No. 04-495

In The Supreme Court Of The United States

REGINALD WILKINSON, et al.,
Petitioners,

v.

CHARLES E. AUSTIN, et al.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

As Ohio showed in its opening brief, Ohio's procedures for assigning inmates to our highest security prison—the Ohio State Penitentiary (OSP), or "supermax"—give far more process than the Constitution requires. See generally Ohio Br. Ohio's Policy—that is, the "New Policy" that would have gone into effect if the courts below had not rewritten it—provides inmates notice and a right to be heard before a placement decision. That is more than adequate as these placement decisions are predictive judgments, and for such decisions the Constitution mandates only the "informal, nonadversary evidentiary review" described in *Hewitt v. Helms*, 459 U.S. 460, 476 (1983). Formalized factfinding is neither necessary nor appropriate in this context, because the focus of a prison-placement process is not to determine what an inmate has done in the past. Rather, the question is what placement is best for the future—not merely for the inmate, but for the system as a whole. That prospective, system-wide inquiry is not advanced by shifting the focus to retrospective factfinding. Indeed, such a shift undermines the placement process by subtly tilting its ultimate orientation, and that of the decisionmakers, toward factfinding, even if that is not the true purpose at hand.

In their brief, Respondents attempt to muddy this prospective/retrospective distinction, along with its implications for the due process analysis, by advancing two internally inconsistent arguments. First, Respondents claim (wrongly), "the decisions at issue here rest principally on historical determinations." Resp. Br. at 44. That is, they contend that these decisions are, in fact, retrospective. And Respondents rely on this to support their call for detailed fact-finding procedures. But at the same time, Respondents also complain that Ohio's New Policy would still allow placement decisions to be based on substantive criteria that are not reducible to historical facts, *id.* at 20–21, and that a security reclassification may occur without a specific

disciplinary violation as a predicate. *Id.* at 30. In other words, they complain that it is *not* sufficiently retrospective. Based on their first claim (i.e., that the decisions are retrospective) they insist that court-ordered factfinding tools are the better fit for the task at hand, while at the same time they try to change the nature of the task at hand (i.e., make the decisions more retrospectively focused) to fit the tools they seek to impose. The real answer is that Respondents are right when they assert that the placement process is not fully tied to discrete historical facts—and that is why they are wrong when they try to turn the process into a disciplinary-style proceeding.

Respondents err in other ways as well, as detailed below. They improperly, although understandably, seek to shift the focus to facts in the record regarding what happened *before* Ohio adopted the New Policy. But the New Policy, and the alleged need for the court-ordered modifications to it, is all that is at issue, making Ohio's pre-policy conduct irrelevant. Thus, Respondents are correct that Ohio is "presenting this case as if it were a facial challenge to the constitutionality of New Policy 111-07." Resp. Br. at 20. But we do so only because *it is*.

Respondents are also wrong to minimize Ohio's interests and to overstate the import of the inmates' interests. Ohio's interests include not only the strong interest in maintaining prison security, but also our interest in doing so without the unnecessary administrative burdens that the courts below imposed. And the inmate's interests carry little weight here because the Court's precedents assign less importance to private interests in the predictive-decision context, and because the inmate interests here are simply not that great to begin with. This case is not about whether inmates remain in prison or are released, or about whether free citizens are newly detained. This case is about whether inmates are housed in one prison or another. Even where

prison conditions differ "significantly" enough to trigger a State-created liberty interest against placement in a certain prison, that resulting interest is not that strong, and the process required is concomitantly minimal.

For all of these reasons, the decision below should be reversed, and Ohio should be free to implement its New Policy for supermax prison-placement decisions.

ARGUMENT

A. This case is a facial challenge to Ohio's New Policy, and the only questions are whether that Policy is facially valid and whether the court-ordered changes are required to satisfy due process.

Just as Respondents want each individual placement decision to look backward rather than forward, so, too, does their overall attack focus backward—stressing problems in the process back in 1998 and 1999—rather than focusing on the present dispute over whether the New Policy or the Court-ordered Policy should be used in the future. Not only do Respondents devote considerable space to elaborating Ohio's past problems, see Resp. Br. at 4–9, but most of their legal argument regarding the New Policy is based on the problems that occurred before the New Policy was developed, see, e.g, Resp. Br. at 19–24. But that approach is irrelevant to the question at hand: whether the New Policy provides adequate due process, and if not, whether the court-ordered changes went too far or were truly required to correct the problem.

