreme Ct.) 11

William Baude, *Is Qualified Immunity Unlawful?* 106 CALIFORNIA LAW REVIEW (2018 Forthcoming); Univ. of Chicago, Public Law Working Paper No. 610 (last revised Mar. 28, 2017), *available at* https://ssrn.com/abstract=2896508 6

Joseph Goldstein, *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, Aug. 22, 2014, at A18, NEW YORK TIMES, *available at* https://www.nytimes.com/2014/08/22/nyregion/with-new-limits-on-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html 11

Murphy et. al v. Madigan et al., No. 1:16-cv-11471, ECF. No. 1 (N.D. Ill.) 11

Christie Thompson, *For Some Prisoners, Finishing Their Sentences Doesn't Mean They Get Out*, THE MARSHALL PROJECT (May 5, 2016), *available at* https://www.themarshallproject.org/2016/05/24/for-some-prisoners-finishing-their-sentences-doesn-t-mean-they-get-out#.9rgxPVm8z 11

REPLY

The State does not dispute that it incarcerated Patrick Werner 378 days beyond his mandatory release date because he was homeless. A combination of strict local ordinances and wary landlords had left him without housing, and on this basis alone the defendants jailed him for over a year. Clearly established law held at the time that this was illegal. The defendants therefore are not entitled to qualified immunity. This Court's saying so would make clear to lower courts across the country that, when defining the relevant law, they must do so in a neutral fashion, and not "aggressively" in a misguided effort to protect public officials from suit, as the lower court did here. This would be to the benefit of plaintiffs and public officials alike in the long run, and continue a project this Court started three years ago to correct for the asymmetry in its qualified-immunity caselaw—an asymmetry that, as one prominent scholar and some members of this Court have recently suggested, tends to over-protect public officials who violate the constitutional rights of the individuals they are sworn to serve and protect.

I. Clearly Established Law Required Mr. Werner's Release from Custody, Not Just from Prison.

1. By the time Mr. Werner reached his mandatory release date, three Wisconsin appellate decisions had ruled out incarceration as a valid method for monitoring homeless sex offenders. *State ex rel. Woods v. Morgan*, 591 N.W.2d 922 (Wis. Ct. App. 1999); *State ex rel. Olson v. Litscher*, 608 N.W.2d 425 (Wis. Ct. App. 2000); *Allen v. Guerrero*, 688 N.W.2d 673 (Wis. Ct. App.

2004). Indeed, by 2004—several years before Mr. Werner's mandatory release date—"no reasonable public official could have believed that . . . continued detention" beyond a prisoner's mandatory release date "was constitutionally permissible." *Allen*, 688 N.W.2d at 680.

The Wisconsin Supreme Court has agreed with this line of caselaw. In 2005 it reaffirmed the essential holding in the *Woods-Olson-Allen* trilogy, no less in the very case that underpins the majority's decision below: *State ex rel. Riesch v. Schwarz*, 692 N.W.2d 219 (Wis. 2005). There the court stated that "the 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). Inmates who are homeless as of their mandatory release date, by no fault of their own, must be freed.

It's true, as Judge Hamilton noted below, that the unique facts in *Riesch* required the court to craft a narrow exception to this rule, namely, that the DOC may continue to detain inmates who "'stubbornly refuse[] to cooperate with the department's efforts to implement a suitable supervision plan.'" Pet. App. 39 (quoting *Riesch*, 692 N.W.2d at 224). But it's equally true, as Judge Hamilton also noted, that the exception for recalcitrant inmates does not swallow the rule: "At least after *Woods*, *Olson*, and *Allen*, and certainly in light of the distinction drawn in *Riesch*, reasonable policy-making officials could not have believed that they were authorized to keep offenders like Werner in jail after their mandatory release dates." *Id.*

2. The defendants nonetheless argue that Mr. Werner's incarceration complied with this clearly established law. They say that although he remained in custody, he was nonetheless technically "released," albeit from state prison to a county jail. Opp'n Br. 20, 23. But not even the majority below rationalized what happened here in such Kafkaesque terms, and for good reason—it makes a mockery of the controlling caselaw.

