To be argued by:
BLAIR J. GREENWALD
15 minutes requested

Supreme Court of the State of New York
Appellate Division – Second Department

In the Matter of the Application of

No. 2019-04287

LUIS ALVAREZ (DIN 16A0694, NYSID 09694706J),

Petitioner-Appellant,

v.

ANTHONY J. ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,

Respondent-Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

After pleading guilty to a charge of sexual abuse of a child under the age of thirteen, petitioner Luis Alvarez was certified as a sexually violent offender and sentenced to three years' incarceration and seven years' post-release supervision (PRS). Before the start of his PRS, the Board of Parole, as required by the Sexual Assault Reform Act of 2000 (SARA), imposed the condition that he reside at least one thousand feet from school grounds during his term of PRS.

When Alvarez had not secured appropriate housing by the start of his PRS, the Department of Corrections and Community Supervision (DOCCS) exercised its statutory authority to house Alvarez at a residential treatment facility (RTF) until he obtained SARA-compliant housing in the community. Alvarez filed this C.P.L.R. article 78 proceeding against DOCCS to challenge that RTF placement. Upon his release to a SARA-compliant residence, Supreme Court, Queens County (Pineda-Kirwan, J.) dismissed the proceeding as moot. This Court should affirm.

This proceeding is indisputably moot because Alvarez has received the ultimate relief requested in his petition: his release

from the RTF. Indeed, Alvarez conceded as much below by asking Supreme Court to reach his claims under the exception to the mootness doctrine, and then to issue a declaratory judgment in lieu of an order of release.

Contrary to his position below, Alvarez now argues that one of his claims is not moot at all—namely, his claim that the SARA condition does not apply to his PRS term. But that claim, which sought his release from the RTF, plainly was mooted by his transfer to community-based housing. Alvarez cannot repackage the claim as a request for the separate relief of a judgment nullifying the Board's determination to impose the SARA condition to his PRS term. He did not properly request that separate relief in his petition and did not name the Board as a respondent.

Finally, Supreme Court did not abuse its discretion in declining to review the moot claims. Alvarez failed to demonstrate that the mootness exception applied and that there was merit to his claims that he did not receive sufficient services at the RTF, that SARA did not apply to his term of PRS, that DOCCS lacked

authority to house him at the RTF for more than six months, and that his RTF placement violated his equal protection rights.

QUESTIONS PRESENTED

1. Whether Supreme Court properly concluded that this proceeding, which sought Alvarez's release or transfer from the Queensboro RTF, became moot upon Alvarez's release from that RTF to SARA-compliant housing in the community.

2. Whether Supreme Court properly exercised its discretion in declining to apply the exception to the mootness doctrine, where Alvarez failed to show that the exception applied to each of his moot claims.

STATEMENT OF THE CASE

A. Legal Framework

1. The Sexual Assault Reform Act of 2000 (SARA)

SARA requires the Board of Parole to impose a mandatory condition of release on certain sex offenders, including those who have been convicted of first-degree sexual abuse of a minor. *See* Executive Law § 259-c(14); Penal Law § 130.65. A sex offender subject to SARA may not knowingly enter any publicly accessible area within one thousand feet of school property. *See* Executive Law § 259-c(14) (codifying "school grounds condition" and adopting Penal Law § 220.00(14)'s definition of "school grounds"). SARA thus also prohibits qualifying sex offenders from residing within one thousand feet of school property. *See Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461, 466 (2018); *People v. Diack*, 24 N.Y.3d 674, 682 (2015). As the Court of Appeals has explained, SARA's residency restriction is an important part of the State's "detailed and comprehensive regulatory scheme [for] . . . ongoing monitoring, management, and treatment of registered sex offenders." *Diack*, 24 N.Y.3d at 685.

Although Executive Law § 259-c(14) refers to offenders subject to parole or conditional release, SARA also applies to qualifying sex offenders who are serving a term of post-release supervision. This is because Penal Law § 70.45 requires the Board of Parole to "establish and impose conditions of post-release supervision *in the same manner and to the same extent* as it may establish and impose conditions in accordance with the executive law upon persons who are granted parole or conditional release." Penal Law § 70.45(3) (emphasis added). In addition, Penal Law § 70.40 provides that "[t]he conditions of release, including those governing post-release supervision, shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law." *Id.* § 70.40(1)(b).