Respondents curiously deny that this is a facial challenge to the New Policy, but they do not seem to explain what, in their view, the nature of the challenge is instead. That is, after repeating the litany of problems from the pre-New-Policy days, and stressing that Ohio did not challenge

on appeal the district court's findings in that regard, they conclude by charging that "Ohio ignores these substantial factual findings, presenting this case as if it were a facial challenge to the constitutionality of New Policy 111-07." Resp. Br. at 20.

Ohio admits that we treat this case as a facial challenge to the New Policy, because it is. It surely is not an as-applied challenge to the New Policy, as the New Policy has never been applied. Nor can this case proceed as a challenge to the Old Policy or to past actions before any policy existed, because any such challenge would be moot. Respondents did not seek damages for past problems, rather, they sought only a declaration that Ohio is not satisfying due process, and they sought injunctive relief forcing us to use different procedures in the future. Such claims can proceed only as a facial attack against the procedures that would exist without court intervention, i.e., Ohio's New Policy.

Thus, it is perfectly understandable that Ohio, after adopting a New Policy, did not invest resources into challenging on appeal the district court's factfinding about the prior problems. Those problems are no longer directly at issue. To be sure, Respondents and the courts below could argue, and do seem to argue, that the past is relevant to assessing the New Policy as an illustration of the kind of problems that, in their view, could still occur under the New Policy. That is, they could argue that the facial invalidity of the New Policy is indirectly supported by those facts. Although they are wrong on that score, for the reasons below, that approach is at least plausible. But Respondents offer no plausible basis for how the actual challenge here can be anything but a facial challenge to the New Policy.

Moreover, because Respondents allege that the New Policy is unconstitutional, and that the Court-ordered modifications are needed to cure that unconstitutionality, the

Court must *first* determine whether the New Policy is adequate, before reviewing the court-ordered modifications. This point is critical because the Sixth Circuit skipped this step, and Respondents lean in that direction as well. That is, the Sixth Circuit found that due process violations had occurred in the past, and then it *directly* jumped to assessing the merits of the court-ordered changes. Pet. App. 9a

But if the New Policy is adequate (and it is), federal courts have no warrant to offer "improvements" to an already constitutional policy. That is so even if the changes could be demonstrated to add value, or to add little burden, or to otherwise be "better" than Ohio's New Policy would be without those court-ordered changes. Here, as shown below, the court-ordered modifications are not an improvement. But equally important, the Court need not reach that point if it first finds, as it should, that the New Policy is facially constitutional.

B. Ohio's New Policy satisfies due process because the placement decisions at issue are predictive judgments, and the court-ordered modifications are not required.

As Ohio's opening brief explained, this case involves essentially two analytical steps. First, a well-established legal framework shows how the *Mathews* analysis applies to predictive judgments such as prison-placement decisions. See Ohio Br. at 16–22; *Mathews v. Eldridge*, 424 U.S. 319 (1976) (outlining three-factor analysis for procedural due process); *Hewitt v. Helms*, 459 U.S. 460, 476 (1983) (holding that informal process is enough for predictive prison-placement decisions); see also *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979) (informal process for parole release decisions) and *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (informal process for predictive decision in academia). Under that

framework, as illustrated by cases such as *Hewitt, Greenholtz,* and *Horowitz,* due process does not require formalized factfinding when the ultimate function of the process is to render a predictive judgment, rather than to resolve a historical fact. Second, applying that framework here shows that Ohio's New Policy satisfies due process, for the function of that Policy is indeed to produce a predictive judgment about where a prisoner belongs, not to resolve whether something happened. To be sure, that predictive judgment involves review of historical facts (as predictive judgments often do), but the ultimate question is a predictive one, not a retrospective one.

Respondents offer several rejoinders, but none overcome our initial showing, on either the legal framework or its application here.

1. Under *Hewitt, Greenholtz,* and *Horowitz,* predictive decisions are categorically different from retrospective factfinding.

