Art. 78 Petitioner's Reply - FUSL000148 (2022-07-20)

[redacted] [redacted]

[redacted]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

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In the Matter of the Application of

[redacted] [redacted]

Petitioner,

Hon. Sanford A. Church

- v. -

TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE,

Respondents.

For Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF

VERIFIED PETITION

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Petitioner[1] [redacted] respectfully submits this Reply Memorandum of Law in Further Support of his Verified Petition for judgment pursuant to Article 78 of the New York CPLR (i) annulling the November 18, 2020 denial of parole and November 19, 2021 affirmation by Respondent New York State Board of Parole, and (ii) directing the Board to provide a properly conducted a *de novo* parole review within 30 days, before Commissioners who have never interviewed Mr. [redacted] and who did not participate in the November 2021 decision denying his administrative appeal.

I. PRELIMINARY STATEMENT

The simple question raised by this Article 78 petition is whether the Board followed the law in considering Mr. [redacted] eligibility for parole. The record here demonstrates that the Board did not satisfy its statutory and regulatory requirements in the course of denying Mr. [redacted] parole. And on that narrow question, the Board acknowledges, as it must, that its decisions are entitled to deference *only when they are made in compliance with the legal requirements governing parole in New York State*. Answer, ¶ 30.

The Answer does not address the primary defects set forth in the Petition, that the Board's decision violated its legal requirements because the Board (1) failed to consider the relevant factors, and (2) failed to explain its decision. The Board instead erroneously claims that other of Mr. [redacted] arguments are unpreserved and responds to arguments he never raised.

The record here demonstrates that the Board acted irrationally because its decision was not made in compliance with its statutory and regulatory requirements. Accordingly, Mr. [redacted] should receive the limited remedy of a properly conducted *de novo* parole review.

[1] Capitalized terms not defined herein are as defined in the Verified Petition and Memorandum of Law (collectively, the "Petition"). NYSCEF Dkt. Nos. 1 & 15.

II. ARGUMENT

Under the Executive Law and its own regulations, the Board is required to consider certain enumerated parole factors, as well as the COMPAS assessment. N.Y. EXEC. LAW § 259-i(2)(c)(A)(i)-(viii), § 259-(c)(4), and 9 N.Y.C.R.R. § 8002.2(d); *see also* N.Y. EXEC. LAW § 259-c(4) and 9 N.Y.C.R.R. § 8002.2(a)(1)-(8). The Court of Appeals has found that the Board may also consider a person's remorse and insight into the offense. *Silmon v. Travis,* 95 N.Y.2d 470, 477 (2000).

The Board is supposed to analyze these elements in determining the three-prong standard for parole: (1) whether a person is likely to "live and remain at liberty without violating the law"; (2) whether a person's release "is not incompatible with the welfare of society"; and (3) whether a person's release "will not so deprecate the seriousness of his crime as to undermine respect for law." N.Y. EXEC. LAW § 259-i(2)(c)(A). The Board is then required to set forth its determinations "in detail and not in conclusory terms." *Id.*; 9 N.Y.C.R.R. § 8002.3(b).

When the Board renders a decision in contravention of these legal requirements, it acts arbitrarily. As the record before the Court demonstrates, that is precisely what happened here.

A. The Parole Board Failed to Consider the Required Factors

The record reflects that the Board failed to meaningfully consider the relevant parole factors and instead excessively relied on the nature of the offense.

(1) The Board has effectively admitted it did not meaningfully consider the statutory and regulatory factors

In its Answer (¶ 15), the Board acknowledges that it "[l]ack[s] knowledge or information sufficient to form a belief as to the truth of" the following facts. But without knowledge of these facts, the Board could not have considered the corresponding parole factors under Executive Law § 259-i and 9 N.Y.C.R.R. § 8002.2:

