SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-12935

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STEPHEN FOSTER MICHAEL GOMES, PETER KYRIAKIDES, RICHARD O'ROURKE, STEVEN PALLADINO, MARK SANTOS, DAVID SIBINICH, MICHELLE TOURIGNY, MICHAEL WHITE, FREDERICK YEOMANS, & HENDRICK DAVIS,
Plaintiffs

v.

CAROL MICI, Commissioner of the Massachusetts Department of Correction, GLORIANN MORONEY, Chair, Massachusetts Parole Board, THOMAS TURCO, Secretary of the Executive Office of Public Safety and Security, & CHARLES BAKER, Governor of the Commonwealth of Massachusetts,
Defendants

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On Reservation & Report from the Supreme Judicial Court for Suffolk County,
No. SJ-2020-0212

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**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANT MASSACHUSETTS PAROLE BOARD**

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The Massachusetts Parole Board ("the Board"), a defendant in this action, submits this memorandum of law in support of its motion dismiss the plaintiffs' complaint ("the complaint").[1] The complaint should be dismissed as to the Board pursuant to Mass. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted. The plaintiffs' complaint fails to state a claim as to the Board because: (a) it fails to plead facts sufficient to establish a causal link between the Board or its actions and the conditions of confinement that the plaintiffs claim are unconstitutional; and (b) it seeks relief that the Board is without authority to grant. Accordingly, the Board should be dismissed as a defendant in the case.

[1] Citation to the complaint will be to paragraph number or page and take the form (Comp. ¶ __) or (Compl. p. __).

## BACKGROUND

### A. The plaintiffs.

The plaintiffs are a group of eleven inmates that comprise: eight inmates serving sentences in the custody of the Department of Correction ("DOC"); one individual who had been formerly in the custody of DOC pursuant to a now-expired order of civil commitment under G.L. c. 123, § 35; and two inmates in the serving sentences in the custody of two different county sheriffs (Compl. ¶ __).

### B. The plaintiff's claims.

The plaintiffs' three claims seek declaratory judgment and injunctive relief as a result of alleged unconstitutional conditions of confinement in the facilities in which they are held.

Two of the plaintiffs' claims apply to those plaintiffs serving sentences of incarceration in facilities operated by DOC or the sheriffs. In the first, the incarcerated plaintiffs request declaratory judgment under G.L. c. 231A, § 2, for relief from alleged violations of the Declaration of Rights amounting to cruel or unusual punishment because all defendants are allegedly "incarcerating [p]laintiffs under conditions" that put them at risk of contracting COVID-19 and "failing to implement an effective mechanism to reduce the incarcerated population to a safe level" (Compl. ¶ 95). In the second, the incarcerated plaintiffs allege a violation of their federal constitutional right to be free from cruel and unusual punishment, under 42 U.S.C., § 1983, because all defendants are "deliberately indifferent" towards the risk of COVID-19 posed by "incarcerating [p]laintiffs under conditions" and "failing to implement" the measures they seek "to reduce the incarcerated population" (Compl. ¶ 97).

The third claim applies to individuals civilly committed to DOC facilities pursuant to G.L. c. 123, § 35, based upon the same alleged federal and constitutional violations as set

out in the first two claims (Compl. ¶¶ 99-102). Like the first two claims, this third claim is asserted against all defendants.

**C. The defendant Board.**

The Board is an agency nominally situated within the Department of Correction (and Executive Office of Public Safety and Security ("EOPSS")), but not subject to the control of the Commissioner of Correction or the Secretary of EOPSS. *See* G.L. c. 27, § 4. Members of the Board are appointed by the Governor, with the advice and consent of the Executive Council, for a term of five years. *Id.* They are removable only for cause. *Id.*

The Board's statutory mandate is to determine which inmates are appropriate for release on parole, when that release occurs, and under what conditions. G.L. c. 27, §§ 4-5. The Board is statutorily bound to release an individual on parole only when it determines "there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society."[2] G.L. c. 127, § 130.

**ARGUMENT**

Even assuming the truth of the facts alleged in the complaint (which the Board must for purposes of the motion only), each of the claims asserted against the Board fails as a matter of law and must be dismissed pursuant to Mass. R. Civ. P. 12 (b)(6) (insofar as it applies to proceedings before the Single Justice Under Mass. R. Civ. P. 1) or Mass. R. App.

[2] An inmate can receive medical parole if the Commissioner of Correction determines that the inmate is "terminally ill or permanently incapacitated such that if the prisoner is released the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society" G.L. c. 127, § 119A(e). The Board is then required to "impose terms and conditions" of that medical parole, and the inmate is released as if they had been paroled pursuant to G.L. c. 127, § 130. G.L. c. 127, § 119A(e), (f).

P. 15 (insofar as it applies to proceedings before the full Court) for failure to allege any fact suggesting an entitlement to relief as against the Board. *E.g.*, *Burbank Apartments Tenant Ass'n v. Kargman*, 474 Mass. 107, 116 (2016) (complaint must plausibly suggest an entitlement to relief assuming truth of facts alleged).