Respondents attempt to dispute the impact of *Hewitt, Greenholtz,* and *Horowitz,* but none of their purported distinctions withstand scrutiny.

1. In *Hewitt,* the Court explained that the decision to place a prisoner in administrative segregation for non-disciplinary reasons was a predictive judgment, so the decisionmaking process would not "have been materially assisted by a detailed adversarial proceeding." *Hewitt*, 459 U.S. at 474. Respondents claim that *Hewitt* does not govern here because, they say, Ohio's supermax placements are more burdensome than the temporary administrative segregation involved in *Hewitt.* Resp. Br. at 40–44. But even assuming arguendo that the burdens here are greater, that does not matter, because *Hewitt's* point was that the *nature* of a predictive judgment was such that adversarial

procedures simply do not add value. If retrospective factfinding procedures do not help to answer the question of where an inmate belongs for the next seven weeks, as in *Hewitt,* then such procedures do not become useful merely because a prospective placement is for twelve months, as here. Indeed, *Horowitz,* as discussed below, further confirms how the degree-of-private-interest does not change things when a predictive decision is at issue.

Respondents also try, and fail, to distinguish *Hewitt* by arguing that the decisions here are in fact more retrospective in nature, so that Ohio's decisions really are not as predictive as we say. Resp. Br. at 42–44. This argument is not only wrong, but it contradicts Respondents' other arguments in a way that undercuts their entire case. Respondents allege that the "decisions at issue here rest principally on factual determinations." Resp. Br. at 44. They approvingly cite the Sixth Circuit's absolutist view that Ohio's own New Policy allows us to place inmates at OSP *only if* we first establish certain "factual predicates, all of which are historical in nature." *Id.* (quoting Pet. App. 23a).

But in sharp contrast to their insistence that the process is already tied to historical predicates, Respondents also complain that the New Policy is *not* strictly limited to such predicates. They point out—rightly—that the New Policy allows a security-level reclassification to occur without a disciplinary violation as a trigger, Resp. Br. at 30, allows reclassification to be based on factors not tied to a specific disciplinary event, such as the inmate's "chronic inability to adjust," *id*., and allows reclassification to be based on a subjective assessment of the existence or extent of gang involvement, *id.* at 20.

Respondents are wrong when they charge that the process is already tied to historical predicates, and they are right when they charge that the process is not so firmly tied

to such predicates after all. And it is precisely *because* the process is not historically-oriented, but is subjective and predictive, that we fall under *Hewitt,* and not under the framework for retrospective factfinding as established in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

2. *Greenholtz* confirms the categorical difference between predictive judgments and retrospective factfinding, and Respondents' attempts to distinguish that case also fail. *Greenholtz* involved parole decisions, which are predictive judgments about whether an inmate is ready to re-enter civil society, so the Court concluded that "[p]rocedures designed to elicit specific facts . . . are not necessarily appropriate." See Ohio Br. at 21; *Greenholtz*, 442 U.S. at 14. Respondents seek to distinguish *Greenholtz* on the idea that the liberty interest there "was not of great consequence." Resp. Br. at 49. But as Ohio explained, the interest in *outright release from prison* surely outweighs the interest here, regarding imprisonment at a higher or lower security level. See Ohio Br. at 21, 25.

To this, Respondents say that the critical difference is the inmate's baseline, or status quo, citing *Greenholtz*'s distinction between "losing what one has and not getting what one wants." Resp. Br. at 48 (citing *Greenholtz,* 442 U.S. at 9). To be sure, *Greenholtz* did distinguish *parole release* decisions, which involved a prisoner's hope of release, from *parole revocation* decisions, which involved a loss of liberty and reimprisonment. The former required less process, while the latter required more, under *Morrissey v. Brewer*, 408 U.S. 471 (1972).

But the Court's distinction between the two turned on more than whether the status change at issue would be good or bad for the prisoner, as the Court also stressed the dramatic difference in prison life versus liberty outside prison. Thus, the difference in direction—getting out of

prison or going back in—mattered so much because of the magnitude of the change along with the direction. Here, by contrast, even changes in the "negative" direction for the inmate are still within an imprisonment context.