2. Correction Law § 73

Correction Law § 73, which was enacted in 1970, authorizes DOCCS "to use any residential treatment facility as a residence for persons who are on community supervision" and provides that "[p]ersons who reside in such a facility shall be subject to conditions of community supervision imposed by the board."

§ 73(10). The term "community supervision" expressly includes PRS. *See id.* § 2(31).

The Correction Law defines an RTF as a "correctional facility consisting of a community based residence," which is located "in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release," among others. *Id.* § 2(6). An individual housed at an RTF is permitted "to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation and in accordance with the program established for him or her." *Id.* § 73(1). "While outside the facility," an RTF resident "shall be at all times in the custody of the department and under its supervision." *Id.* DOCCS is "responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities" and is required to "supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility." *Id.* § 73(2).

B. Factual and Procedural Background

1. Alvarez's plea and conviction for sexual abuse of a child under thirteen years old

In late 2013, at the age of thirty-five, Alvarez victimized a minor under the age of thirteen. (R. 92, 99, 332.) He was charged with first-degree rape, first-degree course of sexual conduct against a child, first-degree sexual abuse, and endangering the welfare of a child. (R. 99.)

In satisfaction of those four charges, Alvarez pleaded guilty to one count of first-degree sexual abuse in Supreme Court, Bronx County (Clancy, J.). (R. 15, 99.) The sentencing court imposed a determinate term of three years' incarceration and seven years' PRS, and designated Alvarez as a sexually violent offender.[1] (R. 15, 99.) The First Department unanimously affirmed. *People v. Alvarez*, 166 A.D.3d 570, 570-71 (1st Dep't 2018).

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[1] A second indictment filed in Bronx County charged Alvarez with additional offenses based on a separate incident. In satisfaction of those charges, he pleaded guilty to criminal possession of a weapon in the fourth degree and was sentenced to one year of imprisonment to run concurrently with the sexual abuse sentence. (R. 15, 99.)

2. Alvarez's three article 78 petitions in this proceeding seeking transfer to a different residential treatment facility (RTF) or release to an appropriate residence

a. Alvarez's first petition challenging his placement at the Fishkill RTF

Prior to Alvarez's release to PRS, the Board of Parole imposed various PRS conditions on him, including the mandatory SARA condition requiring Alvarez to reside at least one thousand feet away from school grounds during his PRS. (R. 101-108.) As authorized by Penal Law § 70.45(3), the Board also imposed a condition providing for Alvarez to be housed at an RTF during the first six months of his PRS, until he secured SARA-compliant housing in the community. (R. 107-108.)

In October 2017, Alvarez was released to PRS subject to those conditions. (R. 38.) Because he was unable to secure a SARA-compliant community residence at that time, DOCCS transferred him to the Fishkill RTF to commence his PRS. (R. 38; *see* R. 106-108, 110.) While housing Alvarez at the Fishkill RTF, DOCCS continued to actively search for SARA-compliant housing for him. (*See* R. 124-125.)

In late October 2017, Alvarez commenced an article 78 proceeding in Supreme Court, Dutchess County, challenging his placement at the Fishkill RTF. (R. 7-85.) In his verified petition, Alvarez admitted that he was subject to the SARA condition during his term of PRS and sought release to a different RTF or to a SARA-compliant residence in the community. (R. 8, 16.) He argued, among other things, that placing him in an RTF because he did not have the financial means to secure SARA-compliant housing in New York City violated the Equal Protection Clause of the state and federal constitutions. (R. 31-33.)

b. Alvarez's second petition challenging his placement at the Queensboro RTF

In late December 2017, after DOCCS filed a response refuting Alvarez's arguments (R. 86-161), Alvarez was transferred to the RTF at Queensboro Correctional Facility (*see* R. 175). At Alvarez's request, Supreme Court transferred his proceeding to Queens County and granted him leave to file a supplemental petition. (R. 234-236.)