Factors the Board is required to consider	Facts about which the Board claims to lack information
"institutional record" "interactions with staff and inmates" N.Y. EXEC. LAW § 259-i(2)(c)(A)(i) 9 N.Y.C.R.R. § 8002.2(d)(1)	Mr. [redacted] "has maintained an excellent disciplinary record. He has never had an infraction for conduct related to violence, drugs, or alcohol" (Petition, ¶ 3) "a Deputy Superintendent of Administration, multiple Corrections Officers, numerous civilian supervisors, and many others submitted letters of recommendation, support, and Commendable Behavior Reports attesting to Mr. [redacted] personal growth, remorse, work ethic, character, and acceptance of responsibility for his offense" (Petition, ¶ 55)
"prior criminal record" N.Y. EXEC. LAW § 259-i(2)(c)(A)(viii) 9 N.Y.C.R.R. § 8002.2(d)(8)	"At the time of his offense, Mr. [redacted] was 38 years old, had never been arrested for any violent offense, and had no prior convictions of any kind." (Petition, ¶ 16)
COMPAS the Board's "written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision" (N.Y. EXEC. LAW § 259-c(4)) "the board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically-validated risk assessment instrument" (9 N.Y.C.R.R. § 8002.2(a))	"All of his COMPAS Assessments have determined him to be low risk in all but one category, risk of substance abuse" (Petition, ¶ 3) "In its 2018 decision, the Parole Board stated "[t]he panel chooses to depart from the COMPAS which indicates low risk scores." (Petition, ¶ 57)
"academic achievements" (and "institutional record") N.Y. EXEC. LAW § 259-i(2)(c)(A)(i) 9 N.Y.C.R.R. § 8002.2(d)(1))	Mr. [redacted] "earn[ed] his Associate and Bachelor degrees, both *cum laude*" (Petition, ¶ 3) "In 2018, DOCCS awarded Mr. [redacted] a Limited Time Credit Allowance ("LCTA") based on his educational achievements and disciplinary record while incarcerated" (Petition, ¶ 25)
"release plans including community resources" N.Y. EXEC. LAW § 259-i(2)(c)(A)(iii) 9 N.Y.C.R.R. § 8002.2(d)(3)	Numerous community members "committed to provide him a variety of resources upon his release, including housing, assistance looking for work, and spiritual and emotional support" (Petition, ¶ 54)
"vocational education, training or work assignments"	"He has extensive vocational training and has contributed his labor to [DOCCS]" (Petition, ¶¶ 3 & 46)

N.Y. EXEC. LAW § 259-i(2)(c)(A)(i) 9 N.Y.C.R.R. § 8002.2(d)(1);	
"program goals and accomplishments" (and "therapy and interactions with staff and inmates") N.Y. EXEC. LAW § 259-i(2)(c)(A)(i) 9 N.Y.C.R.R. § 8002.2(d)(1))	"In addition to his own program participation, he has facilitated numerous therapeutic programs for other incarcerated men and volunteered within the Catholic communities he has joined" and Mr. [redacted] has completed "numerous therapeutic programs" including ART, ASAT, AVP, and substance abuse programs (Petition, ¶¶ 3 & 48)

Additionally, the Board may consider "remorse and insight" but also disclaimed knowledge that Mr. [redacted] expressed his remorse in written statements to the Board and Apology Bank (Petition, ¶¶ 32–33) and that DOCCS employees wrote "attesting to Mr. [redacted] personal growth, remorse, work ethic, character, and acceptance of responsibility for his offense" (*id.*, ¶ 55). *Silmon,* 95 N.Y.2d at 477.

The Board's admitted lack of knowledge regarding vast swaths of the record here establishes that it could not have meaningfully considered the relevant parole factors.

(2) The Board impermissibly relied on the nature of the offense

With no analysis,[2] the Board claims to rely on inapposite authority for its assertion that the Board is entitled to look no further than offense. Answer, ¶¶ 48 & 52–56. But the Board cannot rely exclusively on the offense in denying parole, as it did here.[3]

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[2] As a general matter, while the Board may be able to place more weight on the offense than other factors, the decision here does not state that is why the Board denied parole. *See McBride v. Evans*, Index No. 4483/2013 at *3 (Sup. Ct. Dutchess Cty. Jan. 13, 2014) (granting de novo because "[a]lthough the respondent in its answer asserts that the Board may properly base its decision on the seriousness of the offenses and may place greater weight on the violence and brutality of the crimes, as opposed to an inmate's institutional record, here neither the Board's decision nor the transcript articulate that as the reason for its decision. Rather, the Board merely set forth its determination in conclusory terms which is in contravention of the law."); *see also infra* Argument (B)(1).

