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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---X

IN THE MATTER OF THE APPLICATION OF

[redacted],

Petitioner,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent.

---X

Index No. [redacted]
(Kelley, J.)

ORAL ARGUMENT REQUESTED

PETITIONER'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HER ARTICLE 78 PETITION SETTING ASIDE RESPONDENT'S DENIAL OF HER PAROLE APPLICATION

New York, New York

Dated: February 16, 2018

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TABLE OF CONTENTS

Page

ARGUMENT 2

I. THE PAROLE BOARD'S DENIAL OF MS. [redacted] APPLICATION WAS AN ABUSE OF DISCRETION 2

A. The Board Did Not Conduct The Forward-Looking Assessment Required By Law 2

B. The Board's Denial Unlawfully Relied on the Seriousness of Ms. [redacted] Crime 8

C. The Parole Board Improperly Relied on Generalized Community Opposition 11

D. The Written Parole Decision Fails to Provide Sufficient Detail to Explain the Board's Decision 14

E. The Record As A Whole Demonstrates The Board's Bias and Predetermination 15

F. Denial of Parole Effectively Resentenced Ms. [redacted] 16

II. THE BOARD'S FAILURE TO PRODUCE DOCUMENTS WAS ILLEGAL AND AN ABUSE OF DISCRETION 17

A. The Board Has the Responsibility and Capability to Produce the Record 18

B. The Board's Overbroad Definition of Confidentiality Does Not Permit Denial of Access To the Records 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Andrews v. N.Y. State Dep't of Corr. & Cmty. Supervision,
No. 400897/2014 (Sup. Ct. N.Y. Cty. Jan. 13, 2015) (Schlesinger, J.) 24

Boddie v. New York State Div. of Parole,
290 A.D.2d 327 (1st Dep't 2002) 21

Cappiello v. N.Y. State Bd. of Parole,
6 Misc. 3d 1010(A), (Sup. Ct. N.Y. Cty. 2004) (Wetzel, J.) 9

Coaxum v. N.Y. State Bd. of Parole,
14 Misc. 3d 661 (Sup. Ct. Bronx Cty. 2006) (Billings, J.) 10, 14, 15

Ely v. N.Y. State Bd. of Parole,
No. 100407/16 (Sup. Ct. N.Y. Cty. Jan. 20, 2017) 9, 12, 14

Feneque v. N.Y.State Div. of Parole,
252 A.D.2d 469 (1st Dep't 1998) 21

Graziano v. Pataki,
No. 06CIV0480 CLB, 2006 WL 2023082 (S.D.N.Y. July 17, 2006) 24

Greenberg v. U.S. Dep't of Treasury,
10 F. Supp. 2d 3 (D.D.C. 1998) 19

Hughes v. N. Y. State Div. of Parole,
21 A.D.3d 1176 (3d Dep't 2005) 23

Almonor v. N.Y. State Bd. of Parole,
16 Misc. 3d 1126(A) (Sup. Ct. N.Y. Cty. 2007) (York, J.) 10, 16

Coleman v. N.Y. State Dep't of Corr. & Cmty. Supervision,
No. 2017-07296, 2018 WL 343803 (2d Dep't Jan. 10, 2018) 10

Collins v. Hammock,
96 A.D.2d 733 (4th Dep't 1983) 23

Huntley v. Evans,
77 A.D.3d 945 (2d Dep't 2010) 10

Johnson v. N.Y. State Div. of Parole,
65 A.D.3d 838 (4th Dep't 2009) 10

Jordan v. Hammock,
86 A.D.2d 725 (3d Dep't 1982) 23

Madeiros v. N.Y. State Educ. Dep't,
30 N.Y.3d 67 (2017) 9

McBride v. Evans,
988 N.Y.S.2d 523 (Sup. Ct. Du. Cty. 2014) 10

Platten v. N.Y.S. Bd. of Parole,
34 Misc. 3d 694 (Sup. Ct. Sull. Cty. 2015)....................6

Ramirez v. Evans,
118 A.D.3d 707 (2d Dep't 2014) 10

In re Stein,
131 A.D.2d 68 (2d Dep't 1987) 3

In re Wade,
969 F.2d 241 (7th Cir. 1992) 19

Wallman v. Travis,
18 A.D.3d 304 (1st Dep't 2005) 10

Weinstein v. Dennison,
7 Misc. 3d 1009(A) (Sup. Ct. N.Y. Cty. 2005) (Kornreich, J.) 10

Kellogg v. N.Y. State Bd. of Parole,
160366/2016, NYLJ 1202783795915, at *1 (Sup. Ct. N.Y. Cty., March 20, 2017) (Engoron, J.) 20

Kennedy v. U.S. Dep't of Homeland Sec.,
No. 03-CV-6076-CJS(FE), 2004 WL 2285058 (W.D.N.Y. Oct. 8, 2004) 19

Kinard v. N.Y. State Bd. of Parole,
No. 217417 (Sup. Ct. Du. Cty. Jan 19, 2018) (hereto attached as Exhibit 1) 12

King v. N.Y. State Div. of Parole,
190 A.D.2d 423 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (1994) 8

Legal Aid Soc'y of Ne. N.Y., Inc. v. N.Y. State Dep't of Soc. Servs.,
195 A.D.2d 150 (3d Dep't 1993) 22

Lewis v. Travis,
9 A.D.3d 800 (3d Dep't 2004) 23

Mackenzie v. Stanford,
No. 2789/15....................5

Matter of Bottom v. Dep't of Corr. & Cmty. Supervision,
No. 092448-17 (Sup. Ct. Albany Cty. Nov. 2, 2017) 12

Matter of Bottom v. Dep't of Corr. & Cmty. Supervision,
No. 092448-17 (Sup. Ct. Albany Cty. Jan. 10, 2018)....................13

FILED: NEW YORK COUNTY CLERK 02/16/2018 09:30 PM
FUSL000034
RECEIVED NYSCEF: 02/16/2018

Matter of Grigger v. N.Y. State Div. of Parole,
11 A.D.3d 850 (3d Dep't 2004), *leave denied* 4 N.Y.3d 704 (2005) 13

Matter of Rossakis v. N.Y. State Bd. of Parole,
146 A.D.3d 22 (1st Dep't 2016) 8, 10

Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision,
39 Misc. 3d 1213(A), 975 N.Y.S.2d 367 (Sup. Ct. Col. Cty. 2013)....................................4, 21

Nat'l Ass'n of Home Builders v. Defs. of Wildlife,
551 U.S. 644 (2007)....................................6

Newton v. Dennison,
47 A.D.3d 538 (1st Dep't 2008) 21

Patterson v. N.Y. State Div. of Parole,
298 A.D.2d 254 (1st Dep't 2002) 21

People v. Brown,
25 N.Y.3d 247 (2015) 6

People v. Jones,
950 N.Y.S.2d 493 (Cty. Ct. Essex Cty. 2012) 19

Perry Thompson Third Co. v. City of N.Y.,
279 A.D.2d 108 (1st Dep't 2000) 22

Phillips v. Dennison,
41 A.D. 3d 17 (1st Dep't 2007) 9

Pulinario v. N.Y. State Dep't of Corr. & Cmty. Supervision,
42 Misc.3d 1232(A) (Sup. Ct. N.Y. Cty. 2014) (Moulton, J.)....................................10

Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision,
46 Misc. 3d 603 (Sup. Ct. Sul. Cty. 2014)....................................15

Ramirez v. Stanford,
No. 1928/2016 (Sup. Ct. Du. Cty. Feb. 7, 2017) (attached at DOC 9)....................................12, 24

Ramirez v. Evans,
118 A.D.3d 707, (2d Dep't 2014)....................................10

Rho v. Ambach,
74 N.Y.2d 318, 546 N.E.2d 188 (1989)....................................22

Rios v. N.Y State Div. of Parole,
15 Misc. 3d 1107(A) (Sup. Ct. N.Y. Cty. 2007) (Partnow, J.) 10, 15