In arriving at its release rule, the Wisconsin Court of Appeals did not distinguish between state prisons and county jails, but between *custody* and *release on parole*: "[c]ustody is distinct from parole because custody involves 'incarceration, or deprivation of liberty' while parole concerns 'the conditional privilege of freedom and liberty.'" *Woods*, 591 N.W.2d at 925 (citation omitted). Notably, the *Woods* court made this statement in a case involving a prisoner who was transferred to a state minimum security correctional facility where he "was permitted to leave [the facility] with his parole agent" and "move outside . . . with an escort," much in the same way that Mr. Werner was permitted to leave jail for short stints to look for housing with a chaperone. *Id.* at 923, 925. But despite Mr. Woods's occasional "release," the court held that he had remained "in custody" throughout, for there was "no indication that he was granted the conditional liberty of a parolee." *Id.* at 925.

Olson and *Allen* similarly make clear the law requires not just release from prison, but release from custody—that is to say, *release in fact*. *Olson*, 608 N.W.2d at 427 ("[N]othing in either the administrative code or the statutes . . . authorizes [officials] to *detain* Olson beyond his mandatory release date." (emphasis

added)); *Allen*, 688 N.W.2d at 680 (prohibiting "continued detention"). The Wisconsin Supreme Court's decision in *Riesch* only reinforces this understanding of the law. There the court reaffirmed *Woods*, *Olson*, and *Allen* in the context of a case involving a sex offender who was to be transferred from a state prison to a county jail—just like Mr. Werner here. *Riesch*, 692 N.W.2d at 225, 222.

The State never released Mr. Werner from custody during the 378 days in question. He remained a detainee throughout, without the conditional liberty due a parolee. Even so, the defendants say, Mr. Werner had "substantial rights, similar in many respects to a typical SBN offender . . . ." Opp'n Br. 16. But the defendants' characterization of Mr. Werner's extra year in jail bears little resemblance to reality. Mr. Werner sat in jail for 148 out of 168 hours a week. And in that time he had to wear a jail uniform, he had to sleep in a locked cell, and he could not possess such common items as a bowl and spoon. E.D. Wis. Dkts. 91, ¶ 31; 91-1, p. 33-34.

For the remaining 20 hours each week his movement and activities were severely limited. Contrary to the defendants' assertion, Mr. Werner could not get a job during this time because the jail offered no work-release privileges, and his parole agents discouraged him from seeking employment. E.D. Wis. Dkts. 89, ¶ 93; 91, ¶ 29; 91-1, p. 31. This in turn made it all the more difficult for Mr. Werner to find housing; because Mr. Werner lacked employment, many landlords wouldn't rent to him. E.D. Wis. Dkt. 91-1, pp. 31, 34.

These conditions in no way approximated the freedom Mr. Werner would have experienced had he actually been released to parole. Release to jail isn't release at all; it's just incarceration by another name.

3. The defendants make much of the lack of federal precedent addressing a policy like AD 02-10, but that proves little. Courts look to *all* of the relevant law when determining whether controlling law is clearly established, including state law, as the majority opinion below notes. Pet. App. 22-23 & n.28. Even the majority understood that Wisconsin state appellate decisions could clearly establish the relevant law. It just thought, albeit incorrectly, that one of those state decisions undercut three others.

* * *

Clearly established law forbade the precise conduct at issue here. *Riesch* only confirms this.

II. The Majority's "Aggressive Reading" of *Riesch* Violates This Court's Qualified Immunity Precedent.

The majority opinion below rests on an ambiguity in the controlling law manufactured by an "aggressive reading" of *Riesch*. Pet. App. 30. By reading the controlling law in an "aggressive" way, and not in a fair and neutral way, the majority deviated from this Court's growing line of cases, holding that courts may not define clearly established law "at a high-level of generality" or fail to "particularize" that law to "the facts of the case." *E.g.*, *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (citations omitted). As these and other cases emphasize, lower courts must engage in an "objective" reading of clearly established law, not

an "aggressive" one. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

Although the Court's qualified immunity precedent is clear, in application it tends to skew in favor of officials and against plaintiffs. As one prolific scholar has recently observed, "nearly all of the qualified immunity cases come out the same way—by finding immunity for the officials." *See* William Baude, *Is Qualified Immunity Unlawful?* 106 CALIFORNIA LAW REVIEW (2018 Forthcoming); Univ. of Chicago, Public Law Working Paper No. 610, at 39-40 (last revised Mar. 28, 2017), *available at* https://ssrn.com/abstract=2896508. This has created an "asymmetry" in the Court's qualified immunity jurisprudence that "makes it hard to find a roadmap to the denial of immunity that could give a lower court confidence in its conclusion . . . [and] harder for [a] lower court to know for sure what a violation of clearly established law is supposed to look like." *Id. See also Salazar-Limon v. City of Houston*, __ U.S. __, No. 16-515, 2017 WL 1427676, slip op. at 9 (Apr. 24, 2017) (Sotomayor, J., dissenting from the denial of cert.) (lamenting that the Court "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity" (citations omitted)).