In April 2018, Alvarez filed a supplemental petition. (R. 237-264.) He acknowledged that he needed to find SARA-compliant housing and again sought transfer to a different RTF or release to a SARA-compliant community residence. (R. 246-247, 254.) In addition to his equal protection claim, he argued that Queensboro did not satisfy the statutory requirements of an RTF for him in particular—alleging that Queensboro was not providing him with education, employment, or on-the-job training, and that he was precluded from participating in one particular program that would provide such services. (R. 245-246; *see* R. 264 (describing Reentry Services Program).)

c. Alvarez's third petition challenging his continued placement at the Queensboro RTF

In May 2018, Alvarez filed a second supplemental petition raising two additional arguments. (R. 265-317.) He first argued that DOCCS lacked statutory authority to house him at the RTF beyond six months. (R. 276-286.) He also argued that SARA's residency restriction applies only to those on parole or conditional release, and not to those on PRS like Alvarez (*see* R. 286-289)—an assertion

that was contrary to his position in his two previous petitions (*see* R. 16, 254). As before, he sought only release from the Queensboro RTF. (R. 289.) He did not seek to add the Board of Parole as a respondent or request a judgment to annul the Board's imposition of the SARA condition to his term of PRS. (*See* R. 289-290.)

3. Supreme Court's dismissal of the proceeding as moot upon Alvarez's release to SARA-compliant housing

In June 2018, Alvarez was released to a SARA-compliant shelter in New York City. (R. 321.)

DOCCS then filed a supplemental answer arguing that Supreme Court should dismiss the proceeding as moot because Alvarez had received the ultimate relief requested in his three petitions: release to an appropriate residence. (R. 322-323.) DOCCS also argued that Alvarez's claims were meritless for several reasons. First, DOCCS possessed statutory authority under Correction Law § 73(10) to house Alvarez at an RTF until he secured SARA-compliant housing in the community. Second, Queensboro properly functioned as an RTF for Alvarez, including by giving him paid work directed toward rehabilitation and reintegration. Third,

SARA plainly applies to Alvarez's term of PRS, as Alvarez previously admitted in these proceedings. (R. 323-327.)

In reply, Alvarez did not dispute the mootness of his claims. (*See* R. 360-370.) He instead asked Supreme Court to exercise its discretion to review his claims under the exception to the mootness doctrine, and if appropriate to convert the proceeding to a declaratory judgment action in order to issue a judgment in his favor on the moot claims. (R. 361-364.)

Soon thereafter, the parties notified Supreme Court (*see* R. 371-387) of this Court's intervening decision in *People ex rel. McCurdy v. Warden, Westchester County Correctional Facility*, 164 A.D.3d 692 (2d Dep't 2018), *lv. granted*, 32 N.Y.3d 1084 (2018). In *McCurdy*, this Court held that DOCCS possesses statutory authority to house sex offenders at RTFs for longer than six months in the absence of SARA-compliant housing. 164 A.D.3d at 694-95. Both parties recognized that decision was dispositive of Alvarez's claim that DOCCS had no authority to house him at the RTF for more than six months. (R. 372, 376-377.)

Supreme Court dismissed all claims in the proceeding as moot. The court first explained that Alvarez's release from the RTF gave him the relief he requested in his three petitions. (R. 4.) The court then declined to exercise its discretion to apply the mootness exception, concluding that the issues raised in Alvarez's petitions did not satisfy the requirements for the exception. (*See* R. 5-6.) The court also noted that Alvarez's petitions had not sought a judgment nullifying the Board's imposition of the SARA condition to his term of PRS; the court observed that, in any event, a claim for such a judgment against the Board was "not properly before th[e] court." (R. 5.)

Alvarez appealed the decision to this Court. (R. 1.)

ARGUMENT

POINT I

SUPREME COURT PROPERLY DISMISSED THE PROCEEDING AS MOOT

A. This Proceeding Is Moot Because Alvarez Has Received the Relief That His Petitions Requested.

Under New York law, a case is "considered moot unless the rights of the parties will be directly affected by the determination of the appeal." *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980). Courts are "ordinarily precluded from considering questions which, although once live, have become moot by passage of time or [a] change in circumstances" that causes a complaining party to receive the "requested relief." *Matter of Angel S. (Sadetiana J.)*, 173 A.D.3d 1188, 1189 (2d Dep't 2019) (quotation marks omitted).

In June 2018, DOCCS released Alvarez from the Queensboro RTF to SARA-compliant housing in the community, giving him the ultimate relief he sought in his original petition, his supplemental petition, and his second supplemental petition. (*See* R. 20-21, 237-238, 265-266.) And "since [Alvarez] received the ultimate relief he was seeking, the Supreme Court properly concluded that the

proceeding had been rendered academic." *Matter of Kirkland v. Annucci*, 150 A.D.3d 736, 738 (2d Dep't 2017).