Rodriguez v. Greenfield,
7 Fed. App'x 42 (2d Cir.2001) (unpublished) 24

FILED: NEW YORK COUNTY CLERK 02/16/2018 09:30 PM
FUSL000034
RECEIVED NYSCEF: 02/16/2018

Russello v. U.S.,
464 U.S. 16 (1983) 7

Ruzas v. Stanford,
No. 1456/2016 (Sup. Ct. Du. Cty. Jan. 30, 2017) 12, 19, 23, 24

Ruzas v. Bd. of Parole,
No. 1456/2016, at 9 (Sup. Ct. Du. Cty. Oct. 18, 2017) 16, 19, 23

Santos v. Evans,
81 A.D.3d 1059 (3d Dep't 2011) 20

Scherbyn v. Wayne-Finger Lakes Bd. of CoOp. Educ. Servs.,
77 N.Y.2d 753 (1991) 9

Schwartz v. Dennison,
40 A.D.3d 218 (1st Dep't 2007) 21

Siao-Pao v. Travis,
5 A.D.3d 150 (1st Dep't 2004) 21

Smith v. N. Y. State Bd. of Parole,
34 A.D.3d 1156 (3d Dep't 2006) 23

Thwaites v. N.Y. State Bd. of Parole,
34 Misc. 3d 694, 699 (Sup. Ct. Or. Cty. 2011) 6

Wade v. Stanford,
No. 522949, 2017 WL 1167761 (3d Dep't 2017) 20

Zuckerman v. N.Y. State Bd. of Parole,
53 A.D.2d 405 (3d Dep't 1976) 21

STATUTES

N.Y. Exec. Law § 259-c 6, 7

N.Y. Exec. Law § 259-c(4) 6

N.Y. Exec. Law § 259-i(1) 2

N.Y. Exec. Law § 259-i(2)(a) 14, 18

N.Y. Exec. Law § 259-i(2)(c)(A) 2, 6

N.Y. Exec. Law § 259-i(2)(c)(B) 21, 22

N.Y. Exec. Law § 259-i(6)(b) 18

N.Y. Exec. Law § 259-k(1) 19

1977 N.Y. Laws ch. 904 2

2011 N.Y. Laws, ch. 62, Part C, Subpt. A., § 40 19

RULES

9 N.Y.C.R.R. § 8000.5(c)(2) 21

9 N.Y.C.R.R § 8000.5(c)(2)(i) 22

9 N.Y.C.R.R. § 8000.5(c)(2)(i)(a)(3) 21

9 NYCRR §§ 8002.2-3 5

9 N.Y.C.R.R. § 8006 *et seq.* 17

9 N.Y.C.R.R. § 8008.2 19

9 N.Y.C.R.R. § 8008.3 ....18, 19

Petitioner ████ submits this reply memorandum in further support of her Article 78 Petition to set aside the April 20, 2017 denial of her parole application by Respondent Parole Board of New York, as arbitrary and capricious, an abuse of discretion, and contrary to law.

PRELIMINARY STATEMENT

Much like the Parole Board's decision in this case, Respondent's brief relies on the articulation of generic legal principles to argue that so long as it utters a few "magic words," its discretion cannot be challenged and its decisions are unreviewable. At the same time, Respondent argues that significant statutory reforms to make parole forward-looking had no impact on its authority, and again claims that by merely mentioning that it looked at Ms. ████ objective, evidence-based COMPAS risk assessment, the Board need not give any credence or effect to its conclusions.

Moreover, although it admits that Ms. ████ is entirely rehabilitated and poses no threat to society, the Board nonetheless denied parole based solely on the seriousness of the crime committed in 1981. Respondent now hopes to sustain that decision by arguing that because the Board simply used the words "deprecate the seriousness of the offense" and "undermine respect for the law," its lack of analysis or meaningful consideration of the other statutory factors makes no difference. That is *not* the law, and the Board's improper decision should be vacated.

The Parole Board's denial of Ms. ████ application for release is also unlawful because the Board continually denied Ms. ████ access to the record of her case, to which she has an undisputed statutory right. Respondent's claims, that it is the wrong agency to provide the record of its own proceedings, and that a narrow exception justifies the blanket withholding of all documents, are overbroad and lack support in fact or law.

ARGUMENT

I. The Parole Board's Denial of Ms. [redacted] Application Was An Abuse of Discretion

Although the Parole Board is granted significant discretion to carry out its duties, that discretion is not unfettered; it must be exercised within the confines of the law. Respondent argues that the mere mention of the required statutory factors satisfies this obligation and insulates the Board's decision from meaningful review. That is not the law.

A. The Board Did Not Conduct The Forward-Looking Assessment Required By Law

The first basis for setting aside Respondent's decision is that it is based on an error of law. Parole decisions must be made based on a forward-looking assessment; who the parole applicant is today—not who the person was when the crime was committed.

When the modern Parole Board was first established approximately 40 years ago, its review focused on an evaluation of the nature of an offender's crime and whether sufficient punishment had been served.[1] However, the Legislature amended the parole laws in 2011 (the "2011 Amendments"), requiring the Board for the first time to include objective, evidence-based assessments in its decision making. Respondent asserts (Memorandum of Law in Support of Verified Answer and in Opposition to Petition ("Resp. Br.") 11) that the 2011 Amendments were minor, "technical changes" that had no impact on the Board's discretion or the manner in which it was required to make its decisions. That argument misconstrues the language of the 2011 Amendments, the clear legislative intent underlying them, and the decided cases.

Respondent also argues (Resp. Br. 12) that because the parole law still requires "a case-

[1] When Executive Law § 259-i was first enacted, the Board was responsible for setting minimum periods of imprisonment ("MPIs") for inmates serving indeterminate sentences if a court had not already done so, in addition to overseeing parole. 1977 N.Y. Laws ch. 904 (enacting N.Y. Exec. Law former § 259-i(1)) (Add. 6). MPI was decided solely on the basis of the seriousness of the offense and the prior criminal record of the inmate—expressly static and backwards-looking factors. N.Y. Exec. Law § 259-i(1) (McKinney 1977). Although the Board stopped making MPI determinations in the 1980s, the guidelines remained on the books until the 2011 amendments. *See* N.Y. Exec. Law § 259-i(2)(c)(A) (McKinney 2009); *see also* N.Y.C.R.R. § 8001.3(a) (regulations repealed by the 2011 Amendments stating that static sentencing grid "will be considered in each MPI and release decision").

by-case review of . . . the statutory factors," the 2011 Amendments were largely meaningless. This argument ignores the basic principle that when the Legislature enacts new legislation, it is presumed to have intended to make a material change in the law. *See In re Stein*, 131 A.D.2d 68, 71-72 (2d Dep't 1987). Moreover, Ms. [redacted] has never argued, as Respondent contends (Resp. Br. 12), that the 2011 Amendments eliminated the need for individualized review; rather they *enhanced* the need for truly individualized review, requiring the Parole Board to view each offender as an individual in the context of his or her ability to re-enter society, not as a manifestation of the crime the individual committed.

There are five other reasons for concluding that the 2011 Amendments mandate a forward-looking assessment.

First, at the time of the bill's 2011 passage, experts in the field, such as Columbia Law School professor Philip Genty, wrote that the Amendments involved the "replacement of static, past-focused 'guidelines' with more dynamic present and future-focused risk-assessment 'procedures' to guide the Parole Board," which "has the potential to affect significantly the way that the Parole Board conducts discretionary release determinations." Philip M. Genty, *Changes to Parole Laws Signal Potentially Sweeping Policy Shift*, N.Y.L.J. Sept. 1, 2011.

