COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12882

WILLIAM DINKINS & EUGENE IVEY

v.

MASSACHUSETTS PAROLE BOARD

ON DIRECT APPELLATE REVIEW FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

BRIEF OF AMICI CURIAE COMMITTEE FOR PUBLIC COUNSEL SERVICES AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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STATEMENT OF INTEREST OF AMICI CURIAE

The **Committee for Public Counsel Services** (CPCS) was created by the Legislature in 1983 "to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services" to indigent parties in the commonwealth. St. 1983, c. 673, codified in G. L. c. 211D, §1. Aside from the appointment of counsel for the indigent prisoner, CPCS has no financial interest in the case.

The Parole Advocacy Unit within CPCS appoints, trains, and oversees staff and private parole counsel representing juvenile lifers pursuant to Diatchenko v. District Attorney for the Suffolk District, 471 Mass. 12 (2015), disabled prisoners pursuant to Crowell v. Massachusetts Parole Board, 477 Mass. 106 (2017), and prisoners facing parole revocation pursuant to Gagnon v. Scarpelli, 411 U.S. 778 (1973). Because the vast majority of parole attorneys are appointed by the unit, the decision in this case will affect the interests of the unit's present and future clients.

The **Massachusetts Association of Criminal Defense Lawyers** is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a

substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.[1]

INTRODUCTION

The Parole Board's regulation, 120 CMR 200.08(3)(c), prohibits aggregation of parole eligibility dates on consecutive sentences where the initial sentence is a life sentence. In doing so, the regulation arrogates judicial power, is squarely contrary to G.L. c. 127, § 133, and creates unnecessary complexities and delays in the already protracted parole process.

The Parole Board's non-aggregation regulation violates the separation of powers in at least two ways: **First**, the judiciary's power to sentence includes the power to set a parole eligibility date, meaning the date the inmate becomes eligible for release from prison.

[1] Pursuant to Mass. R.A.P. 17(c)(1) and Supreme Judicial Court Rule 1:21, MACDL represents that it is a 501(c)(6) organization under the laws of the Commonwealth of Massachusetts. MACDL does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in MACDL.

Each time the Parole Board denies a lifer parole on his initial life sentence, the Board defers, indefinitely, the inmates' true parole eligibility date, thereby encroaching upon the court's power to sentence.

Second, the legislature has "broad power" to set the duration of imprisonment when prescribing criminal penalties. Commonwealth v. Guzman, 469 Mass. 492, 498 (2014). Because the legislature has clearly directed in G.L. c. 127, § 133 that all sentences must be aggregated to a "single parole eligibility date," the Board's regulation, 120 CMR 200.08(3)(c), permitting multiple parole eligibility dates, infringes on that power and is unlawful.

ARGUMENT

1. 120 CMR 200.08(3)(C) INFRINGES ON THE POWER OF THE JUDICIARY TO SENTENCE.

Massachusetts Declaration of Rights, Article 30 provides, "the executive shall never exercise the legislative and judicial powers" and "forbids the legislative and executive branches from exercising powers that are entrusted to the judicial branch if that exercise restricts or abolishes a court's inherent powers. … Where a statute impermissibly allocates a power held by only one branch to another, it violates

art. 30." Commonwealth v. Cole, 468 Mass. 294, 301-302 (2014). The plaintiff-appellants in this case have argued that the Board's regulation violates article 30 because parole eligibility is part of the sentence. Plaintiff's Br. at 57-59. But it is not just the question of parole *eligibility* that is an integral part of the sentence. See Diatchenko v. District Attorney for the Suffolk District, 471 Mass. 12, 19 at n.12 (2015). As argued below, it is the setting of an actual parole eligibility *date* that is a critical ingredient to the Court's sentencing power, and which has been arrogated by the Parole Board.