The Court began the project of rebalancing its qualified immunity jurisprudence in *Tolan v. Cotton*, 134 S. Ct. 1861 (2014). There, the Court summarily reversed the Fifth Circuit for failing "to view the evidence at summary judgment in the light most favorable to [the victim] with respect to the central facts of th[e] case." *Id.* at 1866. Mr. Werner's case provides the Court with an ideal opportunity to continue this project. Just as overgeneralizing from the controlling

caselaw can provide public officials with too little protection for their actions, it can also provide them with too much protection, as this case amply demonstrates. A summary reversal here would encourage lower courts to be more mindful of this danger.

One final point here. Mr. Werner does not argue that a governing "rule must . . . be particularized if the official is to have the benefit of qualified immunity." Opp'n Br. 15. Rather, when the law is clearly established, it should be interpreted and applied in a neutral, objective manner to the potential benefit of both the plaintiff and public official alike—and not "aggressively," in favor of the public official. *See Salazar-Limon*, slip op. at 2 (Alito, J., concurring in the denial of cert.) (noting governing law should be applied "in a neutral fashion" and "regardless of whether the petitioner is an officer or an alleged victim"). That's all Mr. Werner asks for here.

III. The State Violated Mr. Werner's Constitutional Rights.

Qualified immunity aside, neither the majority nor the dissent below doubted the defendants had violated Mr. Werner's constitutional rights. The majority expressed uncertainty only as to the best legal theory to explain the violation. Although this Court need not address the constitutional question, we do so briefly here, in response to the defendants' arguments on this issue.

1. Prolonged incarceration violates the Eighth Amendment when the detention was (1) the result of "deliberate indifference," and (2) "without penological

justification." *Armato v. Grounds*, 766 F.3d 713, 721 (7th Cir. 2014) (citation omitted)). *See also Sample v. Diecks*, 885 F.2d 1099 (3d Cir. 1989); *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985). Wisconsin law unambiguously required the release of sex offenders from custody on their mandatory release date—homeless or not. The defendants knew this; indeed, this law is recited on the first page of AD 02-10. Yet they still unlawfully incarcerated Mr. Werner for over a year. That is the very definition of deliberate indifference.

Making matters worse, Wisconsin officials had alternative options for monitoring Mr. Werner upon his release, rendering his continued detention also without penological justification. Since at least 1999, the Wisconsin statutory code has permitted the DOC to require sex offenders on supervised release "to report to a place designated by the department, including an office or station of a law enforcement agency, for the purpose of obtaining the person's fingerprints, [a recent] photograph or other information." Wis. Stat. § 301.45(2)(f) (enacted in its present form by 1999 Wis. Act. 89, § 35); Wis. Stat. § 301.45(1g)(b) (making section 301.45(2)(f) applicable to sex offenders who are "on probation, extended supervision, parole, supervision, or aftercare supervision"). The Wisconsin Supreme Court confirmed this alternative method of monitoring, albeit after Mr. Werner's release date, using "well-settled principles of statutory construction," to explain that the DOC could require sex offenders to report to police stations and provide "information" about where they are staying, such as "the community where homeless individuals are permitted to congregate and sleep." *State v. Dinkins*, 810 N.W.2d

787, 789–90, 795–97, 799 (Wis. 2012). Wisconsin's current policy on homeless sex offenders prescribes these very alternative monitoring methods, Opp'n Br. 8—methods that were equally available to the State on Mr. Werner's mandatory release date.

2. As the majority below also suggests, the defendants likewise violated Mr. Werner's substantive due process rights; for "the continued detention of a person beyond . . . their prison sentence 'violates his rights under the Fourteenth Amendment.'" Pet. App. 21 (quoting *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 246 (1972), and citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015)). The defendants argue this standard requires a showing of behavior that "shocks the conscience." But if 378 days of illegal detention does not shock one's conscience, it is difficult to know what would.