Further, if Respondents are consistent about their distinction between an "upgrade" or a "downgrade" in an inmate's status, and if we apply that distinction here, then Respondents should concede to Ohio on the part of this case that deals with *retention* in OSP, as opposed to initial placement there. That is, the courts below imposed procedural burdens on Ohio not only regarding decisions to move an inmate to OSP, but also regarding the annual review decisions to retain an inmates in OSP or to reduce his security level. The latter is surely within *Greenholtz,* as it, too, involves an inmate's hope for improvement.

Finally, the Court in *Greenholtz* stressed that the "nature of the decision" there differed greatly from the parole-revocation decision at issue in *Morrissey*, because parole revocation *absolutely required* proof of a parole violation *before* proceeding to the question of suitability for revocation. *Greenholtz,* 442 U.S. at 9. And that predicate requirement "involve[d] a wholly retrospective factual question." *Id.* Here—as Respondents concede, and in indeed, complain—supermax placement does not require a disciplinary violation or any other historical factual predicate as an absolute prerequisite to reclassification at Level 5. See Resp. Br. at 30; Ohio Br. at 31–36.

3. Respondents' attempt to distinguish *Horowitz* is also flawed. As Ohio explained, *Horowitz,* which involved the dismissal of a medical student for academic reasons, establishes several principles that are relevant here. Ohio Br. at 17–20, 27–28, 33. For example, it shows that the level-of-private-interest does not matter as much in the predictive-decision context. *Id.* at 19–20 (citing *Horowitz*, 435 U.S. at

86 n.3). It also shows that a decision that is ultimately predictive is not treated like a retrospective factfinding even if the predictive decision is based largely upon historical facts. *Horowitz*, 435 U.S. at 89. And it shows that the Court defers to the administrative experts in the field. *Id.* at 89–90.

Respondents simply ignore the Court's own words in *Horowitz,* as they purport to distinguish *Horowitz* on the idea that the liberty interest involved—dismissal from medical school—was a slight one, and they argue "[h]ad a clearer and weightier interest been at issue, the process due would likely have been different." Resp. Br. at 48. Further, Respondents specifically contrast this allegedly slight interest in *Horowitz* with the "not insubstantial" interest present in *Goss v. Lopez,* 419 U.S. 565 (1975), which involved a ten-day suspension from high school. But Respondents' comparison of the "low" *Horowitz* interest and the "high" *Goss* interest fails entirely to address the Court's express recognition that the "deprivation to which [Horowitz] was subjected . . . was *more severe than*" the suspension at issue in *Goss*. *Horowitz*, 435 U.S. at 86 n.3 (emphasis added). And Respondents never even address the Court's detailed explanation of how *Horowitz* was categorically different from *Goss* because of the different *nature of the decision*.

Respondents also try to distinguish *Horowitz* by praising the careful job that the medical school did there in reviewing the medical student's file, as several officials were involved in the decision, and they informed the student of their concerns. Resp. Br. at 47. But that "careful and deliberate" process gave no more than Ohio's New Policy does. Here, too, several prison officials are involved in recommendations and layers of review, and the inmate receives a copy of the initial committee report and has a chance to respond. J.A. 22–23, 60, 61–65, 69. The medical school in *Horowitz* did not give the *Wolff*-type procedures that the student wanted, and Ohio here should not be forced

to use such procedures where, as in *Horowitz,* they do not fit the task at hand.

2. Ohio's supermax decisions are properly classified as predictive judgments under the Court's precedents, and our New Policy gives sufficient process for that type of decision.

As explained above, the decisions at issue here fit comfortably within the framework established by *Hewitt, Greenholtz,* and *Horowitz,* and Respondents' attempts to distinguish those cases fail. Aside from their misreading of those cases, Respondents' remaining attacks on Ohio's New Policy, tied mainly to disputes about how the Policy works—or should work, in their view—also miss the mark.

1. As noted above, Respondents repeatedly try to describe Ohio's process as *already based solely on historical predicates,* so that in their view, Ohio should be required to use the type of procedures that the Court has already said are appropriate for retrospective factfinding. Resp. Br. at 44. But again, that claim is entirely rebutted by Respondents' own protests that Ohio does *not* commit itself to reclassifying only after precise historical predicates, such as disciplinary violations, are established. *Id.* at 30. Instead, Ohio's New Policy allows us to reclassify prisoners for a variety of reasons, for the good of the system as a whole, and not just because prisoner X committed narrowly-defined act Y.