A. "PAROLE ELIGIBILITY DATE" MEANS DATE ON WHICH A PERSON IS ELIGIBLE TO BE ACTUALLY RELEASED FROM PRISON.

Before turning to the boundaries of executive and judicial power, it is necessary to define some basic terms:

"**Parole**" The "parole" of an inmate entails that inmate's *release from prison*. Being "paroled" does *not* result in a parolee continuing to live inside a cell; the parolee lives "outside prison walls." Commonwealth v. Cole, 468 Mass. at 298 (parole is served "outside a prison."); Morrissey v. Brewer, 408 U.S. 471, 477 (1972) (Parole is "an established variation on imprisonment of

convicted criminals. Its purpose is to help individuals ***reintegrate into society***") (emphasis added); Commonwealth v. Figueroa, 464 Mass. 365, 370 n.6 (2013) ("Parole constitutes a variation on imprisonment" and "… release from confinement," citing Morrissey).[2] One statute governing release on parole, accordingly, refers unambiguously to the prisoner being released to the "community" and "liv[ing] and remain[ing] at liberty." G.L. c. 127, § 130. To a large extent, the parole board's regulations and definitions follow this common understanding. See 120 Code Mass. Regs. 200.01 (parole eligibility is "[t]he date on which an inmate becomes eligible for parole release").[3]

[2] Merriam Webster defines "parole" as "a conditional release of a prisoner serving an indeterminate or unexpired sentence," available at https://www.merriam-webster.com/dictionary/parole. Likewise, Black's Law Dictionary defines "parole" as "[t]he conditional release of a prisoner from imprisonment before the full sentence has been served." Black's Law Dictionary (11th ed. 2019). There is no definition of "parole" that amici could find – other than the Board's – that contemplates a grant of parole being followed by continued incarceration.

[3] The term "parole" as a standalone term is not specifically defined in the Parole Board's regulations. See 120 CMR 100.00. Instead, the Parole Board appears to have a working definition of the term "parole," which allows a prisoner to be on "parole" while incarcerated. Board's Br. at 46.

"**Parole Eligibility Date**" The Board's regulations define this twice. First, "parole eligibility date" is "the date upon which an inmate first becomes eligible for release to parole supervision." 120 CMR 100.00 ("Definitions, Parole Dates and Periods" at (d)). Second, as stated above, is in 120 CMR 200.01 ("Definitions, Parole Eligibility": the "date on which an inmate becomes eligible for parole release.") (emphasis added). Consistent with the Court's and the legislature's definitions of "parole," the Board acknowledges in these definitions that setting a "parole eligibility date" means setting a date when the inmate becomes eligible to be released – i.e., to leave prison.

"**Parole Ineligibility Period**" The Board's regulation states that the term "parole ineligibility period" is the "period of time from the effective date of the sentence until the parole eligibility date during which the inmate cannot be released on parole."[4] 120 CMR 100.00 ("Definitions, Parole Dates and Periods").

"**Aggregation**" Aggregation is "the calculation process by which the parole ineligibility periods of

[4] The definition continues: "[t]he aggregation of parole ineligibility periods does not always follow the rules which pertain to aggregation of sentence structures; the two methods of calculation are distinct and separate."

consecutive sentences are combined, thereby producing a single parole eligibility date." Id. See Henschel v. Commissioner of Correction, 368 Mass. 130, 136 (1975).

B. THE POWER TO SET A PAROLE ELIGIBILITY DATE IS A JUDICIAL POWER.

Whereas the power to impose a sentence is a "quintessential" judicial power, Commonwealth v. Rodriguez, 461 Mass. 256, 264 (2012)," the *execution* of sentences according to standing laws is an attribute of the executive department of government." Committee for Public Counsel Services v. Chief Justice of the Trial Court, 484 Mass. 431, 451 (2020) (emphasis added). The question remains: is the setting of the eligibility date for actual release on parole a judicial power or an executive power? For the following reasons, the law is clear that the judiciary alone sets the date for eligibility to be released.