At all events, it is doubtful whether this is even the right standard. When a defendant's actions are the result of "unhurried judgments" with the benefit of "repeated reflection," as they were here, only a showing of deliberate indifference is required. *County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998); *see also Davis v. Hall*, 375 F.3d 703, 718 (8th Cir. 2004) (applying deliberate indifference standard); *Armstrong v. Squadrito*, 152 F.3d 564, 576-77 (7th Cir. 1998) (same). There can be little doubt that the defendants were deliberately indifferent to Mr. Werner's rights. As Judge Hamilton noted, it is undisputed the defendants had actual knowledge that the law required Mr. Werner's release from custody, and they incarcerated him anyway. Pet. App. 36.

Apparently concerned that the lower might be right about this issue, the defendants resort to suggesting that Mr. Werner waived any potential substantive due process claim. That's incorrect. Mr. Werner filed his action pro se not only under the Eighth Amendment, but also the Fourteenth Amendment. And although his Fourteenth Amendment claim focused on procedural due process, the Court of Appeals volunteered the possibility that Mr. Werner might have a substantive due process claim anyway. Pet. App. 21. Therefore, if this case were remanded for the Seventh Circuit to definitively resolve the constitutional question, neither party would be prejudiced if the court chose to do so on substantive due process grounds, particularly if the court gave the parties a chance to file supplemental briefs on the question. *See U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) ("[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties . . . ." (citations omitted)).

IV. This Case is Part of a Larger National Problem that Needs to be Addressed by the Court.

As Judge Hamilton's dissent suggests, this case is representative of a "pervasive problem in the criminal justice system," one in which state and local restrictions "can make it difficult, and in some cases literally impossible, for released offenders to live and work in compliance with all of the laws that apply to them." Pet. App. 31. Wisconsin's "solution" was to continue to incarcerate its homeless offenders. And although it has changed its policy, that is cold comfort to Mr. Werner now, and to the many other sex

offenders in other states that continue to be incarcerated beyond their mandatory release date for no other reason than because they are homeless. In Illinois, for example, state officials have discretion to "violate at the door" sex offenders who do not have approved housing on their mandatory release date.[1] Similarly, in New York, state officials have discretion to "release" homeless sex offenders to prisons designated as "residential treatment facilities" if they have not found a residence by their mandatory release date.[2]

Two of the most populous states in the country thus continue to detain homeless sex offenders for circumstances beyond their control, and those states show no signs of doing away with their respective policies anytime soon. Thompson, *supra* note 1. States, lower courts, and government officials therefore remain in need of guidance on this thorny area of the law.

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[1] *Murphy et. al v. Madigan et al.*, No. 1:16-cv-11471, ECF. No. 1 (N.D. Ill.) (complaint describing Illinois's scheme); Christie Thompson, *For Some Prisoners, Finishing Their Sentences Doesn't Mean They Get Out*, THE MARSHALL PROJECT (May 5, 2016), *available at* https://www.themarshallproject.org/2016/05/24/for-some-prisoners-finishing-their-sentences-doesn-t-mean-they-get-out#.9rgxPVm8z (describing Illinois's scheme).

[2] *Gonzalez v. Annucci*, __ N.Y.S. 3d. __, No. 521458, 2017 WL 1082949, at *1, 4 (N.Y. App. Div. Mar. 23, 2017) (describing New York's scheme); *Alcantara v. Annucci*, No. 002534-16 (Albany Civil Supreme Ct.) (complaint describing New York's scheme); *see also* Joseph Goldstein, *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, Aug. 22, 2014, at A18, NEW YORK TIMES, *available at* https://www.nytimes.com/2014/08/22/nyregion/with-new-limits-on-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html (describing New York's scheme).

This case is a worthy vehicle to provide that guidance. The parties do not dispute the material facts. The summary judgment record on both sides is well developed. And the ultimate issue to be decided—whether the law is clearly established such that the defendants have no qualified immunity—presents a question of law for the Court to review de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

CONCLUSION

The petition for writ of certiorari should be granted. The Court may wish to consider the possibility of summary reversal. In the alternative, the Court should set the case for briefing and oral argument.

Respectfully submitted,

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