## I. The Claims Against The Board Must Be Dismissed Because The Complaint Pleads No Facts To Establish The Board's Connection To The Purported Unconstitutionality.

The plaintiffs' first two claims focus on the risk of COVID-19 posed by the conditions of their incarceration and the plaintiffs contend deliberate indifference on the part of the defendants towards those risks. The facts alleged by the plaintiffs are insufficient to state a claim against the Board under either the Eighth Amendment or 42 U.S.C. § 1983 because, even if accepted as true, they fail to establish any factual connection between the Board and the alleged constitutional deprivation.

First, declaratory judgment is inapposite as to the Board. An action for declaratory judgment asks a court to determine the legality of the practices and procedure of an agency. G.L. c. 231A, § 2. The plaintiffs, however, have not identified any practice or procedure of the Board that is unlawful or unconstitutional. Indeed, there is no constitutionally protected liberty interest in a grant of parole. *Diatchenko v. Dist. Att'y for the Suffolk Dist.*, 471 Mass. 12, 31 (2015). The plaintiffs may disagree with the parole decisions the Board has made or its process[3] (Compl. ¶¶ 68-70), but they have not even alleged that, due to the

[3] The complaint ignores entirely the steps taken by the Board to adhere to this Court's decision in *CPCS v. Chief Justice of the Trial Ct.*, No. SJC-12926, 2020 WL 1659939 (Mass. Apr. 3, 2020), and the Board's work with the Special Master following that decision. For example, according to the Special Master's report on April 27, 2020, the Board released 203 inmates to parole supervision between April 3, 2020, and April 26, 2020.
By way of comparison, in an April 22, 2020, filing in *CPCS*, the Board represented that in the twelve-day period between April 6, 2020, and April 17, 2020, 127 individuals were released to parole supervision, and that was an approximately 53% increase as compared to

Board's practices and procedures, any one of them has been impermissibly denied parole. *See id.* (denial of parole reviewed for abuse of discretion). Without some plausible allegation that a specific action of the Board violates the law, the claims against the Board must be dismissed.

A violation of the Eighth Amendment or Article 26 of the Massachusetts Declaration of Rights occurs when conditions of an inmate's confinement present an objective "substantial risk of serious harm," and where subjectively "prison officials acted with "deliberate indifference" to inmate health or safety." *Torres v. Comm'r of Corr.*, 427 Mass 611, 613-614 (1998); *id.* at 615-616 (rights guaranteed under art. 26 are at least equally as broad as those guaranteed under the Eighth Amendment); *accord Good v. Comm'r of Corr.*, 417 Mass. 329, 335-336 (1994). In order to establish a violation of 42 U.S.C. § 1983, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

To analyze whether conditions of confinement are unconstitutional, a court examines the actions of the authority with responsibility for those conditions. That analysis requires that "a prison official must know and disregard an excessive risk to inmate health or safety" before a determination of deliberate indifference may be made. *'Abdullah v. Sec'y of Pub. Safety*, 42 Mass. App. Ct. 387, 394 (1997), *cited with approval in Torres*, 427 Mass. at 616. The plaintiffs' complaint fails this test. More specifically, the complaint fails to state a claim under the Eighth Amendment against the Board because it alleges no facts – and indeed there are no facts – to suggest the Board controls the

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the average number of releases to parole supervision during fourteen-day periods in calendar year 2019.

conditions which plaintiffs claim create a substantial risk of harm,[4] nor does it set forth how the Board can be deliberately indifferent to, or disregard, those conditions which it cannot change.[5] The Board has no authority over and no ability to control the conditions of incarceration within facilities that, by law, are committed exclusively to the control of the Department of Correction of the sheriffs. Put simply, the Board is not a "prison official." Likewise, there is no claim under § 1983 against the Board because, given the limited statutory role of the Board, there is no causal connection between any action of the Chair of the Board and any allegedly unconstitutional condition of confinement within facilities the Board cannot control. *See Temple v. Marlborough Div. of Dist. Court Dep't*, 395 Mass. 117, 120 (1985) (complaint must allege action by each defendant that deprives plaintiff of federal or state constitutional rights); *Sanchez v. Pereira-Castillo* 590 F.3d 31, 41 (1st Cir. 2009) (Section 1983 requires a causal connection between the defendant and the deprivation, not a remedial one). Absent an allegation that the Board has caused the conditions of confinement about which the plaintiffs complain, either through the Board's action or its "deliberate indifference," the claim must be dismissed.

## II. The Claims Against The Board Must Be Dismissed Because There Is No Remedy The Board Can Lawfully Provide To Remedy The Alleged Constitutional Violation.