First, Massachusetts statutory law provides for the criminal courts to impose a parole eligibility date (or, said differently, to impose the parole ineligibility period) by setting the "minimum term" for the sentence. G.L. c. 279, § 24. This minimum term is the parole eligibility date. G.L. c. 127, § 133 ("prisoner [not eligible for parole until he has] served the minimum

term of sentence"); Crowell v. Mass. Parole Bd., 477 Mass. at 115 ("the minimum term serves as a base for determining his parole eligibility date."). Accordingly, as a matter of statutory law, the legislature intended for the sentencing court to set the parole eligibility date.

Second, the Courts have interpreted the setting of a parole eligibility date as a judicial function implicit in the power to sentence. For instance, recently in Commonwealth v. LaPlante, 482 Mass. 399, 403 (2019), this Court endorsed the sentencing court's approach of setting eligibility for three consecutive life sentences at 45 years. See Commonwealth v. Washington, 97 Mass. App. Ct. 595, 602 (2020) (noting that this approach was affirmed). This Court held that such a parole eligibility date - the date when the inmate is "afforded a meaningful opportunity to obtain release" - must be set by the Court at sentencing. Id. ("the constitutionality of the defendant's sentence, including the aggregate term to be served before parole eligibility, is to be evaluated in light of the particular facts presented").[5]

[5] In LaPlante the Court's action of setting parole eligibility at 45 years did not conflict with 120 CMR

LaPlante was not the first time this Court has recognized that the sentencing Court sets the parole eligibility date. See Commonwealth v. Amirault, 415 Mass. 112, 117 n.10 (1993) ("We recognize that, in imposing sentences, ***judges necessarily consider parole eligibility dates***. Consideration of that factor after trial is not the same as revision of sentences based on denial of parole") (emphasis added); Clay v. Massachusetts Parole Board, 475 Mass. 133, 136 (2016) ("the possibility of parole is part and parcel of the punishment for a crime"), citing United States ex rel. Steigler v. Board of Parole, 501 F. Supp. 1077, 1080 (D. Del. 1980); Diatchenko, 471 Mass. at 19 & n. 12.[6] This is a matter of both law and common sense. "At the core

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200.08(3)(c) because the crime occurred prior to 1988. But the case still stands for the proposition that the Court sets the parole eligibility date. The same constitutional reasoning in LaPlante holds true if the crime had occurred after January 1, 1988. The same is true of Commonwealth v. Costa, 472 Mass. 139, 140 (2015) ("a consecutive sentence doubles the amount of time the defendant must serve before he becomes eligible for parole").

[6] The Board acknowledges that the Court has the power to set a single parole eligibility date. Board's Br. 55 n.16 ("The judge in effect ordered these parole eligibility dates to be aggregated."). The Board also distinguishes the current plaintiff inmates from LaPlante and thereby suggests that aggregation of life sentences *is* appropriate where the consecutive sentences arose (as in LaPlante) from the same incident. Id.

of the judicial function is the power to impose a sentence." Cole, 468 Mass. at 302. And it is hard to imagine a more central component of the sentencing power than the setting of the minimum term that a defendant must serve until he may be released.

The issue of whether the parole eligibility date is a component of a defendant's sentence (and therefore part of the judicial function) has also arisen in the context of an inmate challenging the extension of the parole ineligibility period as an *ex post facto* violation. Courts agree that it is the sentencing court's responsibility to set such a parole eligibility date and that any extension of the date given at the sentencing (e.g., by a parole board) would be an unconstitutional increase in the sentence itself. United States ex rel. Graham v. United States Parole Comm'n, 629 F.2d 1040, 1043 (5th Cir. 1980) ("official post-sentence action that delays eligibility for supervised release runs afoul of the *ex post facto* proscription."); Jones v. Murray, 962 F.2d 302, 310 (4th Cir. 1992) ("parole eligibility is a facet of the sentence imposed"; "by deferring the eligibility date, the state imposed on the defendant after-the-fact punishment when denying a sentence benefit that he had at the time the

offense was committed"). In short, the parole eligibility date is part of the sentence.