Respondents alternatively suggest that even if our Policy is not purely retrospectively-focused, it is mostly retrospective, or has a stronger "retrospective component." See Resp. Br. at 42, *id.* at 42–44. Further, they accuse Ohio of advancing a flawed view that would categorize a decision as predictive as long as the decision has any predictive or subjective elements. *Id.* at 41. That accusation has a kernel of truth, but it misses the mark. The question is not whether

the "components" of a decisionmaking process can be tallied up as mostly historical, or mostly predictive, with a 51% tilt either way deciding the matter. The issue is whether the *ultimate question* being asked by the process is a predictive judgment.

Often, a predictive judgment may turn almost entirely on historical components, or inputs, but the predictive process centers on an expert's evaluation of what those historical facts imply for the future. That was the case in *Horowitz,* where the ultimate question was whether the medical student should continue in her studies. The inputs there were largely, or perhaps even totally, historical, as the reviewers looked at her academic performance, her clinical performance, her attendance, and so forth. *Horowitz*, 435 U.S. at 80–81, 90. But the use of such historical facts as inputs did not transform the nature of the decision itself into a retrospective one.

Thus, the kernel of truth in Respondents' accusation is that we do say that a decision may be predictive even if the inputs are mostly retrospective. But that is not because of the mere presence of subjective elements as other inputs, but because of the nature of the ultimate question at issue. And more important, our approach has already been adopted by the Court. By contrast, Respondents' approach seems to require *Wolff*-type procedures whenever *any* retrospective element is involved, and the Court has rejected that approach.

2. To the extent that Respondents object to Ohio's use of factors that are not reducible to historical facts, that is a substantive, not procedural, attack, and it should be rejected. For example, Respondents complain that Ohio's New Policy is flawed because it would still allow Ohio to base a decision on rumor or reputation for gang membership, without a *Wolff*-type hearing on that issue. Resp. Br. at 21. But *Hewitt* specifically blessed the consideration of such factors. 459

U.S. at 474. Moreover, *Hewitt* also explained that prison officials may even consider factors not unique to the inmate at issue, such as the general atmosphere in the prisons, e.g., whether tensions have been rising lately. *Id*. Given the Court's approval of that substantive factor, it makes little sense to uniformly require procedures aimed at analyzing an individual inmate's behavior, as his record is not necessarily the controlling factor.

3. Respondents also claim that Ohio offers less process than the federal government and many States use in similar situations. Respondents' comparison to the federal process is misleading, because rather than comparing our supermax prison to the general populations of the federal facilities at Marion, Illinois (USP Marion), and Florence, Colorado (ADX Florence), Respondents use as a benchmark the even-higher-level control unit within the ADX Florence. To be sure, Respondents could dispute which is the better benchmark, but they merely assert that the federal Control Unit is comparable, without even acknowledging the point that the federal government gives *no process directly involving the inmate* before transferring an inmate to the Marion or Florence prisons. See Ohio Br. at 41; U.S. Br. at 2.

Because this litigation did not center on the federal facilities, the record here, not surprisingly, does not contain the detail needed to fully compare cell sizes, inmate privileges, and the like. But Ohio notes that the United States characterizes the Marion and Florence ADX prisons generally—and not just the Florence Control Unit—as "comparable, in some respects," to OSP. U.S. Br. at 1. And the United States also says that a decision here could have an adverse effect on their transfer decisions. *Id.* at 2. Further, the United States describes the conditions at the high-security and general population units at Florence and Marion as only "slightly less restrictive" than the conditions within the

Florence Control Unit. *Id.*; see Bureau of Prisons regarding ADX Florence, at http//www.bop.gov/locations/institutions/flm/index.jsp ("The Administrative Maximum (ADX) facility in Florence, Colorado, houses offenders requiring the *tightest controls*.") (emphasis added).

By contrast, Respondents offer, as the sole reason to compare the Control Unit, the fact that it represents the "highest" level in the federal system. But of course, that says nothing about the relative conditions anywhere, as the highest in one system could easily vary from the highest elsewhere. Finally, the federal decision to offer greater process regarding the Control Unit does not suggest that due process requires that, as prison systems frequently employ procedures for their own penological reasons, not merely because the Constitution forces them to.