Beyond the absence of a factual connection between the plaintiffs' allegations and the limited role of the Board, the Board's complete lack of statutory authority to remedy the claims brought by the plaintiffs presents its own, absolute impediment to the relief they seek. To be sure, the Board has the authority to release sentenced inmates on parole. But

[4] A conclusory assertion in the complaint suggests that the Board is "incarcerating" the plaintiffs (Compl. ¶¶ 95, 97). This is not true as a matter of law. G.L. c. 125, § 12 (Department of Correction holds all persons sentenced to any correctional institution).
[5] As a practical factual matter, the Board has not ignored the circumstances posed by the pandemic. *See* note 3, *supra*.

the Board is required to exercise that authority over only those inmates statutorily eligible and according to the specific criteria set forth by the Legislature; the Board is without any authority to issue a parole permit to relieve an unconstitutional condition of confinement. G.L. c. 127, § 130 (setting forth, *inter alia*, standard for issuance of parole permit, and specific factors for Board to consider when determining if standard has been met); G.L. c. 127, §§ 128, 133, 133A (setting forth parole permit eligibility criteria).

Indeed, in asking this Court to order the Board to issue permits to remedy conditions of confinement, the plaintiffs are asking this Court to contravene case law, statute, and constitution. "'[C]ourts of equity can no more disregard statutory and constitutional provisions than can courts of law.'" *Haverty v. Comm'r of Corr.*, 440 Mass. 1, 8 (2003) (quoting *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893)). The statutory purpose of parole is to ensure that an inmate is released from incarceration with appropriate conditions to ensure that the prisoner will not reoffend and in a way not incompatible with the public welfare. Even if the plaintiffs were able to demonstrate that they were unconstitutionally confined, there is no nexus between those unconstitutional conditions and parole's statutory purpose. In *Haverty*, a trial court determined that prison officials had denied inmates due process by confining them under certain conditions without first providing them with procedural protections, issued injunctive relief, and awarded the inmates statutory good-time credit for the time they were illegally confined. *Id.* at 1-2. While this Court did not reach the constitutional question, it held that those good-time credits could not be ordered as equitable relief. *Id.* at 4. Without a connection between the wrong suffered and the statutory purpose for the credits (improving inmates' prison experience and enhancing rehabilitation and reentry), awarding credit that the inmates did not earn was improper. *See id.* at 8-9.

Finally, this Court is bound to reject the plaintiffs' demand that it order the Board to take specific actions as relief for any alleged unconstitutional condition of confinement, including orders to compel the Board to "[e]xercise its authority" under statute and "presumptively grant parole" to certain individuals (Compl. pp. 29-30). The requested relief would violate art. 30. Even where a court finds a constitutional violation in conditions of confinement (which the Board does not concede exists), the authority and responsibility to fashion and implement a remedy for that violation is consigned to the executive branch. "Where a court contemplates an injunctive order to compel an executive agency to take specific steps, it must tread cautiously in order to safeguard the separation of powers mandated by art. 30 . . ." *Smith v. Comm'r of Transitional Assistance*, 431 Mass. 638, 651 (2000). Indeed, affirmative injunctive relief against the Board (or any defendant) would run counter to the presumption that public officials will take steps to comply with an order entered against them. *See, e.g.*, *LaChance v. Comm'r of Corr.*, 475 Mass. 757, 765 (2016); *Mass. Coalition for the Homeless v. Sec'y of Human Servs.*, 400 Mass. 806, 825 (1987) ("[W]here the declaratory judgment is directed to public officials, an injunctive order is not necessary . . . because Massachusetts courts 'assume that public officials will comply with the law declared by a court and that consequently injunctive orders are generally unnecessary'"); *cf. Bromfield v. Treasurer & Receiver General*, 390 Mass. 665, 669 (declining to order affirmative action to meet a judgment against the Commonwealth and articulating (1983) the "presumption . . . that the Commonwealth will honor its obligations").

## III. The Claim Against The Board Relating To Civil Commitment Under G.L. c. 123, § 35, Must Be Dismissed Because The Board Lacks Any Authority Over Persons So Committed.

Finally, the claim regarding an individual formerly civilly committed pursuant to G.L. c. 123, § 35, must be dismissed against the Board. The Board has no authority over the conditions of those individuals' civil commitment. G.L. c. 123, § 35. Nor does the Board

have any authority over their release. *See* G.L. c. 27, § 5. Accordingly, there are no legal grounds upon which relief could be granted as to the Board regarding these individuals, and the claims should be dismissed.[6]

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that all claims against it be dismissed.

Respectfully submitted,

THE MASSACHUSETTS PAROLE BOARD,

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Dated: April 29, 2020

## CERTIFICATE OF SERVICE

I, Pamela Murphy, hereby certify, under the penalties of perjury, that on April 29, 2020, I caused a true and accurate copy of the foregoing to be filed and served via electronic filing, and served copies upon the following counsel by email to:

[6] Furthermore, the claim is moot, as the named plaintiff is no longer civilly committed (Compl. ¶ 16).

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