This proposition -- that the parole eligibility date is a component of the sentence -- is not limited to the *ex post facto* context. In Warden v. Marrero, 417 U.S. 653 (1974), the Supreme Court made clear that because the parole eligibility date itself is implicit in the sentence, it is a part of the judicial power to sentence for separation of power purposes:

> Although, of course, the precise time at which the offender becomes eligible for parole is not part of the sentence … it is implicit in the terms of the sentence. And because it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, parole eligibility can be properly viewed as being determined -- and deliberately so -- by the sentence of the district judge.

Warden, 417 U.S. at 658. The Court continues,

> [T]he fact that the Board of Parole, not the sentencing judge, finally determines whether and when an offender should be released on parole does not undercut our conclusion that ***the district judge, at the time of sentencing, determines when the offender will become eligible for consideration for parole and the Board's action simply implements that determination***.

Id. at 659 (emphasis added).[7] In 1975, Judge Tauro, citing Warden, picked up on this reasoning in his decision in Bel v. Chernoff, writing:

> The parole eligibility date, be it one-third or two-thirds, is triggered by the period of confinement selected by the sentencing judge. It is ancillary to, rather than an intrusion on, the sentencing process and *is a matter the judge is aware of at time of disposition*.

390 F. Supp. 1256, 1259-1260 (1975) (emphasis added). The animating principle is that the Court, with its knowledge of the defendant and the criminal conduct at the time of sentencing, does and should have the sole power to set a parole ineligibility period for the sentence, within the existing law.[8] See G.L. c. 127 § 133

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[7] This is remarkably similar to this Court's reasoning in Amirault, 415 Mass. at 117, n.10. See also State v. Leighton, 2000 WI App 156, P51 (2000) ("A sentencing court sets the parole eligibility date using the same discretionary balancing of factors that governs the imposition of a prison sentence."); Thomas v. State, 239 Md. App. 483, 491-492 (2018) ("When a statutory provision determines parole eligibility, [Warden v. Marrero] distinguishes between the eligibility for and granting of parole and reasons that eligibility is "a function of the length of the sentence fixed by the [trial] judge," while granting parole falls outside the purview of the sentencing court.")

[8] The legislature may set mandatory minimums for sentences, which effectively sets a lower bound for a parole ineligibility period. See Commonwealth v. Therriault, 401 Mass. 237, 239 (1987). The Court, nevertheless, has the power to impose a sentence within the range set by the Legislature and thereby set a parole date within the bounds of the law.

(giving the Court the power to set parole eligibility dates by aggregating the minimum terms of consecutive sentences). If the power to set a date for parole eligibility is a judicial function, any executive infringement on that power is unconstitutional. Cole, 468 Mass. at 301-302 (concluding that community parole supervision for life law was an unconstitutional delegation of a quintessential judicial function, sentencing, to the parole board, an executive branch of government, in violation of the separation of powers clause).

Having established that (A) "parole eligibility" date means the date when the inmate will first be considered for *actual release* and (B) the power to set a parole eligibility date is inherent in the judicial power to sentence, it follows that the judiciary, at sentencing, must set the date for when the inmate will be first considered for release to the community. Warden, 417 U.S. at 658; LaPlante, 482 Mass. at 403; Amirault, 415 Mass. 112, 117 n. 10. The Parole Board's regulation deprives the court of its authority to set the actual parole eligibility date for prisoners serving initial life sentences by leaving that date undefined until such time as the Board itself decides the inmate

can begin serving the consecutive sentence. Effectively, this means that each time the Board denies an inmate "parole" from the life sentence, the Board indefinitely defers the prisoner's eligibility date on the consecutive sentence. This it cannot do.