Second, the Assembly's Committee on Corrections has consistently made clear that those Amendments were intended to fundamentally shift the law to effect a forward-looking approach. Every edition of the Committee's Annual Report since 2013 has referenced the need to improve the Board's decision-making and refocus its work on a forward-looking paradigm.[2] *See, e.g.*,

[2] Respondent asserts that "a risk and needs assessment is not even mentioned" in the 2011 Annual Report. However, the report states that "[t]he budget legislation also includes a requirement that the Board establish new written procedures for its use in making parole release decisions. These new guidelines will incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board and the likelihood of success of such persons upon release." *See* N.Y. State Assembly Comm'n on Corr., 2011 Annual Report at 5 (2011) *available at* http://nyassembly.gov/comm/Correct/2011Annual/report.pdf. While the 2010 Report did not explicitly mention the legislation—it also did not mention the Parole Board merger with the Department of Corrections and

N.Y. State Assembly Comm'n on Corr., 2013 Annual Report at 3 (2016) *available at* http://nyassembly.gov/comm/Correct/2016Annual/index.pdf (noting that the Parole Board regulations in effect at the time "did not comply with the intent of the Legislature in that they treated risk and needs principles enacted in 2011 as a *mere factor in the decision-making process rather than as the fundamental basis for release decisions*"[3] (Emphasis added.))[4] Respondent's attempt to cast aside the opinion of the Assembly Committee is unavailing. The 2016 Report and its predecessors reflect a clear frustration with the Board's refusal to follow the mandate created by the 2011 law, and provide a strong indication of how leading legislators viewed its purpose and effect.

Third, comments of individual legislators demonstrate the forward-looking assessment required by the 2011 Amendments. At a 2013 hearing on parole reform after adoption of the 2011 Amendments, Assembly Member Giglio stated that "[i]t was a mistake to leave it to the Parole Board to [enact complying regulations] itself," and that "with such bad faith and frankly, unprofessional conduct, it seems to me that there's a much bigger club that needs to be used to

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Community Supervision ("DOCCS")—it listed parole reform as a key issue to be addressed, "to evaluate whether the practices and procedures in place today for both the Division of Parole and the Board of Parole are fair and effective, and to make recommendations to improve future outcomes." *See* N.Y. State Assembly Comm'n on Corr., 2010 Annual Report at 14 (2010) *available at* http://nyassembly.gov/comm/Correct/2010Annual/index.pdf.

[3] As noted in Ms [redacted] initial brief, the Board failed to draft regulations compliant with Executive Law for more than five years after passage of the 2011 Amendments, and at least one court held that its refusal to do so violated the law. *See* Petitioner's Memorandum of Law in Support of Her Article 78 Petition ("Pet'r Br.") at 32, n.21 (citing *Morris v. N.Y. State. Dep't of Corr. & Cmty. Supervision*, 40 Misc. 3d 226 (Sup. Ct. Col. Cty. 2013), amended by 975 N.Y.S.2d 367 (Sup. Ct. Col. Cty. 2013)).

[4] *See also* N.Y. State Assembly Comm'n on Corr., 2013 Annual Report at 10 (2013) *available at* http://nyassembly.gov/comm/Correct/2013Annual/index.pdf (discussing a hearing held to determine what changes were necessary "to ensure that inmates who do not pose a public safety risk are released from prison in a timely and rational fashion" and noting that the Committee will continue to encourage legislation to "permit increased parole of inmates posing little risk to public safety"); N.Y. State Assembly Comm'n on Corr., 2014 Annual Report at 14 (2014) *available at* http://nyassembly.gov/comm/Correct/2014Annual/index.pdf (noting that the Committee will continue to advocate "to make sure that inmates who do not pose a public safety risk are released to community supervision as quickly as possible"); N.Y. State Assembly Comm'n on Corr., 2015 Annual Report at 16 (2015) *available at* http://nyassembly.gov/comm/Correct/2015Annual/index.pdf (repeating sentiments from 2014 report and adding advocacy for inmates "who are assessed as posing a low risk of recidivism" being released "unless the Board identifies *overriding factors* militating against release that were not taken into account by such assessments") (emphasis added).

reform [the parole] process . . . *It's not just about some procedures about how to use COMPAS*."[5] This statement directly rebuts Respondent's argument that if the Legislature intended to fundamentally change the law, it would have used stronger language. The Legislature *did* think it had used strong enough language, it simply did not expect the Board to do everything possible to sidestep its mandate.[6] Respondent cites no countervailing legislative history to indicate that such a shift was *not* intended to overcome the presumption of a material change in the law. There is little question the 2011 law *was* meant to incorporate the forward-looking idea of objective risks-and-needs principles throughout parole decision-making, not just as a minor counterweight to the practice of denying parole based on the seriousness of a crime.

Fourth, numerous courts have recognized the fundamental shift required by the 2011 Amendments. Contrary to the cases relied upon Respondent which do little more than cite general, pre-existing propositions of law, cases that have analyzed the intent underlying the 2011 Amendments have consistently favored Petitioner's reading of the statute. *See Mackenzie v. Stanford*, No. 2789/15, NYLJ 1202759023393, at *1 (Sup. Ct. Du. Cty. 2015) (the 2011 Amendments require the Board "to focus on an applicant's rehabilitation and future rather than giving undue weight to the crime of conviction and to the inmate's pre-incarceration behavior");

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[5] N.Y. State Assembly Standing Comm. on Corr., Testimony from Public Hearing, Board of Parole (hereinafter "Committee Testimony") at 173:10-16 (Dec. 4, 2013), *available at* http://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_fb550f4dc8b2cb99d203b3db32a36fb3.pdf.

[6] Indeed, the Board itself seems to have recognized that its initial response to the 2011 Amendments was inadequate, but remains determined to avoid changing its decision making process in any meaningful way. Immediately after the Amendments were passed, the Board released only a memorandum from its counsel discussing the COMPAS assessment and noting that risk-and-needs assessments should be considered. After courts divided on the propriety of this response, the Board began the process of creating official regulations designed to encompass risk-and-needs assessments. The Board adopted one set of regulations in 2014 (N.Y. St. Reg., vol. XXXVI, issue 30 at 11 (July 30, 2014)), which were widely viewed as inadequate, and updated those regulations in 2017—*six years* after the 2011 Amendments passed—to require that the Board provide a detailed explanation if it departs from a COMPAS recommendation. 9 NYCRR §§ 8002.2-3 (eff. Sept. 27, 2017). From Respondent's argument, (Resp. Br. 15) the Board has adopted the position that such a departure occurs only when it specifically rejects the COMPAS's conclusion (e.g. believes the assessment is itself incorrect), not when it reaches a release decision inconsistent with the objective, forward-thinking assessment. This approach appears specifically designed to undermine the legislative mandate that the Board incorporate forward-thinking mechanisms into its decision making.

Platten v. N.Y.S. Bd. of Parole, 34 Misc. 3d 694, 699 (Sup. Ct. Sull. Cty. 2015) ("The changes were intended to shift the focus of parole boards away from focusing on the severity or heinous nature of the instant office, to a forward-thinking paradigm to evaluate whether an inmate is rehabilitated and ready for release."); *Thwaites v. N.Y. State Bd. of Parole*, 34 Misc. 3d 694, 699 (Sup. Ct. Or. Cty. 2011) (issued shortly after passage of the law, noting that the 2011 Amendments "are remedial in nature and designed to modernize decision-making in the area of parole release"); *see also People v. Brown*, 25 N.Y.3d 247, 251 (2015) (observing that "the 2011 amendments were not purely budgetary or technical changes" because they "emphasized 'the evolution of the sentencing structure' toward a 'focus on reentry'").

Fifth, the statute's text and structure further support Petitioner's view that the 2011 Amendments represented a fundamental shift in the way the Board is required to make decisions. The Amendments, requiring that the Board consider risk-and-needs principles in every case,[7] were codified in Executive Law § 259-c, which sets out the fundamental "functions, powers and duties" of the Parole Board. Section 259-i, titled "Procedures for the conduct of the work of the state board of parole," which Respondent relies on for the proposition that it need not give any deference to Ms. [redacted] risk assessment, merely sets forth the procedures by which those parole duties are carried out. That section states that the factors the Board must consider are to be made according to "the procedures adopted pursuant to [§ 259-c(4)]." *Id.* at § 259-i(2)(c)(A).