Similarly, the use of more detailed procedures in some States does not imply that the Constitution requires it, as Respondents properly acknowledge. See Resp. Br. at 37. Respondents' citations do seem to indicate that perhaps our earlier description, that Ohio offers more procedures than other States, was overbroad. But at worst, Ohio is well within the range of State practices, as several States do offer less process, or none at all. See Amicus Br. of California, et al. at 10 ("Other states, like California, have more-freeform guidelines"; in California, "the choice is otherwise entirely left to the officials' discretion.").

3. The court-ordered modifications do not add value, and they improperly burden Ohio

Ohio's New Policy already satisfies due process. In addition, the court-ordered modifications do not add value to the process, and in fact, the modifications burden Ohio unnecessarily.

First, as already explained in our opening brief, the modifications burden us administratively and substantively, especially by limiting the appropriate use of confidential information. See Ohio Br. at 36–41. Respondents merely point out that the court's rules do not require us to provide all confidential information that we use, but to do so only to the extent consistent with concerns over an informant's safety. But that does not answer the point we raised regarding the difficulty of drawing that line, and being put to that choice without risking safety at the margins, or holding back from using the best information.

Second, the modifications, by ordering *Wolff*-type factfinding procedures, raise the possibility that the process will be subtly diverted into *substantively* becoming the type of purely retrospective decisionmaking that Respondents apparently want it to be. That is, even though we instruct our officials to look forward to what is best for the system, the procedural slant toward looking backward, at one inmate's record, may shift the whole process that way subtly and indirectly. Indeed, one of the primary reasons for shaping due process is to orient decisionmakers toward the desired result in terms of accuracy, proper focus, etc. But here, the process is not *meant* to reward or punish inmates, but procedures that better fit such a disciplinary mindset may shift the process toward that mindset. That would prevent us from truly making the type of forward-looking decisions that are required for effective prison management and for the security of other inmates.

C. Ohio's interests here are strong, and the inmates' interests are lower than Respondents claim.

1. Ohio has a compelling interest in maintaining secure prisons without unnecessary burdens.

Ohio's interest here is undeniably strong, for we need to maintain a safe and secure prison environment. As we work to keep our prisons safe, we need flexibility in sending inmates to OSP without undue barriers or delay. Indeed, Respondents do not dispute the strength of our interest, nor do they deny that conditions in our other prisons have improved since we opened OSP and removed problem inmates from those other prisons. See Ohio Br. at 46 (citing J.A. 454–56 (Meyer Test.)). But as explained above, our ability to use this tool wisely is degraded by the court-ordered procedures.

2. The inmates' interests in avoiding OSP placement are not that high.

As explained above and in our opening brief, the *Mathews* factor regarding the private interest carries less weight in the context of predictive judgments such as the OSP placement decisions at issue. And to the extent that such private interests do matter, the inmate interests against OSP placement are not nearly as great as Respondents suggest.

1. Respondents are simply wrong in insisting that our argument regarding the low interest here is "in direct contradiction to" the existence of a State-created liberty interest under *Sandin v. Conner,* 515 U.S. 472 (1995). See Resp. Br. at 15. For support, Respondents merely repeat the Sixth Circuit's statement below that *Sandin*'s higher threshold for finding a State-created liberty interest must lead to a presumption of greater weight for the private interest in

conducting the *Mathews* balancing. *Id.* But as Ohio extensively discussed in our opening brief, see Ohio Br. at 23-30, that conclusion does not follow in the predictive-judgment context, and Respondents fail to respond to most or all of the points we raised there. In particular, Respondents offer nothing to rebut our reminder that this is, after all, a State-created liberty interest. So any rule that leads to burdensome *Wolff*-type procedures every time *Sandin* is triggered, with no room to ever use *Hewitt*-style process or anything between the two, gives us a strong incentive to avoid creating a liberty interest. Ohio Br. at 28–30