C. THE PAROLE BOARD HAS ARROGATED JUDICIAL POWER BY CHANGING THE DEFINITION OF "PAROLE."

The Board's argument for non-aggregation is ultimately predicated on a redefinition of "parole" that allows for a person to be "paroled into" another sentence without release from prison. Board's Br. at 46 ("some prisoners could be paroled from one sentence into another without being released outside prison walls"). But this unwarranted redefinition of the term "parole" is precisely the problem. Words have meaning, and the executive branch cannot change the irreducible core of what "parole" is: an opportunity for supervised release in the community upon proven rehabilitation.

Most fundamentally, the Board disagrees with the Legislature, this Court, and the Supreme Court that "parole" means release "outside the walls." See G.L. c. 127, § 130; Cole, 468 Mass. at 298; Morrissey, 408 U.S. at 477. In Massachusetts, the decision made at a parole hearing, at its most basic, should be a decision whether

the prisoner will continue to live in a cell. Id. Indeed, that is the metric the Board applies in deciding whether to grant parole. See G.L. c. 127, § 130 (whether the person can "live and remain at liberty without violating the law" and whether "release is not incompatible with the welfare of society"); 120 C.M.R. 300.04(1) (Board "shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release if not incompatible with the welfare of society"). That standard comports with the purpose of parole, which is to "help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed, and alleviate the cost to society of keeping the individual in prison." 59 Am. Jur. 2d Pardon and Parole § 6 (2020). Thus, keeping someone in prison who has been granted "parole" is inconsistent with the standard the Board applies at the hearing and undermines the purpose of parole itself.

Accordingly, it is logically incongruous for a person to be in prison *and* on parole at the same time. It makes no sense to refer to a parolee as having been

"paroled" into another sentence for which they are still incarcerated. Henschel, 368 Mass. at 136 ("[Non-aggregation] makes little sense since the decision to grant parole is to be based on whether the board believes the prisoner can live freely outside of prison without violating the law"); Hamm v. Latessa, 72 F.3d 947, 955, n. 13 (1995) ("since parole decisions are premised on whether the Parole Board believes a convict can live outside prison without behaving in an antisocial manner, the Parole Board should not normally be required to make a series of decisions paroling a convict from one sentence to another").

But the Board uses its non-release redefinition of "parole" to argue that "parole eligibility" is different from "release from prison on parole." Board's Br. at 58.[9] Taking this convoluted position allows the Board to acknowledge (as it must) that the sentencing court sets

[9] Similarly, the Board argues that "a parole permit can be offense specific." Board's Br. at 42. The Board provides no authority for that novel proposition. Indeed, the administrative and legal complications such a process would create are numerous. Its own definition of "parole permit" is "[t]he official document signed by the Chairman of the Parole Board or his or her designee allowing an offender to assume parole status and specifying the conditions of parole." 120 CMR 100.00. As explained above, prisoners are paroled from a *sentence*, not an offense.

"parole eligibility," while continuing to insist that the Board retains the power to set an eligibility date for "release from prison on parole." Board's Br. at 58.

That cannot be so. In setting parole eligibility, the sentencing court sets the date the defendant becomes eligible for release from prison on parole. Warden, 417 U.S. at 658; LaPlante, 482 Mass. at 403; Amirault, 415 Mass. at 117 n. 10. The Parole Board cannot wrest that power from the judiciary by simply redefining the term "parole" to mean something that it does not. "The essence of parole is release from prison." Samson v. California, 547 U.S. 843, 850 (2006), quoting Morrissey, 408 U.S. at 477.

2. 120 CMR 200.08(3)(C) INFRINGES ON THE LEGISLATURE'S POWER TO AGGREGATE SENTENCES.

The language of G.L. c. 127, § 133 is clear: "Where an inmate is serving two or more consecutive or concurrent state prison sentences, a single parole eligibility shall be established for all such sentences." 120 CMR 200.08(3)(c) states, however, "[a] sentence for a crime committed on or after January 1, 1988 which is ordered to run consecutive to a life sentence shall not be aggregated with the life sentence for purposes of calculating parole eligibility on the

consecutive sentence." These two provisions are irreconcilably inconsistent. The Parole Board routinely ignores the legislative directive in favor of its own policy. See R. 148-242 (granting or denying parole "into" a consecutive sentence). A regulation such as 120 CMR 200.08(3)(c), which is inconsistent with governing statutory law must be struck down. Buckman v. Commissioner of Correction, 484 Mass. 14, 24 (2020) ("[...] deference does not suggest abdication; '[a]n incorrect interpretation of a statute … is not entitled to deference").