The proceeding would remain moot even if converted to a declaratory judgment action. A declaratory judgment action requires a "justiciable controversy." C.P.L.R. 3001. As this Court has explained, the issuance of a declaratory judgment is improper where the case does not "present a concrete, actual controversy for adjudication," but instead presents only a "hypothetical issue" whose determination "would not have an immediate practical effect." *Fragoso v. Romano*, 268 A.D.2d 457, 457 (2d Dep't 2000).

In light of Alvarez's release from the RTF, any declaratory judgment regarding Alvarez's moot claims would not have any "immediate practical effect" on him or on DOCCS. *Id.*[2] Alvarez's filings below appear to recognize "[t]he fundamental principle that

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[2] *See also, e.g.*, *Matter of Hearst Corp.*, 50 N.Y.2d at 713-14 (conclusion of plea proceeding rendered moot article 78 proceeding seeking declaration that closure of plea proceeding was illegal); *Eve & Mike Pharm., Inc. v. Greenwich Pooh, LLC,* 107 A.D.3d 505, 505 (1st Dep't 2013) (tenant's action for declaratory judgment regarding legal effect of notice of lease termination became moot upon landlord's withdrawal of notice).

a court's power to declare the law is limited to determining actual controversies in pending cases" unless "subject to [the mootness] exception." *Matter of David C.*, 69 N.Y.2d 796, 798 (1987). Notably, Alvarez asked Supreme Court *first* to apply the mootness exception to his moot claims *and then* to convert the proceeding to a declaratory judgment action—if the court decided the latter was the proper form to resolve his moot claims. (*See* R. 361-362.) His opening brief on appeal likewise asks for application of the exception to the mootness doctrine and then a declaratory judgment on the merits, for example, of his claim regarding Queensboro's adequacy as an RTF (*see* Br. for Pet'r-Appellant (Br.) at 18).

B. Alvarez's Statutory Claim Regarding the Proper Interpretation of SARA Also Became Moot Upon His Release.

Like the other claims in his petitions, Alvarez's claim that the SARA condition does not apply to his term of PRS sought his release from the RTF to appropriate housing in the community, but did not seek a separate judgment lifting the SARA condition. (R. 286, 289, 368.) Accordingly, his attack on the SARA condition also became moot upon his release. *See Matter of Kirkland*, 150 A.D.3d at 738.

Alvarez effectively conceded this in Supreme Court. In his reply to DOCCS's request to dismiss the proceeding as moot, he asked Supreme Court to review the SARA claim under the mootness exception. (*See* R. 364.) He cannot complain on appeal that there was "no need for the lower court to engage in exception to mootness analysis" for that claim (Br. at 20), when he himself urged Supreme Court to apply that analysis.

Because Alvarez did not argue to Supreme Court that his challenge to SARA's applicability presented a live controversy (*compare* Br. at 19-20, *with* R. 367-368), that argument is not properly before this Court on appeal, *see Marinkovic v. IPC Intl. of Ill.*, 95 A.D.3d 839, 839 (2d Dep't 2012). In any event, settled law prevents him from reframing his original request for release from the RTF as a new request to eliminate the SARA restriction as "an active condition of [his] PRS" (Br. at 19-20). The latter request amounts to a demand for article 78 review and nullification of the Board of Parole's imposition of the residency restriction. *See* C.P.L.R. 7806 (authorizing court to annul an administrative determination). But Alvarez can obtain that relief only in a proceeding

where he has sued and served the Board or its Chairwoman.[3] *See* C.P.L.R. 7804(d); *see also, e.g.*, *Matter of Bressette v. Supreme Ct.*, 18 A.D.3d 1082, 1082 (3d Dep't 2005) (Board must be joined as a necessary party to challenge parole condition).

