SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-12935

STEPHEN FOSTER, MICHAEL GOMES, PETER KYRIAKIDES, RICHARD O'ROURKE, STEVEN PALLADINO, MARK SANTOS, DAVID SIGNICH, 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.

On Reservation & Report from the
Supreme Judicial Court for Suffolk County, SJ-2020-0212

PLAINTIFFS' OPPOSITION TO DEFENDANT MASSACHUSETTS PAROLE BOARD'S MOTION TO DISMISS

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INTRODUCTION

This is a putative class action lawsuit brought by named Plaintiffs seeking injunctive relief on behalf of persons incarcerated in Massachusetts prisons and jails, who are facing a substantial risk of serious harm from the spread of COVID-19, up to and including death. On April 1, 2020, this Court declared that "the situation is urgent and unprecedented, and . . . a reduction in the number of people who are held in custody is necessary." *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, 484 Mass. 431, 142 N.E.3d. 525, 537 (2020). Despite the ongoing emergency, the Chairperson of the Parole Board (hereinafter the "Board") informed this Court at oral argument in *Comm. for Pub. Counsel Servs*., that it had made no efforts to accelerate the scheduling of parole hearings, and that approximately 300 individuals who had been approved for parole still remained in custody. *Id*.; *see* Compl. ¶ 69. Although the petitioners in *Comm. for Pub. Counsel Servs*. did not raise any constitutional claims, this Court nonetheless directed the Board "to use every effort [to expedite parole hearings and releases] "as far as reasonably possible so as to reduce the over-all number of incarcerated inmates as quickly as possible." *Comm. for Pub. Counsel Servs*., 484 Mass. 431 at n.24.

This case does raise constitutional claims against the Board. Count I alleges that Defendants are violating the prohibition in art. 26 of the Declaration of Rights against cruel or unusual punishment by incarcerating Plaintiffs under conditions

that put them at grave and imminent risk of contracting COVID-19 and by "failing to implement an effective mechanism to reduce the incarcerated population to a safe level[.]" Compl. ¶ 95. Count II makes similar claims under the Eighth and Fourteenth Amendments, alleging that Defendants are "deliberately indifferent" to the serious risks posed by COVID-19 in failing to reduce the incarcerated population in the Commonwealth. Compl. ¶ 97.[1] Accordingly, Plaintiffs seek an order requiring Defendants to develop a population reduction plan, prioritizing release of prisoners who are at particularly high risk due to age or underlying medical condition, and utilizing all permissible mechanisms to reduce the incarcerated population, including modifications to parole criteria and procedures.

The Board has moved to dismiss the Complaint on grounds that it fails to state a claim as to the Board because: (a) there is no 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. Since there is no merit to either argument, the motion should be denied.

[1] Plaintiffs do not oppose dismissal of the claim against the Board in Count III relating to prisoners civilly committed under G.L c. 123, § 35.

BACKGROUND

COVID-19 is spreading rapidly throughout the Department of Correction ("DOC") and many county correctional facilities. Compl. ¶ 6. Between April 5 and the April 13, the number of COVID-19 cases among prisoners, staff, and vendors across the state shot up from 30 to 243, and continued to rise steeply, reaching 319 on the day the Complaint was filed. *Id*. The Board informed this Court at oral argument in *Comm. for Pub. Counsel Servs.* that it had made no changes to their ordinary release practices in response to the threat posed by COVID-19. Compl. ¶ 69. It also told the Court that there were over 300 prisoners whom it had already approved for parole but who remained incarcerated. *Id.*; Compl. ¶ 9. Although the Board informed the Court that this is because it typically takes 14 days to approve a home plan, it sometimes takes much longer. For example, the Board approved Plaintiff Sibinich for parole more than a year ago, and he was scheduled to move to a long-term residential program, but he remains incarcerated at Pondville Correctional Center. Compl. ¶ 17. Indeed, the Special Master's April 12 report to this Court discloses that the Board has only released 58 people on parole since the Court issued its decision. Compl. ¶ 69. And there is no evidence that the Board has released anyone in this period who would not have been released in the normal course if there were no pandemic. Compl. ¶ 70. Unlike in other states, the Board

has made no effort to streamline the parole process or modify the criteria for release in light of COVID-19. Compl. ¶ 68.[2]

LEGAL STANDARD

In considering a motion to dismiss, the Court must:

> [A]ccept the factual allegations in the plaintiffs' complaint, as well as any favorable inferences reasonably drawn from them, as true. [A] complaint is sufficient against a motion to dismiss if it appears that the plaintiff may be entitled to any form of relief, even though the particular relief he has demanded and the theory on which he seems to rely may not be appropriate. A motion to dismiss will be granted only where it appears with certainty that the nonmoving party is not entitled to relief under any combination of facts that he could prove in support of his claims.