A. SECTION 133A DOES NOT SUPPORT THE PAROLE BOARD'S NON-AGGREGATION REGULATION.

To prop up 120 CMR 200.08(3)(c), the Parole Board points to another law, G.L. c. 127, § 133A, which, at least in 1988 (when this policy was adopted), required a parole hearing for any lifer after fifteen years. R. 248 (Parole Board explaining, "[t]he reason for this 1988 policy was Mass. Gen. Laws, ch. 127, s. 133A, which clearly directed the Board to conduct a public hearing at the fifteen-year mark of the life sentence."). But this argument quickly falls apart.

First, a more recent version of § 133A no longer contains the provision that required a hearing at 15

years. The law was changed in 2012.[10] Now, a hearing is required after a "minimum term fixed by the court under G.L. c. 279, § 24 [the indeterminate sentencing statute]." See St. 2012, ch. 192, § 37. The Board's only support for their position, therefore, has been legislated away, replaced by a clear directive to use the court's minimum term – i.e., the parole eligibility date fixed by the sentencing judge. In this way, 120 CMR 200.08(3)(c) is not simply inconsistent with G.L. c. 127, § 133 (the aggregation statute), it is *also* now inconsistent with G.L. c. 127 § 133A.[11]

Second, the Board has lost the right to deference towards its interpretation. Because of its hollow and shifting rationales, the Board should not be given the "substantial deference" normally afforded agencies' interpretations of their own regulations. See Goddard Memorial Hosp. v. Rate Setting Comm'n, 403 Mass. 736, 744 (1989). "Significance in interpretation may be given to a consistent, long continued administrative

[10] Section 133A was again amended in 2014 and 2018 but those amendments are not relevant here. See St.2014, c. 189, § 3 and St.2018, c. 69, § 98.

[11] In its brief, the Board repeatedly replaces the statutory phrase "minimum term fixed by the court" with its preferred "minimum term *of the life sentence*." See Board's Br. at 13-14, 20, 23, 30-31. It never justifies that reading of the statute.

application of an ambiguous statute . . . especially if the interpretation is contemporaneous with the enactment." Connery v. Commissioner of Correction, 414 Mass. 1009, 1010 (1993), citing Cleary v. Cardullo's, Inc., 347 Mass. 337, 343 (1964).

Here, both rationales for deference are missing: (1) there has been no consistent application and (2) there is no sign that the reinterpretation of the regulation – put into place in 1988 - was tethered to any changes to a parole statute. See Id.

First, as to the Board's inconsistent application: aggregation was the policy of the Board beginning in at least 1977. See generally Hamm, 72 F.3d at 950 (recounting the history of the aggregation policy). Especially after Henschel, decided in 1975, and after a 1977 opinion from the Attorney General suggesting that aggregation of consecutive sentences was necessary post-Henschel, R. 105, the doctrine of aggregation became routine.[12] Although the Board "stubbornly insisted" that

[12] R. 108, Parole Board's "New Policies And Practices Regarding Aggregation Of From And After Sentences (Henschel Decision)," dated June 6, 1977 ("Life sentences which do carry parole eligibility (e.g. life for first degree murder which has been commuted to a term of years; life for second degree murder or any other offense ***will be aggregated*** with other sentences for parole eligibility purposes…").

it did not change the policy pursuant to Henschel, the First Circuit found that this is exactly why the Board changed its policy in 1977. Hamm, 72 F.3d at 951, n.3-5.