Had the Legislature merely wanted to make risk-and-needs principles another factor in § 259-i, it could have amended the § 259-i factors separately in the same bill. Yet, it chose to place the language in the section outlining the fundamental powers and duties of the Board for a

[7] *Compare* N.Y. Exec. Law § 259-c(4) (McKinney 2009) (the Board's "written guidelines *may* consider the use of a risk and needs assessment instrument" (emphasis added) *with* N.Y. Exec. Law § 259-c(4) (McKinney 2011) (the Board's "written procedures" "*shall* incorporate risk and needs principles to measure" the rehabilitation standard (emphasis added)).

reason. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section, . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). The most natural reading of the statute is that when making decisions, the Board must exercise its discretion in line with its fundamental duties under the governing statute, § 259-c—which requires the forward-looking risk and needs assessment. Regardless of whether this statutory change *mandates* any particular result (*see* Resp. Br. 11-15), it demonstrates that the Legislature believed risk-and-needs principles were an essential component of the Board's duties. At a minimum, it provides a lens through which all of the § 259-i factors must be viewed.

Contrary to Respondent's overbroad contention, Petitioner's argument is not, and never has been, that the presence of a risk-and-needs assessment mandates a particular result.[8] Rather, it is that the 2011 Amendments were intended to create a paradigm shift in the Board's approach to its work so that it makes a forward-looking assessment of the parole applicant, and that a decision—such as the one here—which recognizes an offender's complete rehabilitation, but casts it aside based on nothing more than the seriousness of the crime, fails to reflect adequate consideration under the law, constituting an abuse of discretion.

Here, the distinction is dispositive. Respondent concedes (Resp. Br. 15) that, based on her COMPAS assessment, "the Board did not find that there is a reasonable probability that Petitioner would not live and remain at liberty without violating the law." Using a forward-looking paradigm, there is no legitimate basis to deny parole. However, by maintaining its position that parole decisions may be based entirely on factors tied to past behavior and a desire

[8] Respondent cites to numerous cases for the proposition that the COMPAS assessment—one of the manifestations of evidence-based risk-and-needs assessment—is only an "additional consideration" that the Board must consider amongst other factors. *See* Resp. Br. 16. While those cases reflect an unduly restrictive reading of the law, they are not inconsistent with Petitioner's arguments that the 2011 Amendments change the Board's fundamental analysis, even if no particular result is required.

for punishment, Respondent argues its decision cannot be set aside. Under the Board's approach, the Board could in *every* decision, no matter how rehabilitated a person was, state that it did not depart from the COMPAS assessment but nonetheless render it meaningless by denying parole. Although the Board has discretion, it may not subvert the will of the Legislature to accomplish its own goals, as it seeks to do here.

B. The Board's Denial Unlawfully Relied on the Seriousness of Ms. [redacted] Crime

Wholly apart from its fundamental error of law, the Board's denial of parole was improper because the *sole basis* for its decision was the seriousness of Ms. [redacted] crime. This is impermissible. It is black letter law in the First Department that "in order to preclude the granting of parole exclusively on 'the seriousness of the crime' there must have been some significantly aggravating or egregious circumstances surrounding the commission of the particular crime." *King v. N.Y. State Div. of Parole*, 190 A.D.2d 423, 431-33 (1st Dep't 1993), *aff'd*, 83 N.Y.2d 788 (1994); *see also Matter of Rossakis v. N.Y. State Bd. of Parole*, 146 A.D.3d 22, 27 (1st Dep't 2016) ("The Board may not deny parole based solely on the seriousness of the offense."); other cases cited in Pet'r Br. 11.[9]

Respondent concedes that Ms. [redacted] is fully rehabilitated and presents no danger to society. Resp. Br. 15. While in prison, Ms [redacted] has earned a Bachelors and a Masters degree, has mentored and aided the rehabilitation of *hundreds* of prisoners, founded a nationally replicated AIDS education program, become an expert in infant care and served in Bedford Hills' parenting center, and trained dogs to help both law enforcement and veterans, among

[9] Notwithstanding this well-established law, parole denial based solely on the seriousness of the crime is a longstanding practice of the Parole Board. Former Parole Board Chair Robert Dennison testified to the Assembly that "if the Parole Board doesn't like the crime, they're not going to let you out. It doesn't matter what else you've accomplished, to be quite frank about it." Committee Testimony (*supra* n.5) at 104:10-13. Another former Board Commissioner, Thomas Grant, testified that the Board process was "broken," in part because it typically engages in a "static evaluation despite what all of the legislation has attempted to do," because "they can do it. They can just look at the instant offense and nothing else." *Id.* at 128-30.

many other accomplishments. *See* Verified Petition ("Ver. Pet.") at ¶¶ 26-35. As Governor Cuomo said when he granted Ms. [redacted] clemency, "I think the situation is corrected as it ever going to be, unless you can bring a person back to life." Ver. Pet. Exhibit 3 (hereinafter "Vol. II") at 386. In light of this record, what possible reason could there be to deny parole other than the seriousness of the crime? And, under *King,* to deny parole based on the seriousness of the crime there must be "aggravating circumstances," which are nowhere referred to in the Parole decision and in any event are not present.[10]

While Respondent makes much of the fact that the decision and the parole hearing discuss other aspects of Ms. [redacted] application other than the crime itself, the record must reflect more than mere references to other issues, it must show a *qualitative* assessment of the factors to demonstrate that denial was based on more than the seriousness of a crime. *See Cappiello v. N.Y. State Bd. of Parole*, 6 Misc. 3d 1010(A), at *4 (Sup. Ct. N.Y. Cty. 2004) (Wetzel, J.). ("When the record of the Parole hearing fails to convincingly demonstrate that the Parole Board . . . *qualitatively weigh[ed]* the relevant factors in light of the three statutorily acceptable standards for denying parole release, the decision is arbitrary and capricious."); *see also Ely v. N.Y. State Bd. of Parole*, No. 100407/16, at 13-14 (Sup. Ct. N.Y. Cty. Jan. 20, 2017) (Jaffe, J.) (ordering de novo hearing where the Board, including Commissioner Ludlow,

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[10] Respondent's brief (Resp. Br. 19), implicitly concedes the insufficiency of the Board's decision, by attempting for the first time in this proceeding to identify "aggravating factors" that were never mentioned by the Board or the Appeals Unit. The law is clear that "judicial review of an administrative determination is limited to the grounds invoked by the agency," and courts may not "affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Madeiros v. N.Y. State Educ. Dep't*, 30 N.Y.3d 67, 74 (2017); *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991).

In any event, Ms [redacted] crime—though terrible—has no aggravating factors, and Respondent's two-sentence attempt to manufacture them, unsupported by case law, would not revive an otherwise improper denial of parole. Ms. [redacted], a getaway driver in an armed robbery, who has fully accepted responsibility for her crimes, is a far cry from the parole applicant in *Phillips*, the pre-2011 case on which Respondent relies. There, the petitioner was a former police officer who abused his own authority while engaged in a long-term extortion plot and shot three people himself, and whose "limited remorse" was found to actually deprecate the seriousness of his crime. *See Phillips v. Dennison*, 41 A.D. 3d 17, 22-24 (1st Dep't 2007).

discussed other aspects of application, but the decision reflected a "marked disinclination to consider [Petitioner's] achievements and other mitigating factors or explain how or why they are outweighed by the severity of her crime.").[11] Here, even though the Board—or at least one Commissioner—engaged in some discussion of Ms. ████ remorse and achievements, the clear focus of the transcript and the entirety of the Board's decision demonstrate an "overwhelming emphasis" on the offense, rendering the decision improper. *See Pulinario v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 42 Misc.3d 1232(A) (Sup. Ct. N.Y. Cty. 2014) (Moulton, J.).