Alvarez failed to sue and serve the Board or its Chairwoman here. And he cannot circumvent that requirement by repackaging his claim as a request for a declaratory judgment that the SARA condition does not apply to the remainder of his PRS term. *See* Br. at 20-21. "[A] declaratory judgment action is not the proper vehicle to challenge an administrative [determination] where judicial review by way of article 78 proceeding is available." *Greystone Mgt. Corp. v. Conciliation & Appeals Bd. of City of N.Y.*, 62 N.Y.2d 763, 765 (1984). Moreover, the Board would be a necessary party even in a declaratory judgment action challenging the Board's imposition of the SARA condition. *See, e.g.*, *Matter of Garden City Ctr. Assoc.*

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[3] The Board of Parole, while located within DOCCS, "function[s] independently of [DOCCS] regarding all of its decision-making functions." Executive Law § 259-b(1). Those functions include the Board's exclusive jurisdiction to impose the conditions of release for individuals on PRS, including the mandatory SARA school-grounds condition. *See id.* § 259-c(2), (14); Penal Law § 70.45(3).

v. Incorporated Vil. of Garden City, 193 A.D.2d 740, 740 (2d Dep't 1993).

Alvarez misplaces his reliance on certain aspects of the Court of Appeals's analysis in *Matter of Gonzalez*. *See* Br. at 20. There, the petitioner directly challenged, among other things, DOCCS's having kept the petitioner incarcerated after his conditional release date because he had not yet secured SARA-compliant community housing. The petitioner complained that his incarceration until his maximum expiration date caused him to lose approximately four months of good-time credit. That claim remained live even after the petitioner's release to a community residence because the petitioner was still on PRS, and a decision reversing the withholding of four months of good-time credit would have shortened the petitioner's term of PRS by a corresponding amount of time. *See Matter of Gonzalez*, 32 N.Y.3d at 466-67, 471 n.3.

POINT II

SUPREME COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO REVIEW ALVAREZ'S MOOT CLAIMS UNDER THE EXCEPTION TO THE MOOTNESS DOCTRINE

Courts "have discretion to review [a moot] case if the controversy or issue involved is likely to be repeated, typically evades review, and raises substantial and novel questions." *Wisholek v. Douglas*, 97 N.Y.2d 740, 742 (2002). Even where an issue satisfies those three requirements, however, a court may decline to exercise its "exceptional discretion" to reach the issue. *Matter of David C.*, 69 N.Y.2d 796, 798 (1987). That declination decision is reviewed only for an abuse of discretion.[4] *See Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 398 (2014) (discretionary determinations are subject to abuse of discretion review).

Supreme Court did not abuse its discretion in declining to apply the mootness exception here. Alvarez argued that the exception

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[4] By contrast, a court's affirmative decision to reach moot issues on the grounds that they satisfy the three requirements for an exception to mootness is reviewed as a question of law. *See, e.g.*, *Berger v. Prospect Park Residence, LLC*, 166 A.D.3d 937, 939-40 (2d Dep't 2018), *lv. denied*, 33 N.Y.3d 910 (2019).

applied to RTF issues generally (R. 361-364), but he did not specifically explain why Supreme Court needed to address his particular claims regarding (1) whether Queensboro satisfied the statutory requirements for an RTF under the facts of Alvarez's particular case, (2) whether DOCCS possessed authority to house Alvarez at an RTF for more than six months, (3) whether SARA applies to covered sex offenders on PRS, and (4) whether Alvarez's RTF placement violated his right to equal protection.[5]

A. Alvarez's Fact-Specific Claims Regarding the Conditions at the Queensboro RTF Are Not Likely to Recur and Are Not Substantial.

Supreme Court providently exercised its discretion in declining to review Alvarez's moot claim that the Queensboro RTF did not "serve as an RTF for [Alvarez] in particular." (R. 6.) Courts have consistently held that the exception to the mootness doctrine does

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[5] In addition to the claims Alvarez presses on appeal, Alvarez argued below that Fishkill was not an appropriate RTF and that DOCCS had not provided him with sufficient assistance in locating SARA-compliant housing. (R. 11-12.) On appeal, he has abandoned both of those moot claims (*see* Br. at i-ii). Those claims are thus not before the Court here. *See Melious v. Besignano*, 125 A.D.3d 727, 728-29 (2d Dep't 2015) (declining to reach claims abandoned on appeal).

not apply to a claim based on "unique factual underpinnings," because such a claim is "not likely to recur." *Shelton v. New York State Liq. Auth.*, 61 A.D.3d 1145, 1147 (3d Dep't 2009); *see also Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 811 (2003). Indeed, this Court has concluded that "there [i]s no likelihood of repetition" when the issue presented is "fact-specific." *Berger v. Prospect Park Residence, LLC*, 166 A.D.3d 937, 939 (2d Dep't 2018), *lv. denied*, 33 N.Y.3d 910 (2019).