[3] As set forth in the Petition, the Board ultimately relied on the offense because the letters that the Board mentioned—in passing and with no analysis—focus on the offense and related penal philosophy. Memorandum, p. 5. The Court of Appeals has found that reliance on the penal philosophy that homicide requires life imprisonment, despite a sentence that permits parole, is not permissible. *See King v. New York State Div. of Parole*, 83 N.Y.2d 788, 791 (1994); *see also* Memorandum, pp. 19–21.

To the exclusion of the statutory factors above, this decision rests squarely on the offense Mr. [redacted] committed more than 28 years ago. *See* Petition, Ex. 1, p. 31, lines 9–14 & 21–22; p. 32, lines 7–14. The Appellate Division has repeatedly found that such overreliance is impermissible. *See, e.g., Johnson v. New York State Div. of Parole*, 65 A.D.3d 838, 839 (4th Dept 2009) (granting *de novo* because "the only reason for the Parole Board's denial of parole that is discernible . . . is that the determination was based solely upon the seriousness of the crime."); *Ferrante v. Stanford*, 172 A.D.3d 31, 37 (2d Dep't 2019) (affirming Supreme Court finding "that the Board's determination to deny parole release was not supported by an application of the factual record to the statutory factors set forth in Executive Law § 259-i, that the Board's determination was based exclusively on the severity of the petitioner's offense, and that there was no rational support in the record for the Board's determination" and restating the rule that "the Board may not deny an inmate parole based solely on the seriousness of the offense.") (citations omitted); *Ramirez v. Evans*, 118 A.D.3d 707, 707 (2d Dep't 2014) (granting *de novo* interview because "it is clear that the Board denied release solely on the basis of the seriousness of the offense"); *Perfetto v. Evans*, 112 A.D.3d 640, 641 (2d Dep't 2013) (affirming granting of *de novo* interview where the Board "mentioned the petitioner's institutional record, [but] it is clear that the Parole Board denied the petitioner's request to be released on parole solely on the basis of the seriousness of the offense") (citations omitted); *Huntley v. Evans*, 77 A.D.3d 945, 947 (2d Dep't 2010) ("Here, the Parole Board cited only the seriousness of the petitioner's crime. . . . Accordingly, the Parole Board's determination demonstrates that it failed to weigh the statutory factors, and a new parole hearing is warranted."). Similarly, the Board's decision here improperly relied on the nature of the offense and should be annulled.

B. The Parole Board Failed to Explain Its Decision

The Board failed to explain its decision "in detail" and "not in conclusory terms," as required by both Executive Law and its own regulations. It also failed to explain its departure from COMPAS, an independent violation of its regulations.

(1) The Board did not explain its decision in detail

New York law requires that the Board provide its reasons for denial "in detail and not in conclusory terms" (Executive Law § 259-i) and "in factually individualized and non-conclusory terms" (9 N.Y.C.R.R. § 8002.3). The Board asserts—again with no analysis of the record before this Court—that its decision contained "adequate detail" and "sufficient detail". Answer, ¶¶ 72–73. But the error here is not that the Board did not repeat two of the statutory standards "verbatim" (Answer, ¶ 68), the error is that the Board simply parroted the statutory language with no explanation. And courts regularly find that conclusory decisions like the one here lack detail and are entitled to no deference.

The Appellate Division's thorough analysis in *Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22 (1st Dep't 2016) is instructive. In *Rossakis*, the Board had issued a conclusory decision much like decision at issue in this case:

> The Board's denial consisted of a brief four-paragraph decision. In its first paragraph, the Board asserted that petitioner's release was incompatible with the welfare of society, largely mirroring the text of the Executive Law itself. The Board's second paragraph described the facts of the underlying offense and made mention of petitioner's substance use around the time of decedent's death. The Board's third paragraph summarily listed petitioner's institutional achievements with no further analysis. In its final paragraph, the Board concluded that petitioner lacked remorse . . .