This lack of meaningful review is especially evident in the Board's written decision. It is no coincidence that Respondent is forced to rely heavily on quotes from the hearing transcript to support its claims about the written decision's sufficiency. *See* Resp. Br. 21. While the review of a written decision's adequacy may take the hearing into account, a review of this decision demonstrates that the *only* basis for denial was the seriousness of the crime. The decision begins, as most do, by reciting the boilerplate legal standard for parole. It then provides significant detail about Ms. ████ crime, again focusing on who she was at the time of the crime rather than who she is today. Next, the decision rotely lists some of Ms. ████ accomplishments and parrots the materials reviewed. Only then does it list its bases for denying parole: statements from others—presumably about the nature of Ms. ████ crime, entirely unidentified "additional information" that Governor Cuomo supposedly lacked when granting Ms. ████ clemency, and

[11] These are far from isolated decisions. In recent years, courts have begun exercising more exacting judicial review over the Board's improper practices, without unduly limiting its discretion. This is true at the appellate level, where the First and Second Departments have regularly overturned Parole Board decisions that rely on the seriousness of the crime. *See Coleman v. N.Y. State Dep't of Corr. & Cmty. Supervision*, No. 2017-07296, 2018 WL 343803, at *1 (2d Dep't Jan. 10, 2018); *Rossakis*, 146 A.D.3d at 28; *Ramirez v. Evans*, 118 A.D.3d 707, (2d Dep't 2014); *Huntley v. Evans*, 77 A.D.3d 945, 947 (2d Dep't 2010); *Johnson v. N.Y. State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dep't 2009); *Wallman v. Travis*, 18 A.D.3d 304, 307, (1st Dep't 2005). It also includes cases from this Court and numerous other Supreme Courts throughout the state. *See e.g. Almonor*, 16 Misc. 3d 1126(A) (Sup. Ct. N.Y. Cty. 2007) (York, J.); *Rios v. N.Y State Div. of Parole*, 15 Misc. 3d 1107(A) (Sup. Ct. N.Y. Cty. 2007) (Partnow, J.); *Weinstein v. Dennison*, 7 Misc. 3d 1009(A) (Sup. Ct. N.Y. Cty. 2005) (Kornreich, J.); *Coaxum v. N.Y. State Bd. of Parole*, 14 Misc. 3d 661 (Sup. Ct. Bx. Cty. 2006); *McBride v. Evans*, 988 N.Y.S.2d 523 (Sup. Ct. Du. Cty. 2014).

Ms. [redacted] status as a "symbol of violent and terroristic crime." App. 195-96. It closes by telling Ms. [redacted] that maybe, if she can convince more of the public to get on her side, she will have a better chance for parole at her next hearing. *Id.*

To the extent that the decision purports to be based on the fact that Ms. [redacted] release would deprecate the seriousness of the offense or undermine respect for the law, nowhere does the decision explain *why* that is so other than because it was a serious crime. The decision and transcript can be searched in vain for any basis for parole denial other than the seriousness of the crime. Petitioner has spent more than 36 years in prison (which Respondent refers to (Resp. Br. 18) as "*only* 36 years after the . . . robbery" (emphasis added)), and is the third longest-serving woman in a New York State prison. In addition, the Parole Board, as well as a President of the United States, have paroled some participants in the Brinks robbery who were far more complicit than Ms. [redacted] and virtually all other participants have been released (Vol. 2 at 614; Pet'r Br. 22, n.13).[12] It therefore defies explanation, notwithstanding Respondent's dismissal of the argument as "irrelevant," that releasing Ms. [redacted] who represents the best of what an offender can become, would somehow deprecate the seriousness of the crime or undermine respect for the law. The law requires more, and the Board fell short of that in this case.

C. The Parole Board Improperly Relied on Generalized Community Opposition

Of the many unlawful ways the Board relies on the seriousness of Ms. [redacted] crime, its reliance on generalized community opposition to Ms. [redacted] release is particularly problematic. As a preliminary matter, there is *no question* that the Board heavily based its decision on what it

[12] Respondent's argument (Resp. Br. 27) that Kathy Boudin's release in 2002 demonstrates that *this* board could not have been predisposed to deny Ms. [redacted] application is entirely baseless. Neither of the commissioners who voted to release Ms. Boudin remain on the Board. *See* Beth Schwartzapefel, *A Parole Hearing in New York, With a Governor's Blessing This Time* (Jan. 5, 2017), *available at* https://www.themarshallproject.org/2017/01/05/a-parole-hearing-in-new-york-with-a-governor-s-blessing-this-time. While Ms. Boudin's release demonstrates that parole may be granted without undermining respect for the law or deprecating the seriousness of the crime, it has no bearing on the feelings of the commissioners who sat on Ms [redacted] panel or the reasons for denial in this case.

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interpreted to be society's views of the seriousness of Ms. [redacted] crime—it says as much in its brief. *See* Resp. Br. 14 (discussing decision based on "public perceptions of the seriousness of a crime"). Recent cases have held that this type of public opinion, which has nothing to do with the offender's risk to society and everything to do with the nature of the crime, cannot support denying parole because it does nothing more than insert penal philosophy into what should be an individualized release determination. *See Ruzas v. Stanford*, No. 1456/2016 (Sup. Ct. Du. Cty. Jan. 30, 2017) ("*Ruzas I*"); *Ely*, at 13-14; *Ramirez v. Stanford*, No. 1928/2016 at 3 (Sup. Ct. Du. Cty. Feb. 7, 2017) ("*Ramirez*") ("As members of the parole board are not permitted to apply their own penal philosophy in determining whether release is appropriate, it necessarily follows that they may not deny parole release based upon letters from third parties expressing their penal philosophies."); *Kinard v. N.Y. State Bd. of Parole*, No. 217417 (Sup. Ct. Du. Cty. Jan 19, 2018) ("Presumably, such individuals have no first-hand knowledge of facts relevant to the Parole Board . . . .") (attached hereto as Exhibit 1).[13]

Even courts that have read the law differently do not require a different result, as they have made clear that even if the list of permissible communications which the Board can consider is broader than those explicitly within the statute, generalized community opposition, especially based on penal philosophy, is nonetheless improper. *See Matter of Bottom v. Dep't of Corr. & Cmty. Supervision*, No. 092448-17 (Sup. Ct. Albany Cty. Nov. 2, 2017) ("*Bottom I*") ("[A] non-individualized objection to the parole release of an individual because his or her crime falls within a class of crimes would appear to be improper."). Respondent's two primary cases are entirely inapposite to Ms. [redacted]. *Matter of Grigger v. N.Y. State Div. of Parole*, 11 A.D.3d

[13] Respondent's claim that the Board's obligation to preserve the confidentiality of the names and addresses of submissions means that it must be able to consider them lacks merit. "That section does not address or govern the individuals who are authorized to provide information to the Parole Board with respect to a release application. It addresses the confidentiality of identifying information provided to a Parole Board." *Kinard*, No. 217417, at *4; *see also* Pet'r Br. at 38-39.

850, 852 (3d Dep't 2004), *leave denied* 4 N.Y.3d 704 (2005) was about a letter from a District Attorney, not generalized public opposition, and therefore has no bearing here. *Matter of Bottom v. Dep't of Corr. & Cmty. Supervision*, No. 092448-17 (Sup. Ct. Albany Cty. Jan. 10, 2018) ("*Bottom II*"), which Respondent cites for the proposition that consideration of generalized penal philosophy documents did not taint a parole denial, contains significantly different facts. In *Bottom II*, the Court held that there was no evidence the Board had been influenced by the letters it had received. *Id.* Here, the record here is replete with evidence the Board not only agreed with the penal philosophy expressed by community opposition, but explicitly stated that its decision was largely based upon it. The Board's decision made no secret of the fact that it believed Ms. [redacted] release was incompatible with the welfare of society as noted by "thousands of its members, and because Ms. [redacted] is still a symbol of violent and terroristic crime." App. 196. The Board then strongly implied that the best way for Ms. [redacted] to achieve a different result at her next appearance would be to try and make it so that not as many letters expressing the same penal philosophy were submitted.

While Ms. [redacted] has not seen the documents, because the Board has refused to produce them, *see* Part II, *infra*, it is highly unlikely that boilerplate letters from "thousands" of members of the community, which convinced the Board that Ms. [redacted] is a "symbol" of crime, are based on anything more than a belief that Ms. [redacted] deserves continued punishment because of who she was in 1981 and what she did then. This clear reliance on inappropriate, generalized community opposition expressing a penal philosophy is both improper by itself and additional evidence of the Board's unlawful decision based upon the seriousness of Ms. [redacted] crime.

If permitted, Respondent's view turns parole into a popularity contest subject to political whims, rather than an independent, objective evaluation of an applicant's fitness for release. No

matter how positive the risk assessment, if what the Board deems to be enough members of a community, who have no knowledge of the offender's extensive rehabilitation, sign a petition objecting to her release the Parole Board can deny the application. That is not the law.