In 1988, this Court's Henschel rationale was jettisoned and the rule for aggregation of life sentences changed.[13] The Board has given varying reasons for its change of heart over the years. In a March 1991 memorandum, legal counsel for the Board wrote that the non-aggregation policy came about simply because a review of § 133A showed that it "did not provide for aggregation." R. 137.[14] But eight years later, according to a 1999 memorandum by legal counsel, "[t]he significance of th[e 1988 change in] policy [was] that earned good-time deductions accrued during the service

[13] See R. 130, "Parole Eligibility Policies (annotated) (1988)" at §203.6[B][3] "The parole ineligibility period of a state prison sentence consecutive to a life sentence with parole eligibility ***shall not be aggregated*** with the fifteen year parole ineligibility period of that life sentence[.]"

[14] Only two months prior, in January of 1991, the Appeals Court found that aggregation would benefit inmates serving consecutive sentences by allowing them to accrue good time with respect to both sentences. Hamm v. Commissioner of Correction, 29 Mass. App. Ct. 1011, 1014 (1991). The case was litigated on behalf of the Parole Board by the same legal counsel who wrote the March 1991 memo giving §133A as a basis for non-aggregation. R. 137.

of the life sentence [would no longer] reduce the parole eligibility date – or the minimum or the maximum date – of the consecutive sentence." R. 145.[15] The Board has given different rationales at different times in defense of its non-aggregation policy. The shifting grounds for the Board's policy decision undermines the force of any deference owed to its regulation.[16]

Second, the re-interpretation was not contemporaneous with the enactment of the relevant portion of § 133A. If the Board had changed 120 CMR 200.08(3)(c) to reflect a change in the statutory law, then perhaps the Board could be given deference. But the

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[15] This explanation appears to have originated with Judge Volterra in Cantell v. Hubbard, 93-SUCV-4516 (1994) ("[w]hen sentences are aggregated, GL c. 127 §129D earned good time credits are subtracted from the tentative parole date of his 'single' sentence; if the sentences are unaggregated, §129D earned good time credits are applicable only to the sentence currently being served.. See Hamm v. Commissioner of Correction, [29 Mass. App. Ct. 1011, 1014 [1991]."

[16] The Board has been confused by its own policies as recently as 2007. See Commonwealth v. Flores, 98 Mass. App. Ct. 1108, at *4 (2020) ("Although the defendant received in 2004 a letter from the parole board informing him that his sentences would be aggregated, he received a follow-up letter in 2007 from the office of Massachusetts Correctional Legal Services informing him that the information contained in the 2004 letter was incorrect, and that his sentences, in fact, were not aggregated based on the parole board's changed policy (in the 1990s), which abolished aggregated sentences.")(unpublished).

reinterpretation occurred in 1988; Section 133A's "minimum term" language was introduced in 2012. Section 133A had been previously amended in 1982, 1996, 1997, and 2000.[17] See Connery, 414 Mass. at 1010 (endorsing the Appeals Court's non-deference to the Department of Corrections because "the interpretation now urged by the defendants was not contemporaneous with the enactment of the statute and is inconsistent with the contemporaneous (and long-standing) interpretation made by the agencies at the time of enactment").[18] The Board's change in regulation was completely untethered from any change in the relevant statutory law.

Both the inconsistency of the Board's rationale for its rule and the timing of that rule suggest that the Board's regulation is not due any heightened deference.

B. THE LEGISLATURE INTENDED AGGREGATION OF SENTENCES.

As noted above, the legislature has spoken on aggregation. General Laws c. 127 § 133 requires "a single parole eligibility" date. The Legislature had the

[17] See St. 1982, ch. 108, § 2; St. 1996, ch. 43; St. 1997, ch. 217, § 1; St. 2000, ch. 159, § 230; St. 2012, ch. 192, §§ 37-39.