Compare 146 A.D.3d at 25, *with* Petition, Ex. 1, pp. 31–32. The Appellate Division went on to find that:

> The Board summarily listed petitioner's institutional achievements, and then denied parole with no further analysis of them, in violation of the Executive Law's

> requirement that the reasons for denial not be given in "conclusory terms" (Executive Law § 259–i[2][a]). Moreover, the Board's decision began by stating that petitioner's release "would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law." These statements came directly from the language of Executive Law § 259–i(2)(c), further violating the Executive Law's ban on the Board making conclusory assertions (*see* Executive Law § 259–i[2][a]).

146 A.D.3d at 28.

Like in *Rossakis* (and as originally set forth in the Petition), the Board's repetition of two of the statutory parole standards is conclusory and does not explain the reasoning for its denial. *See, e.g.,* Memorandum, pp. 11–12; *see also Morris v. New York State Dept. of Corr. & Cmty. Supervision*, 40 Misc.3d 226, 235 (Sup. Ct. Columbia Cty.) (granting *de novo* interview because "[t]he Board's decision utterly failed to explain its reasoning for denying Petitioner parole. Indeed, here, the Board failed to explain, other than the facts of the crime, why Petitioner's release was "incompatible with the public safety and welfare" . . . . the Board should be well able to articulate the reasoning for its decision, if it were come to reasonably, in a non-arbitrary, un-capricious manner.") (internal citations and quotations omitted).

The Board's efforts in its Answer to offer new explanations not stated in its cursory decision are improper. *See, e.g.,* Answer, ¶ 29 (claiming that Mr. [redacted] was unwilling to discuss his offense). Such *post hoc* rationalizations illustrate the problem with how the Board made its decision here. *Phillips v. Stanford*, Index No. 52579/19 at *3 (Sup. Ct. Dutchess Cty. Oct. 1, 2019) (granting *de novo* interview after finding that "[i]t is not the function of this court to review the record to determine whether or not it, taken as a whole, would lend rational support to the Board's final determination. The Board is obligated to articulate facts underlying its ultimate determination to enable this court to review whether it rationally applied those facts to the requisite statutory factors. The Board in this case failed to articulate such facts and thus its decision lacks

a rational basis. While there may be factors in the record supporting its ultimate determination, it is the obligation of the Board to state those facts and its reliance thereon in its decision."); *cf. O'Connor v. Stanford*, Index No. 54/2021 at *7 (Sup. Ct. Dutchess Cty. Sept. 29, 2021) (granting *de novo* interview after finding that "[a]lthough the Decision herein is length and contains information about the factors that the Board considered, *the reasons for its denial are not set out with sufficient detail to allow for intelligent appellate review*.").

(2) The Board departed from COMPAS without explanation

The Board claims that the COMPAS assessment is only relevant for the first of the three prongs of the parole standard. The Board then argues that because it did not find that Mr. [redacted] was likely to reoffend—and instead found that "release is not in the welfare of society" and "release would deprecate the crime"— its "decision did not depart from the COMPAS." Answer, ¶ 38.

As a preliminary matter, this limitation of COMPAS's applicability to only the first statutory prong has no basis in the Board's own rulemaking.[4] When the Board originally proposed revised COMPAS regulations in 2016, § 8002.2(a) read in pertinent part: "If a Board determination, denying release, *departs from the COMPAS scores, an individualized reason for such departure shall be given in the decision*." N.Y. St. Reg., Sept. 28, 2016 (emphasis added).

In response to public comment, the Board promulgated a different regulation in 2017, with § 8002.2(a) reading in pertinent part: "If a Board determination, denying release, departs from the

[4] It also has no basis in the 2011 statutory amendments that necessitated the Board's rulemaking. As revised, Executive Law 259-c(4) required that the Board "incorporate risk and needs principles to measure [1] the rehabilitation of persons appearing before the board, [2] the likelihood of success of such persons upon release, and [3] assist members of the state board of parole in determining which inmates may be released to parole supervision" "for use in making parole decisions as required by law" not solely for use in determining whether a person is likely to reoffend. N.Y. EXEC. LAW § 259-c(4).