In Supreme Court, Alvarez repeatedly characterized his claim as an individualized challenge to the alleged inadequacy of the Queensboro RTF *for him*.[6] He also argued that Queensboro did not provide sufficient RTF services *for him*—alleging that Correction Law § 73(2)'s requirement that an RTF provide "appropriate education, on-the-job training, and employment" was not satisfied

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[6] (*See, e.g.*, R. 241 (Queensboro "is not an RTF for Mr. Alvarez"), 252 (Queensboro "is not a statutorily-compliant RTF for him"), 251 ("Queensboro is not a lawful RTF for Mr. Alvarez" (capitalization modified)), 242 ("Mr. Alvarez is not held at a facility that functions as an RTF for him . . . because he is not receiving RTF services"), 368 ("Queensboro is not an RTF for Mr. Alvarez" (capitalization modified)).)

by his employment as a porter, his assignment to a work crew program that included some off-site jobs and higher pay, and his off-site visits to a parole officer. (*See* R. 252-253, 368-369; *see also* R. 335-336.)

Whatever the merits of these arguments, Alvarez has failed to demonstrate that his "fact-specific" experience is likely to recur. *Berger*, 166 A.D.3d at 939. He has not shown that others at the Queensboro RTF have had the same specific experience, or that he would experience the same conditions in the unlikely event that he is returned to DOCCS's custody and once again placed at the Queensboro RTF. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109-10 (1983) (mootness exception inapplicable where plaintiff failed to show a "realistic[] threat[]" that he would be subject to the challenged conduct again); *Matter of Lunar Pursuit, LLC v. Frame*, 149 A.D.3d 1398, 1399 (3d Dep't 2017) (declining to apply mootness exception where "[i]t would be speculative to assume" the same fact pattern would recur).

Alvarez's "fact-specific" complaints likewise present no "substantial" question. *Berger*, 166 A.D.3d at 939. Alvarez has not

shown that resolution of his claims will likely affect anyone else, such that the court below should have exercised its "exceptional discretion to retain the appeal despite mootness." *Matter of David C.*, 69 N.Y.2d at 798.

Nor has Alvarez raised a serious claim that DOCCS violated its obligation to provide him with RTF services at Queensboro. By statute, DOCCS is "responsible for securing appropriate education, on-the-job training and employment for" RTF residents; establishing "[p]rograms directed toward the rehabilitation and total reintegration into the community"; and "assign[ing] a specific program" for each RTF resident. Correction Law § 73(2)-(3). Here, the record shows that Alvarez was "assigned to a work crew program directed toward the rehabilitation and total reintegration into the community of RTF residents" that included work performed both on the grounds of the correctional facility as well as "off grounds." (R. 335.) Indeed, through his "on-the-job training and employment" in the work crew program, Correction Law § 73(2), Alvarez earned ten dollars a day, "more than any inmate can earn in the prison vocational programs" (R. 336). Alvarez has not demonstrated that program is insufficient

to satisfy DOCCS's responsibilities under Correction Law § 73. *See, e.g.*, *Matter of Gonzalez*, 32 N.Y.3d at 468-69, 475 (rejecting similar challenge to Woodbourne RTF where petitioner "admittedly participated in Woodbourne's RTF program" and an outside work crew, and "earned higher wages than" Woodbourne prison inmates).[7]

On appeal, Alvarez attempts to reframe his challenge as a broader claim that Queensboro does not function as an RTF for any sex offender. *See* Br. at 16, 18. However, he never alleged below that all sex offenders at the Queensboro RTF fail to receive appropriate programming and employment. Rather, his presentations to Supreme Court made clear that his challenge concerned *his* ability to participate in a particular reentry program, as well as the work opportunities that Queensboro made available to him in particular. (*See* R. 245-246, 251-253, 368-369.)

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[7] Although Alvarez also complains that he did not receive a written memorandum explaining the RTF programming (Br. at 17), that alleged procedural defect does not warrant a declaratory judgment that the Queensboro RTF did not provide him with RTF services (*see id.* at 18).