Sullivan v. Chief Justice for Admin. and Mgmt. of Trial Ct., 448 Mass. 15, 20 (2006) (citations and internal quotation marks omitted). Plaintiffs must provide "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief" and with "enough heft to 'sho[w] that the pleader is entitled to relief.'" *Iannacchino v. Ford Motor*, 451 Mass. 623, 636 (2008) (quoting *Bell Atlantic v. Twombly,* 550 U.S. 544, 557 (2007)).

[2] The Board also argues that the Complaint should be dismissed because it has subsequently paroled a significant number of additional prisoners. *See Board's Memo.* at 4 n.3. Whether any actions the Board may have taken after the Complaint was filed are constitutionally adequate can be considered by the Court when it decides the merits of this case, but these actions are irrelevant to disposition of the motion to dismiss.

ARGUMENT

I. THE BOARD IS SUBJECTING PRISONERS TO UNCONSTITUTIONAL CONDITIONS OF CONFINEMENT BY FAILING TO STREAMLINE PAROLE PROCEDURES OR MODIFY PAROLE CRITERIA TO REDUCE THE PRISON POPULATION IN LIGHT OF COVID-19

For prison conditions to violate Article 26 of the Declaration of Rights or the Eighth Amendment, "a prison official must know and disregard an excessive risk to inmate health or safety." '*Abdullah v. Sec'y of Pub. Safety*, 42 Mass. App. Ct. 387, 394 (1997). The Board argues that because it is not a "prison official," it has no ability to control the conditions of confinement within the prisons and jails, and therefore has no responsibility to address the risk to prisoners' health and safety from exposure to COVID-19. Although the Board is correct that it is not responsible for issues like sanitation conditions inside correctional facilities, the fact that it is not a "prison official" is irrelevant. The Board still plays a vital role with respect to the most important issue in this case—whether there are too many people incarcerated in Massachusetts prisons and jails to permit Plaintiffs to practice the physical social distancing that is essential for their safety.

A number of factors contribute to the total number of prisoners incarcerated at any given time in Massachusetts correctional facilities, including among other things the sentencing and bail practices of the courts and the amount of good time awarded by the DOC. The Board is an integral part of the equation. By deciding whether and when to release prisoners on parole, as well as whether or not to

revoke the parole of individuals who may have violated a condition of parole in the community, the Board plays a crucial role in regulating the overall correctional population levels. Contrary to the Board's argument, there is a direct causal link between parole practices and decision-making and the degree to which crowded prisons expose Plaintiffs to an unreasonable risk of COVID-19 infection. *See Good v. Comm'r of Corr.*, 417 Mass. 329, 334 (1994) (Massachusetts Commissioner of Correction was a proper defendant in an action claiming unconstitutionally dangerous drinking water in a federal prison over which he had no authority because he "has the ability to prevent harm to [the plaintiff] by, for example, transferring him to another facility with safe drinking water, but has failed to do so"). Similarly, here the Board has failed to implement effective measures to reduce the incarcerated population by, for example, expediting parole hearings and releases, and modifying the criteria for release to reflect the impact of COVID-19. Accordingly, the Complaint states a claim that the Board is acting with deliberate indifference to the prisoners' health and safety in violation of the Eighth Amendment and Article 26 of the Massachusetts Declaration of Rights.

II. THE REQUESTED RELIEF DOES NOT REQUIRE THE BOARD TO EXCEED ITS STATUTORILY PRESCRIBED AUTHORITY

The Board also asserts that it has no authority to issue a parole permit to relieve an unconstitutional condition of confinement because the criteria for parole are set forth in G.L. c. 127, § 130, and the timing of parole eligibility is established

G.L. c. 127, §§ 128, 133, 133A. The Board's argument is flawed for several reasons.

First, Plaintiffs are not asking the Court to order relief that would require the Board to violate any statute. Nothing in the Prayers for Relief asks the Board to do anything that it does not already have discretion to do under existing statutes and regulations. Compl. at pp. 29-30.[3] Nonetheless, the Board claims that Plaintiffs want this Court to order it to disregard the criteria for parole set forth in G.L. c. 127, § 130, which provide that it can release a person on parole only if "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."