Additionally, Respondent asserts that Ms. [redacted] "cannot have it both ways" by asking the Court to ignore generalized community opposition while she herself had many letters of support. Resp. Br. 31. There is a categorical difference between the "boxes and boxes" of generalized public opposition letters Respondent relied upon, which are discussed in the Board's written decision, and the hundreds of letters of support submitted on Petitioner's behalf by people who *actually know* Ms. [redacted] and have witnessed her transformation and accomplishments first hand, which are not discussed. The authors of these letters include the long-time Superintendent of Bedford Hills who believed Ms. [redacted] should have released in 2004, numerous public officials and civic leaders, and dozens of others whose lives she has touched. Those letters speak *directly* to the factors contained within the parole laws, warranting consideration by the Board.

D. The Written Parole Decision Fails to Provide Sufficient Detail to Explain the Board's Decision

The Board's written decision was also improper because it failed to explain the reasons for denial of parole "in detail and not in conclusory terms." N.Y. Exec. Law. 259-i(2)(a). Though it need not discuss each factor in detail, a written decision "may not summarily itemize a petitioner's achievements while incarcerated or render a conclusory decision parroting the statutory standard," as happened here. *See Ely*, at 12; *Coaxum v. N.Y. State Bd. of Parole*, 14 Misc. 3d 661 (Sup. Ct. Bronx Cty. 2006) (rejecting "perfunctory" discussion of positive factors because "actual consideration of factors means more than acknowledging that evidence of them was before the Board"). The written decision itself must provide *some* basis from which a reader can determine *how* the factors were weighed and why release was not warranted. *See Coaxum*,

827 N.Y.S. 2d at 494 ("The decisionmaking is a process of determining which factors outweigh others: a balancing process.").

No matter how many times the Board's decision is reviewed, the reader is still unable to understand why, given Ms. [redacted] undisputed rehabilitation, parole was denied because "release . . . is incompatible with the welfare of society . . . and that it would deprecate the seriousness of the crime." App. 192. Respondent cannot avoid its statutory responsibility solely by referencing the hearing transcript and relying on the vague notion that the Board need not discuss each factor in detail, which again willfully misconstrues Ms. [redacted] argument. As discussed in greater detail in Ms. [redacted] initial brief (Pet'r Br. 24-28), the Board's decision lists without discussion some of Ms. [redacted] accomplishments and acknowledges her remorse, but provides no information as to why those were insufficient. The absence of meaningful interaction between the factors, not the number of words on the page, is what renders the decision improper.

E. The Record As A Whole Demonstrates The Board's Bias and Predetermination

There is no question that, upon a showing of evidence of bias by even one member of the Board, the decision must be vacated and a de novo hearing granted. *See Rios v. N.Y. State Div. of Parole*, 15 Misc. 3d 1107(A) (Sup. Ct. Kings Cty. 2007) (presence of a Board member for whom denial is a foregone conclusion is sufficient to taint the entire proceeding); *Rabenbauer v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 46 Misc. 3d 603, 607 (Sup. Ct. Sul. Cty. 2014) (commissioners may not base decisions on their own beliefs about the nature of the offense). Here, a review of the full record shows that the Board predetermined the outcome of Ms. [redacted] hearing and had no intention of giving her an objective opportunity for release.

Although Ms. [redacted] initial brief gives repeated examples of statements by the Board members demonstrating their animosity towards Ms. [redacted] and predetermination to deny her parole (Pet'r Br. 11-16), it is telling that Respondent responded to only two of those statements.

Resp. Br. 23-27. In any event the record is clear, as a review of the transcript thoroughly demonstrates the nature and extent of that bias. Former Commissioner Ludlow, who was subsequently held in contempt for his "administrative arrogance" and "contemptible" treatment of parole applicants before him, *see Ruzas v. Bd. of Parole*, No. 1456/2016, at 9 (Sup. Ct. Du. Cty. Oct. 18, 2017) ("*Ruzas II*"), went to great, and wholly unnecessary lengths to discuss the details of Ms. [redacted] crime in a manner that betrayed his true opinion about the crime, and about Ms. [redacted]. *See* Pet'r Br. 11-16, 28. There was no reason, for example, for Commissioner Ludlow, to describe the crime with the words "terrorist swat team" or "slaughter," no reason to dwell on—and repeatedly return to—details of the crime in which Ms. [redacted] played absolutely no role, and no reason to discuss his penal philosophy by comparing the idea of "mercy" on parole to mercy for the victims of Ms. [redacted] crime. *See id.* All of which stands in stark contrast to Commissioner Ludlow's virtual silence when the discussion turned to Ms. [redacted] 30 years of achievements, during which time he did not ask a single substantive question.[14] Respondent's argument that discussion of the crime allowed Ms. [redacted] to open up about her remorse and facilitate a conversation does not come close to justifying the invective and colorful language used by the Board in asking the questions.

F. Denial of Parole Effectively Resentenced Ms [redacted]

When the Parole Board uses its authority to impose its own belief about punishment, or when a Board freely admits that no greater rehabilitation could be asked for, yet denies parole anyway, it has effectively imposed its own sentence on the parole applicant. *See Almonor v. N.Y. State Bd. of Parole*, 16 Misc. 3d 1126(A) (Sup. Ct. N.Y. Cty. 2007) (York, J.) That is what happened here, and Respondent cannot avoid that conclusion by relying on the broad proposition

[14] As noted in Ms. [redacted] initial brief, there is also a demonstrated basis supporting a finding that the other two commissioners on the Board exhibited bias and predetermined the outcome. *See* Pet'r Br. 14-15.

that there is no guaranteed right to parole. Ms. ■■■ has been in prison for more than 36 years. She has fully accepted responsibility for her actions, and spent the past three decades helping *thousands* of people, both inside and out of prison. She has been granted clemency by the Governor for those actions, and Respondent freely admits that she poses no danger to society. It is difficult to believe there is anything Ms. ■■■ could say or do before her next scheduled appearance that would make any of the above less true.

At the same time, there is nothing Ms. ■■■ can do to change the seriousness of her crime or take back what she has done. In this case, the Board was particularly transparent about its intent, denying parole in large part because of Ms ■■■ supposed status as a symbol of crime. App. 196. If the Board did not believe parole was warranted after 36 years, nothing Ms. ■■■ can do before her next parole hearing in April 2019 will change that fact. Thus, if the Board's determination is upheld, it will effectively mean that Ms. ■■■ cannot possibly satisfy the Board's interpretation of the parole requirements, effectively resentencing her to life in prison despite her clemency and decades of positive works. This is improper, and cannot stand.[15]

II. The Board's Failure to Produce Documents Was Illegal and An Abuse of Discretion

Immediately after filing her administrative appeal, and as the parole law specifically provides (9 N.Y.C.R.R. 8006 *et seq.*), Ms. ■■■ requested all documents in her parole record. App. 208. The Board acknowledges Ms. ■■■ entitlement to documents, as well as its possession of and capacity to produce them. *See* Resp. Br. 31, n. 10. It nonetheless asserts it should not be ordered to produce them because (A) it is not the right entity to produce its *own* documents, and (B) the documents fall under the Board's expansive definition of confidentiality.

[15] Respondent cannot avoid this conclusion by arguing that it is only Ms. ■■■ first appearance before the Board. *See* Resp. Br. 22, 27. Additionally, Respondent's implication that those who appear before the Board for the first time are somehow less fit for parole because they have not sufficiently been through the process represents a perversion of the parole process and is unlawful. An offender's satisfaction of the requirements for parole has nothing to do with the amount of time they have spent in prison—especially when that time is nearly four decades.

Neither argument is supportable.