Department Risk and Needs Assessment's scores, *the Board shall specify any scale* within the Department Risk and Needs Assessment *from which it departed and provide an individualized reason for such departure*." N.Y. St. Reg., Sept. 27, 2017. The expansion of the regulation's requirement is self-evident from its revised language and is not limited to any single prong of the statutory parole standard. Further, the Board explicitly set forth its interpretation of the final rule it was promulgating:

> The new regulation is also intended to increase transparency in the Board's decision making by providing an explanation when the Board departs from any scale in denying an inmate release. . . . In response to concerns regarding the meaning of "departs from" scores on a periodically-validated risk assessment instrument, the Board has clarified that it will specify any scale within the assessment from which it departed that impacted its decision.

Id.

Courts interpret the Board's new regulation as the Board intended: explanation is required when the Board's decision, denying release, departs from a COMPAS scale. *See* Memorandum, pp. 14–18. For instance, in *Voii v. Stanford,* the Board raised similar arguments to those it makes here:

> In its Answer and Return, Respondent Board maintains that it considered Petitioner's COMPAS instrument and issued a decision "consistent" with the amended 9 N.Y.C.R.R. §8002.2(a). It further argues that Respondent Board "did not find Petitioner likely to reoffend, but rather concluded, despite low risk scores, release would be inappropriate under the other two statutory standards [emphasis in original]." As a result, the Board "was not strictly required by the regulation to address scales from which it was departing."

Id. at *7. In rejecting those arguments, Supreme Court determined that:

> Respondent Board's interpretation of the regulation is flawed. Respondent Board appears to argue that this regulation only requires it to address the scales from which it departs when there is a finding that a petitioner is likely to reoffend – the first criteria listed under Executive Law §259-i(2)(c)(A). *However, the regulation does not tie the requirement to explain departures to any particular category in Executive Law §259-i(2)(c)(A). Rather, it clearly indicates that a departure requires the Board to identify any scale from which it departs and provide an*

> *individualized reason [Emphasis added]. The fact that Respondent Board here relied upon the other two standards in denying release does not excuse the Board from complying with 9 N.Y.C.R.R. §8002.2(a).*
>
> Moreover, even assuming the Board's generic statement identified the scale from which it departed, the explanation given for the departure is not "individualized." The Board asserts that it is departing from COMPAS because of the "tragic reckless nature of the crimes themselves." However, the COMPAS Risk Assessment contains twelve categories, none of which involve the nature of the underlying crimes. Thus, the alleged "individualized" reason provided by the Board for the departure is unrelated to any scale contained in the COMPAS Assessment."

Id. at *6–7 (emphasis added). The Board's reasoning here is erroneous for the same reasons. *See, e.g.,* Petition, Ex. 1, p. 31, lines 21–23 (stating that the Board was departing from COMPAS because "these low scores do not dismiss" the nature of Mr. [redacted] offense).

Other recent decisions are in accord that departures from COMPAS need to be explained for more than just the first of the three statutory parole prongs. *See, e.g., Robinson v. Stanford*, Index No. 2392/2018, at *2 (Sup. Ct. Dutchess Cty. Mar. 13, 2019) (ordering *de novo* interview because "the Parole Board's finding that *discretionary release would not be compatible with the welfare of society directly contradicts these scores in his COMPAS assessment. As the Board's determination denying release departed from these risks and needs assessment scores, pursuant to 9 NYCRR § 8002.2 it was required to articulate with specificity the particular scale in any needs and assessment from which it was departing and provide an individualized reason for such departure.*") (emphasis added); *Diaz v. Stanford*, Index No. 2017/53088, at *8 (Sup. Ct. Dutchess Cty. Apr. 4, 2018) (ordering *de novo* interview because "[w]hile a low COMPAS score does not entitle an inmate to parole release, the Board did not discuss why it completely discounted Mr. Diaz's COMPAS scores . . . The Court cannot glean from the cursory nature of its decision how it utilized its own risk assessment procedures in concluding that petitioner's release is *incompatible with the welfare of society at this time*.").