2. Respondents continue to ascribe artificial weight to the fact that Ohio bars Level-5 inmates from consideration for parole, but in truth, that rule had literally zero effect on most or all of the inmates at issue. As we explained—and Respondents do not dispute this—Ohio does not allow Level 4 inmates to be paroled, either, and about 90% of Ohio's Level 5 inmates (at the time of trial) came from Level 4. Ohio Br. at 44. Thus, the marginal change from 4 to 5 did not change their parole status at all. Further, even for the 10% or so who jumped two or more levels from Level 3 or below, the Level-5 parole barrier almost certainly had no net effect, either. That is so because, if those inmates had not been moved to Level 5, for whatever reason (including arguendo the idea that better procedures would have given them a different outcome), such inmates would almost surely have still been raised to Level 4 instead. And at that level, they, too, would have been ineligible for parole in their new status. And of course, all of this is against the backdrop that parole itself is not a protected liberty interest in Ohio, and indeed, we have since abolished it in Ohio. See *id.*

3. Respondents err in suggesting that the State-created liberty interest at issue here is comparable to an interest protected directly by the Due Process Clause, of its own force, under *Vitek v. Jones*, 445 U.S. 480 (1980). See Resp.

Br. at 19, 46. *Vitek*-type interests differ greatly in degree, in kind, and in doctrinal underpinnings, from those interests that States create under *Sandin.* Indeed, the Court expressly noted in *Sandin* that the interests that would henceforth be covered by *Sandin* did not rise to the level of *Vitek* interests. *Sandin*, 515 U.S. at 483–84. *Sandin* covers conditions that, although "significant and atypical" enough to warrant due process protection *when combined with State creation of a liberty interest* in the condition, do not alter the sentence "in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force" under *Vitek. Id.*

Respondents have never raised a *Vitek* claim, nor could succeed on one if they did. Their Sixth Circuit brief does not even cite *Vitek* or the similar case of *Washington v. Harper*, 494 U.S. 210 (1990). Further, *Hewitt,* in an additional holding that remains good law after *Sandin,* expressly held that transferring an inmate to a higher-security level did *not* trigger a *Vitek* claim. *Hewitt,* 459 U.S. at 460. That was so because "the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." *Id.* Thus, the Court in *Hewitt* went on to find a State-created interest only after holding squarely that no *Vitek* interest existed. Consequently, when *Sandin* later altered *Hewitt* regarding the standard for *State-created* liberty interests, it did not alter *Hewitt's* foreclosure of a *Vitek* interest against transfers to more secure prisons.

4. The inmates' interests here also are not in any way comparable to the interests of those *not convicted* of a crime, and not imprisoned, but who might nevertheless be detained. Thus, Respondents' reliance on cases such as *United States v. Salerno*, 481 U.S. 667 (1980), Resp. Br. at 45, or *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), Resp. Br. at 40, are not helpful, whether on the strength-of-interest factor, or regarding the nature-of-decision factor, or for any purpose.

5. Finally, the due-process claims here are not substantive Eighth Amendment claims, so the issue here is what process is adequate to determine which inmates are transferred into undisputedly legal conditions—the issue is not whether such conditions are allowed at all. While that should go without saying, much of Respondents' argument, and that of some amici, implicitly sounds like an "Eighth Amendment lite" attack, aimed solely at condemning the conditions here independent of any connection to the procedural condition at issue. To be sure, the *Mathews* analysis does include consideration of the private interests at stake. But that is for the purpose of reaching better decisions regarding who is subject to the end result, accepting that the end result may be not to the party's liking. Procedural due process should not be used as a way to simply raise the cost to the States of using supermax facilities, and thus impeding their use at all.

In a similar vein, the suggestion that international standards have a role in this case is misplaced. See Amicus Br. of Amicus Human Rights Watch, et al. at 19–21. Whatever the role of international law should be, or not be, in substantive Eighth Amendment analysis regarding cruel and unusual punishment, it has no role where the issue is due process. Our American system is unique in its commitment to due process, which builds on an adversarial system that is foreign to the civil law tradition and many other traditions. Indeed, opening the door to international norms in the due-process arena would more likely decrease, rather than increase, protections in this field. Thus, the Court should decline the invitation to start down that path.

CONCLUSION

For the above reasons, the judgment below should be reversed.

Respectfully submitted,

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