Alvarez thus has not properly presented a claim that the exclusion of sex offenders from a particular reentry services program renders the Queensboro RTF inadequate for all sex offenders, regardless of what additional programming and employment they each receive. *See Marinkovic*, 95 A.D.3d at 839. Nor does the record contain any evidence suggesting that all sex offenders at the Queensboro RTF are deprived of appropriate programming and employment. Alvarez therefore is not entitled to a broad declaratory judgment that Queensboro is "unfit to serve as an RTF for [all] people with sex offense convictions" (Br. at 18).[8]

[8] Alvarez misses the mark in arguing that DOCCS originally established that reentry services program at Queensboro as a way to provide the required RTF services (*see* Br. at 16-17). Regardless of whether that program constitutes sufficient RTF programming, Alvarez points to no statute or regulation barring DOCCS from providing the necessary RTF services through other means, such as a work crew program.

B. Alvarez's Challenges to the SARA Condition and to DOCCS's Authority to House Him at the Queensboro RTF Are Not Substantial and Novel.

Appellate courts have already addressed and rejected arguments that the SARA school-grounds condition does not apply to individuals on PRS, and that DOCCS lacks authority to provide RTF housing to a person on PRS for more than six months. Alvarez's rehashing of those arguments does not present any substantial or novel issue. Supreme Court therefore properly declined to apply the mootness exception to reach those claims.

First, contrary to Alvarez's assertion that no appellate court has considered SARA's applicability to persons on PRS (Br. at 27-29), the Court of Appeals has twice recognized that SARA's school-grounds condition applies to persons on PRS. *See Matter of Gonzalez*, 32 N.Y.3d at 473 n.5; *Diack*, 24 N.Y.3d at 681. Executive Law § 259-c(14) requires the Board of Parole to apply SARA's school grounds restriction to covered sex offenders who are "on parole or conditionally released." The Penal Law, in turn, directs that the Board "shall establish and impose conditions of *post-release supervision* in the same manner and to the same extent" as the Board does under the

Executive Law for those on "parole or conditional release." Penal Law § 70.45(3) (emphasis added); *see also id.* § 70.40(1)(b). That language unambiguously requires SARA's school-grounds condition to be applied to covered sex offenders on PRS.[9] *See Matter of Gonzalez*, 32 N.Y.3d at 473 n.5 (citing Penal Law § 70.45(3) in explaining that the SARA residency restriction "is a mandatory condition of petitioner's PRS").

Second, as even Alvarez admits (*see* Br. at 30), this Court has squarely ruled that DOCCS does possess authority to provide RTF housing to a person on PRS for more than six months until SARA-compliant housing has been secured. *See McCurdy*, 164 A.D.3d at 694-95. The fact that the Court of Appeals has granted leave to

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[9] Alvarez is mistaken in his suggestion (Br. at 26-27) that the Legislature created PRS as a more lenient form of community supervision that should not include the SARA condition. Legislative history materials from the Sentencing Reform Act of 1998, which created PRS, demonstrate that the Legislature intended PRS to be a "stringent" period of supervision where the State would "impos[e] and enforce[] . . . conditions" of PRS to "provide[] opportunities for early intervention, including reincarceration." Executive Chamber Mem. (Aug. 6, 1998), *in* Bill Jacket for Ch. 1 (1998), at 5-6; Bill Mem., *in* 1998 Bill Jacket, *supra*, at 7.

appeal in *McCurdy* does not render this Court's decision nonbinding or restore the issue's novelty.

C. Alvarez Failed to Demonstrate That the Mootness Exception Applied to His Equal Protection Claim and That the Claim Was Substantial.

Supreme Court did not abuse its discretion by declining to consider Alvarez's equal protection claim under the exception to the mootness doctrine, because Alvarez did not request that Supreme Court do so. (*See* R. 361-364.) A party seeking review of moot issues has the burden of demonstrating that each issue qualifies for application of the exception. *See Matter of David C.*, 69 N.Y.2d at 798; *see also, e.g.*, *Matter of DeCintio v. Village of Tuckahoe*, 100 A.D.3d 887, 888 (2d Dep't 2012). Alvarez, however, never specifically mentioned his equal protection claim in his filing on mootness in Supreme Court. (*See* R. 361-364.)