A. The Board Has the Responsibility and Capability to Produce the Record

Respondent concedes that it was aware of Ms. [redacted] request for records, that the request was properly filed, and that it in fact possesses the requested documents.[16] Nevertheless, it points the finger at DOCCS and disclaims all responsibility for the enforcement of its own statutes. According to the Board, if Ms. [redacted] was dissatisfied with her non-receipt of the documents, she should have: i) continued to demand them from DOCCS, ii) requested from the Parole Board an extension of time to file her administrative appeal,[17] iii) if still dissatisfied, brought an Article 78 proceeding against DOCCS, iv) when that issue was resolved, return to the Administrative Appeals Unit to perfect her parole appeal, and v) then, if necessary, brought an Article 78 proceeding! Resp. Br. 39. That such a procedure would have meant that two years would certainly have elapsed before this case could be heard—and by then Ms. [redacted] would be entitled to a new parole hearing in any event[18]—apparently does not concern Respondent.

Not only is this argument frivolous, it cannot be squared with the statute, regulations, or case law. New York Executive Law requires that "the chairman of the *board of parole*"—not DOCCS—"maintain records of all parole interview and hearings" (N.Y. Exec. Law § 259-i(6)(b) (emphasis added)) which is defined by the regulations to *include* those maintained by the division [of parole] (9 N.Y.C.R.R. § 8008.3 ("The term record or records means any memorandum, document, tabulation or other writing . . . maintained by the division.")). Moreover, even if a DOCCS employees is responsible for fielding document requests, he is the

[16] Respondent's answer annexed for *in camera* review some of the very records Petitioner requested and also asked, if it was in fact ordered to produce the requested records, to be given 30 days to produce them. Resp. Br. 31, n. 10.

[17] Respondent's repeated assurance that it would grant extensions of time to permit Ms. [redacted] to appeal the denial of document production (*see, e.g.*, Resp. Br. 39) misses the point: Ms. [redacted] does not want to extend her stay in prison any longer than is necessary to overturn the Board's abuse of authority.

[18] An applicant denied parole is entitled to a new interview within two years. N.Y. Exec. Law § 259-i(2)(a).

"employee designated by the *chairman* [of the Parole Board] to receive and respond to inquiries for access to division of records." 9 N.Y.C.R.R. § 8008.2 (emphasis added).

Moreover, DOCCS' alleged assumption of duties to maintain documents in the Board's possession did not divest the Board of its responsibility under the statute. The amendments to the Executive Law cited by Respondent neither deprive the Board of continued responsibility to maintain documents nor take such documents out of the Board's possession, it merely assigns additional responsibility to DOCCS.[19] 2011 N.Y. Laws, ch. 62, Part C, Subpt. A., § 40. Indeed, the current parole regulations expressly permit Parole Board officials—and those like them—to make records available as they have done in the past. 9 N.Y.C.R.R. § 8008.3 (the law "shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so"). Notwithstanding the alleged transfer, the Board continues to retain the right to "use," "access," and "make such entries as the board of parole deems appropriate." N.Y. Exec. Law § 259-k(1).

The Board's contention that it is not authorized to disclose the requested documents (Resp. Br. 37), is belied by the words of the statute and the decided cases. In *Ruzas v. Stanford,* the Board was ordered to produce redacted versions of community opposition letters and was able to do so in a short period of time. *See Ruzas II*, at 12; *Ruzas I*, at n. 1 ("The Court also reviewed, in camera, confidential documents submitted by Respondent."); *see also People v. Jones*, 34 Misc.3d 1217(A) (Cty. Ct. Essex Cty. 2012) ("The report sought by the defendant here

[19] In a similar context of federal Freedom of Information Act requests, courts have repeatedly held that agencies cannot shirk their responsibility for processing document requests in their possession by claiming another agency is responsible for those documents. *See Wade*, 969 F.2d 241, 248 (7th Cir. 1992) ("The agency cannot avoid the request or withhold the documents by referring them back to the agency where they originated."); *Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3, 18 (D.D.C. 1998) ("[E]ven though Customs referred these documents to other agencies for review and processing, Customs is still responsible for explaining their non-production."); *Kennedy v. U.S. Dep't of Homeland Sec.*, No. 03-CV-6076-CJS(FE), 2004 WL 2285058, at *5 (W.D.N.Y. Oct. 8, 2004) ("Once a FOIA request has been made to an agency, that agency's referral to a different agency regarding disclosure does not divest the original agency of responsibility to respond to the FOIA request.").

already is, or should be, in the possession of the Parole Board and *it is within the authority of the Chairman to allow the defendant access to that report*." (emphasis added)).

Furthermore, Respondent's position is contradicted by the requirement that a petitioner raise the denial of access to the record in the Administrative Appeals process to preserve it for review under Article 78. *Wade v. Stanford*, No. 522949, 2017 WL 1167761, at *1 (3d Dep't 2017); *Santos v. Evans*, 81 A.D.3d 1059, 1060 (3d Dep't 2011) ("Although petitioner further asserts that he was denied access to confidential materials considered by the Board, he has not preserved this claim for our review given his failure to raise it in his administrative appeal."). If the Appeals Unit or the Supreme Court had no authority to order the Parole Board to release documents it supposedly does not have, that requirement would be completely superfluous.

Finally, Respondent's position would undermine any meaningful right of appeal. It takes up to eight months from the day notice of parole appeal is filed until the day an Article 78 may be filed. By the time the Article 78 process on the *documents* is complete, the process must begin anew on a parole appeal.[20] Even a wholly successful Article 78 parole claim would likely take longer than the period between statutorily mandated parole hearings. This puts petitioners in a lose-lose situation: pursue the statutory right to their own record to conduct a fully informed appeal, effectively eliminating any practical relief if successful, or roll the dice based on

[20] Ms [redacted] experience is a perfect illustration of the problem with the Board's view. Although Ms. [redacted] filed a notice of appeal and requested the documents immediately following the Board's decision (App. 208), production of a "final response" was delayed for months by a litany of excuses, including bureaucratic error, vacation, and being subject to additional scrutiny because her case was "high profile." Vol. II at 104, 117-18. And that allegedly completed "final response" was not final; after Ms. [redacted] counsel pointed out that additional document requests were still outstanding—lack of production then being acknowledged to be an "oversight"—another response was delivered declining to produce anything else. *See* App. 237-39; Vol II. at 1017-19. The Appeals Unit took nearly four months—the maximum time it was allowed—to decide the case, and this proceeding was delayed by more than a month at Respondent's request, even though Ms. [redacted] counsel regularly communicated with the Attorney General's office during her appeal to avoid just such a delay. If Ms. [redacted] had pursued a separate Article 78 to obtain the documents, this appeal would likely not be heard and resolved before she would be entitled to a new hearing. Such an outcome completely undermines a meaningful right of appeal. *See Kellogg v. N.Y. State Bd. of Parole*, 160366/2016, NYLJ 1202783795915, at *1 (Sup. Ct. N.Y. Cty., March 20, 2017) (Engoron, J.) ("Often, [ordering a new interview] is meaningless, or close to it, because with the passage of time, the inmate would have been entitled to a new hearing regardless.").

incomplete information and hope for the best. On the other hand, the Board is effectively insulated from meaningful judicial review of its decisions.[21] *See Morris v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 39 Misc. 3d 1213(A) (Sup. Ct. Col. Cty. 2013) (criticizing the Board for encouraging delay to "shield[] it[self] from judicial scrutiny").[22]

B. The Board's Overbroad Definition of Confidentiality Does Not Permit Denial of Access To the Records

Apparently anticipating that its "ain't my fault" excuse will be rejected, the Board next argues Ms. [redacted] was not entitled to the documents in any event. It is undisputed that Ms. [redacted] properly requested, and is entitled to *all* records the Board considered in deciding her application, subject only to a few specific carveouts, *see* 9 N.Y.C.R.R. § 8000.5(c)(2), which must be read narrowly. *Zuckerman v. N.Y. State Bd. of Parole*, 53 A.D.2d 405, 407-08 (3d Dep't 1976) ("[S]tatutory exemption from disclosure must be narrowly construed to allow maximum access."). Though the documents Respondent declined to produce (which were virtually all of the documents requested) were withheld in their entirety, the statute permits withholding *only* the "name and address" of a letter's author. N.Y. Exec. Law § 259-i(2)(c)(B).[23] It does not permit blanket denial of the records if they can be redacted. While Respondent claims its interpretation

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[21] In practice, it is invariably common for parole appeals to take so long that they are moot by the time any meaningful relief is obtained. *See Newton v. Dennison*, 47 A.D.3d 538 (1st Dep't 2008); *Schwartz v. Dennison*, 40 A.D.3d 218 (1st Dep't 2007); *Siao-Pao v. Travis*, 5 A.D.3d 150 (1st Dep't 2004); *Boddie v. New York State Div. of Parole*, 290 A.D.2d 327, (1st Dep't 2002); *Patterson v. N.Y. State Div. of Parole*, 298 A.D.2d 254, 254 (1st Dep't 2002); *Feneque v. N.Y.State Div. of Parole*, 252 A.D.2d 469, 471 (1st Dep't 1998) ("In many ways, this procedural impasse leads to a frustrating outcome for an appellate tribunal and, of course, far more so for petitioner himself.").