DOCCS has repeatedly assessed Mr. [redacted] "low" or "unlikely" risk in 11 categories and recommended that he receive the lowest level of parole supervision if released. Petition, Exs. 7–9. His COMPAS assessment thus indicates that his release "is not incompatible with the welfare of society" and would not "depreciate the seriousness" of the offense. Yet the Board's decision contradicted this assesment. And when the Board departs from COMPAS scales under its revised regulations, it must provide individualized reasons for doing so. *See Hill v. New York State Bd. of Parole*, Index No. 100121/2020, at *11 (Sup. Ct. Dutchess Cty. Oct. 23, 2020) (ordering *de novo* interview for petitioner with 11 low COMPAS scores when the Board found that his "release would be incompatible with the welfare of society" but "[t]he Board failed to articulate the reasons for this determination with respect to [petitioner]'s low COMPAS Risks and Needs Assessment scores or to "provide an individualized reason for this departure," in accordance with 9 NYCRR 8002.2.[]").

C. The Parole Board's Remaining Arguments Lack Merit or Are Irrelevant

The Board erroneously spends much of its opposition claiming that Mr. [redacted] did not preserve certain of his arguments. *See* Answer, ¶¶ 32–43. The Board also addresses various arguments Mr. [redacted] never raised. *See, e.g.,* Answer, ¶¶ 32, 39, 42–43.

Even if the Court wholly agrees with the Board regarding these points, the Petition should still be granted. The Board does not claim in its Answer that any of the main flaws with its decision (set forth in the Petition and reiterated above) are improperly preserved. Nor does it address them. Any one of these arguments would independently justify granting the narrow relief Mr. [redacted] seeks.

(1) Mr. [redacted] properly preserved the Board's violations regarding COMPAS

Troublingly, the Board does not argue that these "unpreserved" arguments are not problematic errors made by the Board. The Board instead claims, on technical grounds, that the errors it made should not be addressed. But fortunately—and more fundamentally—the Court need not ignore the substance of these errors. Mr. [redacted] preserved his arguments regarding the errors in COMPAS. *Compare* Answer, Ex. F, n. 12, *with* Answer, ¶¶ 32 & 35. Further, Mr. [redacted] did, in fact, raise his concerns about the accuracy of his single non-low scale during the interview, when he discussed and agreed with Parole Commissioner Coppola's prior statements regarding the accuracy of this scale. *Compare* Petition, Ex. 1, pp. 15–16, *with* Answer, ¶¶ 32 & 35. Finally, Mr. [redacted] also preserved his claims that the Board improperly withheld and redacted the COMPAS assessment from him. *Compare* Answer, Ex. F, n. 11, *with* Answer, ¶¶ 32 & 35.

(2) The Board responds to arguments Mr. [redacted] has not made

Also contrary to the Board's claims, Mr. [redacted] does not argue that the Board's decision was "predetermined" (Answer ¶¶ 32, 39 & 42). Nor does he argue that "statistics show that the petitioner should be released" (Answer, ¶¶ 32 & 43). The Board fails to cite to either of these supposed arguments in the Petition. Similarly, the Board's Answer sets forth various other generalized and conclusory arguments that are not relevant to the Petition. *See, e.g., id.* at ¶¶ 76–78 (raising "due process clause" arguments).

III. CONCLUSION

For the foregoing reasons and those in the Petition, Mr. [redacted] respectfully requests that this Court, pursuant to New York CPLR §§ 7801–7806, (i) vacate the Board's November 18, 2020 parole denial and November 19, 2021 affirmation and, (ii) order the Board to provide a properly

conducted *de novo* parole review within 30 days, before Commissioners who have never interviewed Mr. [redacted] and who did not participate in the November 2021 decision denying his administrative appeal.

Dated: July 20, 2022
New York, New York

Respectfully submitted,

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WORD COUNT CERTIFICATION

Pursuant to 202.8-b of the Uniform Rules for the Supreme Court and County Courts, I, Matthew D. Cipolla, certify that this Reply Memorandum of Law complies with the word count limit, as it contains 4,199 words based on the word-processing system used to prepare this document.

Dated: July 20, 2022
New York, New York

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