In any event, Alvarez cannot show that this particular claim presents a question so substantial as to merit review under the mootness exception. *See Matter of Jablonski v. Steinhaus*, 48 A.D.3d 465, 466-67 (2d Dep't 2008). Alvarez is doubly mistaken in claiming

that DOCCS's provision of interim housing in an RTF unconstitutionally extends his incarceration because of his indigence. (*See* R. 32.) First, temporary housing in an RTF during his term of PRS does not amount to an extension of his term of incarceration. Penal Law § 70.45(3) expressly provides that PRS may commence in an RTF, and Correction Law § 73(10) confirms that RTFs may be used as residences for persons on community supervision—a term expressly defined to include PRS, *see* Correction Law § 2(31).[10]

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[10] This case is therefore distinguishable from the cases cited in Alvarez's petition (R. 32) that concern the deprivation of liberty through the imposition of an additional sentence of *incarceration* based on an inmate's inability to pay a fine or court costs. *See Williams v. Illinois*, 399 U.S. 235, 242 (1970); *People v. Saffore*, 18 N.Y.2d 101, 104 (1966); *see also State v. Adams*, 91 So. 3d 724, 741-42 (Ala. Crim. App. 2010) (criminal felony statute imposing additional sentence if mailing address was not provided violated equal protection for indigent or homeless inmates for whom securing a residence was impossible). Here, there is no fundamental right involved, and the relevant standard is rational-basis review. *See Matter of Williams v. Department of Corr. & Community Supervision*, 136 A.D.3d 147, 164 (1st Dep't 2016) (parolees "have no liberty interest, let alone a fundamental right, to be free from special conditions of parole"); *see also Morrissey v. Brewer*, 408 U.S. 471, 483 (1972) (parolee's earlier conviction "justifies imposing extensive restrictions on the individual's liberty" through conditions of parole).

Second, Alvarez was not temporarily housed in the RTF because of his indigence. Penal Law § 70.45(3) authorizes the Board of Parole to require any offender to reside in an RTF during his or her first six months of PRS, regardless of the offender's financial circumstances. After that six-month period, the relevant restriction on Alvarez's ability to secure housing was the SARA condition, which applies to every covered offender regardless of that offender's financial means.

Alvarez also fails to demonstrate that DOCCS's use of RTFs as temporary housing for Alvarez results "simply" from Alvarez's lack of "financial means to afford SARA-compliant housing." (R. 32.) Alvarez's difficulty in obtaining SARA-compliant housing, and his consequent need for temporary RTF housing, reflect (1) the places in which he had community ties and could safely be released, (2) the communities in which he was willing to live, (3) the large number of schools in those communities, (4) the general availability of housing in the SARA-restricted zones in those communities, and (5) the availability of affordable housing in those zones. Only the

last factor relates to financial means, and all five factors together constrained Alvarez's ability to secure housing.

SARA is thus not an economic classification, either on its face or in its application. Even if it were, it would be reviewed merely for a rational basis. *See Abberbock v. County of Nassau*, 213 A.D.2d 691, 691 (2d Dep't 1995) ("Under both the New York State and Federal Constitutions, an equal protection challenge based upon an economic classification . . . must be judged under a 'rational basis' standard."). SARA readily satisfies that level of review because it is rationally related to the legitimate governmental interest in protecting vulnerable children from sex offenders. *See Matter of Devine v. Annucci*, 150 A.D.3d 1104, 1106 (2d Dep't 2017) (concluding that legislative history of SARA "make[s] clear that it was intended to provide protection to children from the risk of recidivism by certain convicted sex offenders"); *Matter of Williams v. Department of Corr. & Community Supervision*, 136 A.D.3d 147, 161, 163 (1st Dep't 2016) (reasoning that SARA reflects a "rational connection between deterring recidivism and limiting access to potential victims," and rejecting Ex Post Facto Clause challenge because "the

categories of parolees to whom SARA applies is sufficiently narrowly drawn and reasonably related to an assessment of recidivism so as to pass constitutional muster").

CONCLUSION

For the foregoing reasons, this Court should affirm Supreme Court's dismissal of the petition.

Dated: New York, New York
December 27, 2019

Respectfully submitted,

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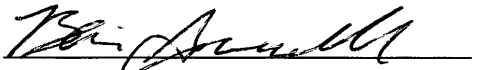
By: 
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