[22] Indeed, when Ms [redacted] counsel inquired why there was such a lengthy delay, the DOCCS Records Access Officer blamed the Parole Board for not acting more quickly when it knew appeal would be taken. Vol. II at 117. This blame-shifting on both sides underscores how difficult the Board makes appeal of its decisions.

[23] Respondent states that letters were withheld pursuant to 9 N.Y.C.R.R. § 8000.5(c)(2)(i)(a)(3), because they might result in harm to a person. But that justification was never raised by the Administrative Appeal Unit (App. 205-06), nor by DOCCS (App. 440 (invoking only 259-i(2)(c)(B)), and so should not be considered. *See* n.9, *supra*. Respondent makes no effort to explain why individuals are in danger of being harmed, and cannot rely on the theoretical possibility of harm to support a blanket record denial.

is owed deference, Resp. Br. 43, n.14, the question is a matter of pure statutory interpretation, and requires no "special competence or expertise." *Rho v. Ambach*, 546 N.E.2d 188, 189 (1989) (citation omitted). A court can easily interpret the term "name and address" as precluding withholding of documents in their entirety. Resp. Br. 43, n.14.

Respondent attempts to circumvent this issue by asserting that the "name and address" language of § 259-i(2)(c)(B)) must be read in conjunction with the parole regulation which describes a goal to "permit private citizens to express freely their opinions for or against an individual's parole." 9 N.Y.C.R.R § 8000.5(c)(2)(i). But this neither permits the Board to be extraordinarily over-inclusive and withhold all documents, nor to treat a general goal described in a regulation as overriding a specific statutory command. *Perry Thompson Third Co. v. City of New York*, 279 A.D.2d 108, 115 (1st Dep't 2000) ("An administrative agency . . . cannot extend the meaning of the statutory language to apply to circumstances not intended to fall within the statute." (internal citations and quotation marks omitted)). Redacting the name and address does not endanger the ability of people to freely express their opinions to the Board.

Respondent then attempts to justify its withholding of documents by asserting that authors could be identified by virtue of writing style or personal information contained in the submission, which could embarrass them. This reasoning was specifically rejected by the Third Department in *Legal Aid Soc'y of Ne. N.Y., Inc. v. N.Y. State Dep't of Soc. Servs.*, 195 A.D.2d 150, 153 (3d Dep't 1993) (finding the idea that "an individual intent on discovering the particulars" may be able to identify and "embarrass or harass the applicant or recipient" of the requested determination to be "unpersuasive"). Here, Respondent offers no support for its arbitrary speculation about what *could* happen if document access was provided. Moreover, Respondent effectively contends that Ms. [redacted] is subject to less protection under the law

because her parole application is the subject of media attention. *See* Resp. Br. 42. Theoretical concerns, especially those that can be cured by additional redactions to specific documents if necessary, cannot override Ms. [redacted] undisputed right of access to the documents that served as a fundamental basis for the denial of her parole.

The Board argues that *Jordan v. Hammock*, 86 A.D.2d 725 (3d Dep't 1982) justifies blanket withholding. It does not. That Court never considered the issue of providing redacted letters, as Ms. [redacted] seeks here. Moreover, there was no indication in *Jordan* that the Board documents at issue played a significant impact in denying release. Here, "meaningful judicial review" requires considering the letters' content "to determine if the actions of the Board were, in fact, in accordance with law." *Collins v. Hammock*, 96 A.D.2d 733 (4th Dep't 1983). Additionally, *Jordan*'s reasoning is outdated because while it may have made sense at a time, the advent of the internet, online petitions (which were undisputedly used here), and the ability for large groups to mobilize against release with no real effort greatly minimize the risks of providing redacted letters. Modern cases, like *Ruzas*, have reached the conclusion is that redacted submissions must be produced. *Ruzas II*, at 10 ("[S]ubmissions to the Board "are not to remain confidential. Rather, *only the names and addresses are to remain confidential*, not the substance of the letters." (emphasis added)).

Failure to produce the requested documents with redactions requires a de novo hearing. When the Board relies on inappropriate materials, its decision must be annulled.[24] For instance,

[24] Respondent fails to respond to the argument (Pet'r Br. 37, n. 24) that the list of letters in opposition and support (App. 578-82) provided is incomplete, because it omits numerous letters Petitioner believes to have been submitted to the Board on her behalf. Petitioner is entitled to review the record to ensure that all the documents of which she was aware were in fact reviewed by the Board. To the extent the Board was not provided with or did not consider all of the letters appropriately submitted on Ms. [redacted]s behalf, especially from those who know her personally, the Board's decision was improper and must be reversed. *Smith v. N. Y. State Bd. of Parole*, 34 A.D.3d 1156, 1157 (3d Dep't 2006) (reliance on erroneous record warrants de novo interview); *Hughes v. N. Y. State Div. of Parole*, 21 A.D.3d 1176, 1177 (3d Dep't 2005) (same); *Lewis v. Travis*, 9 A.D.3d 800, 801, (3d Dep't 2004) (same).

as noted *supra* at pp. 11-14, reliance on penal philosophy contained in the letters is inappropriate and a basis to grant a de novo interview. *Ramirez*, at 3 (consideration of "letters from third parties expressing their penal philosophies" "improperly injected penal philosophy in rendering the challenged determination"); *Ruzas I*, at 5-6. Moreover, the Board's violation of its own regulations is itself a sufficient reason to warrant a de novo parole hearing. *Andrews v. N.Y. State Dep't of Corr. & Cmty. Supervision*, No. 400897/2014 (Sup. Ct. N.Y. Cty. Jan. 13, 2015) (Schlesinger, J.) (Board violated its rules by "denying Ms. Andrews access to records in her file that were considered by the Board but not provided to her in whole or in part."). Respondent does not deny that the documents formed a key part of the reason to deny parole, nor could it, given that the Board wrote that it was "persuaded" against release by the "boxes of opposition" contained in the requested documents. App. 195-96. In addition, the Board claimed that Ms. ███ must convince unnamed parties that she was fit for release. App. 196. Moreover, the Board distinguished its conclusion in denying parole from Governor Cuomo's grant of clemency on the basis of "substantial additional information" it had received by virtue of its "unique process" beyond what was available to him. App. 196.[25] Therefore, the content of the letters is crucial to determining if the Board abused its authority.

[25] Respondent's argument that there is no due process interest in parole or her parole file, even if correct, is immaterial, because there is a liberty interest implicated—and a new hearing owed—when an agency does not follow its own regulations. *Id.*; *cf. Rodriguez v. Greenfield*, 7 Fed. App'x 42, 44 (2d Cir.2001) (unpublished) (noting that there may be a "liberty or property interest in having the Parole Board comply with its own statutory and regulatory guidelines in determining whether to grant or deny parole"); *cf. Graziano v. Pataki*, No. 06CIV0480 CLB, 2006 WL 2023082, at *7 (S.D.N.Y. July 17, 2006) ("[T]his Court concludes as a matter of law that there is an entitlement to a process of decision-making, which comports with the statutory guidelines of consideration to all relevant statutory factors").

CONCLUSION

For the foregoing reasons, this Court should vacate the Parole Board's denial of parole and order an immediate *de novo* hearing before a new panel of Commissioners, with all documents previously before the Parole Board immediately produced, and only identifying names and addresses of the authors of those documents redacted.

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Respectfully Submitted,
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