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[3] The Prayers for Relief ask the Court to order the Parole Board to:
a. Exercise its authority under G.L. c. 127, § 130, and 120 Code Mass. Regs. § 200.10 (2017), to make all persons serving house of correction sentences eligible for early parole;
b. Consider the dangers posed by COVID-19 when it evaluates whether "release is not incompatible with the welfare of society," as required by G.L. c. 27, § 130;
c. Presumptively grant parole to all parole eligible individuals unless it makes a determination based on clear and convincing evidence that the person cannot live at liberty without violating the law;
d. Expedite the actual release of all individuals who have been granted parole or medical parole contingent on approval of a home plan or satisfaction of some other condition;
e. Ensure that no prisoner is held beyond his "release to supervision date" under G.L. c. 127, § 130B; and
f. Conduct parole hearings for all parole eligible prisoners no later than 60 days prior to their parole eligibility date, as required by G.L.c. 127, § 136.

The Board fails to appreciate that § 130 does not establish a static standard with a fixed meaning; it is easily flexible enough to allow consideration of how COVID-19 may affect both the individual prisoner's risk of recidivism and the welfare of society. Indeed, § 130 also requires the Board to consider a risk and needs assessment as part of its evaluation of the prisoner, which in these extraordinary times should obviously take COVID-19 into account. In fact, this Court has already made it clear that when judges decide whether to grant a stay of sentence, they should consider:

> not only the risk to <u>others</u> if the defendant were to be released and reoffend, but also the health risk to the <u>defendant</u> if the defendant were to remain in custody. In evaluating this risk, a judge should consider both the <u>general</u> risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff and the <u>specific</u> risk to the defendant, in view of his or her age and existing medical conditions, that would heighten the chance of death or serious illness if the defendant were to contract the virus.

Christie v. Commonwealth, 484 Mass. 397 (2020) (emphasis in the original); *see Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Ct.*, 484 Mass. 431 (2020) (requiring similar consideration of COVID-19 when deciding whether to release a defendant on personal recognizance). For much the same reason, it would be appropriate for the Board to make comparable adjustments in how it evaluates the risk of re-offense and the effect of release on the welfare of society in light of the

COVID-19 pandemic. The Board's argument that such modifications would conflict with the purpose of parole therefore has no merit.[4]

Second, the Board is also wrong that this Court has no authority to order a remedy for a constitutional violation that would be contrary to state law. Even the Prison Litigation Reform Act, which was designed to limit the authority of courts to order prospective relief, recognizes that a court may order government officials to take action that violates a state law where necessary to correct the violation of a federal right. *See* 18 U.S.C. § 3626 (a)(1)(B). And as this Court pointed out in *Richardson v. Sheriff of Middlesex Cnty*., "[m]any courts have held that population caps are particularly appropriate remedial measures in jail overcrowding cases," using their equitable powers to order early release of prisoners before their sentences expired. 407 Mass. 455, 468 (1990) (collecting cases); *see*, *e.g.*, *Brown v. Plata*, 563 U.S. 493 (2011) (requiring California to release thousands of prisoners to ensure that those who remained incarcerated received constitutionally adequate medical care). Since the courts have an obligation to protect

[4] The Board's reliance on *Haverty v. Comm'r of Corr.,* 440 Mass. 1, 8-9 (2003) is misplaced. There, the court overturned an award of good time deductions made as compensation to prisoners who had been held in solitary confinement in violation of DOC regulations because the good time statute only authorized deductions to prisoners who had actually participated in work, education, or rehabilitation programs. By contrast, in the present case, as explained above, there would be no conflict between the parole standards set forth in §130 and an order that required the Board to consider COVID-19 as part of its evaluation.

constitutional rights, such orders do not violate the separation of powers clause in art. 30 of the Declaration of Rights. *See Blaney v. Commissioner,* 374 Mass. 337, 342 (1978).

III. THE BOARD IS A NECESSARY PARTY TO THIS ACTION

Even if the Plaintiffs cannot state a claim against the Board, the Board should not be dismissed because it is a necessary party to this action, pursuant to Mass. R. Civ. P. 19(a). Even without any finding of a constitutional violation, this Court has already urged the Board to do all it can to reduce the prison population in order to protect prisoners from infection by COVID-19. If the Court ultimately concludes that a reduction in the correctional population is constitutionally required, the Board will be an indispensable party in order to achieve complete relief in a reasonable and effective manner. *See Richardson v. Sheriff of Middlesex Cnty.*, 407 Mass. 455, 469-70 (1990) (joinder of the Commissioner of Correction was necessary in a jail overcrowding case because of his statutory responsibility to enforce minimum standards in county as well as state correctional facilities).

CONCLUSION

Since Plaintiffs have alleged sufficient facts showing an entitlement to relief from the Board, the motion to dismiss should be denied.

Dated: May 4, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on May 4, 2020 by email to the following addresses:

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