[18] Connery was also a challenge to a parole eligibility policy, but with respect to a policy of the Department of Correction.

benefit of this Court's logic in Henschel to guide that decision. There are any number of reasons the Legislature might have required the aggregation of consecutive sentences, including that it comports with the definition and common understanding of parole, the standard applied in parole hearings, and the purpose of the parole system. The cost of these hearings to the public fisc is well-documented in the plaintiffs' initial brief. Plaintiff's Br. at 48-53. Besides the separation of powers, there are other policy reasons that the legislature would have allowed the Courts (and the Courts alone) to set a single, aggregated parole eligibility date.

First, judges believe that they ***are*** setting a parole eligibility date, and so make carefully considered sentencing decisions to impose sentences tailored to the individual defendant. This Court need look no further than the criminal case underlying this one, Commonwealth v. Dinkins,[19] to find an example of judicial expectation flouted. Here, Mr. Dinkins was to be resentenced for consecutive life sentences as a result of Diatchenko v. District Attorney for the

[19] SUCR-8598-11036; SUCR-8590-86520, 86538-39.

Suffolk County, 466 Mass. 655, 658-59 (2013). The Court, in imposing consecutive sentences, wrote: "The fact that the sentences, when aggregated, could result in a thirty year term before the possibility of release on parole, does not deprive the defendant of the possibility to pursue a meaningful life to such a degree as to become disproportionate in violation of art. 26." Here the sentencing court clearly intended for Mr. Dinkins to be "parole eligible" at 30 years and assessed the constitutionality of its imposed sentence on that assumption. See LaPlante, 482 Mass. at 403. But under the Parole Board's interpretation, Mr. Dinkins would not actually be "parole eligible" (i.e., eligible for *release*) on any date at all. His parole eligibility date is indefinitely deferred – frustrating the intent and expectation of the Court that sentenced him. Only once he is "released" from his first sentence will he be given a true parole eligibility date – i.e., a date at which he might be *released*. But as of the time of sentencing, that eligibility date could be any time from 15 years to never. This opacity in parole eligibility frustrates the purposes of sentencing and the Court's traditional understanding of sentencing structure. It makes it impossible for the sentencing court to know the

minimum term the defendant might actually serve before his release, which is perhaps the most important aspect of any imposed sentence.[20]

Second, this policy bogs down the Parole Board in unnecessary and cumulative non-release "parole" hearings. Where an inmate is serving, for instance, consecutive life sentences with 15-year ineligibility periods, the Board might hold an indefinite number of "non-release" hearings starting at the fifteen-year mark or the Board could simply aggregate to a *single* hearing at the 30-year mark (as they would for any other kind of initial sentence).[21] The latter is clearly more sensible and efficient.

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[20] In reversing the sentencing court's decision, the Single Justice wrote: "The judge's belief that, here, the two fifteen-year periods of parole ineligibility would be aggregated to make an overall thirty-year parole ineligibility period for this defendant is understandable…." The Court observed, "[u]ntil and unless he is released on parole on the first sentence, the defendant will not begin serving the ineligibility period of fifteen years on the second sentence, leaving him at present with no defined parole eligibility date." SJ-2019-0221, "Order of Remand" at p.

[21] See, e.g., In the Matter of David Mendoza. R. 148-50. Under the current regulation, Mr. Mendoza has received hearings at least every five years since 2007. If he is ever "paroled" out of his initial life sentence he will then stop having parole hearings, only to begin having parole release hearings that could actually result in release on parole to the community 15 years later. This "makes little sense." Henschel, 368 Mass. at 136; R. 93 (Affidavit of Patricia Garin) at ¶10.

Importantly, the prisoner is no more or less likely to be released – indeed, the statutory release standard stays the same, whether "the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society," G.L. c. 127, § 130. The discretion of the Parole Board in matters of parole *release* remains unfettered. But without these "non-release" hearings, the Board could focus its resources on hearings for those prisoners it actually has the lawful power to release, id., and on supervising those it has actually released to the community. G.L. c. 27, § 5 (granting the Parole Board the authority to "supervise all prisoners released on parole permits granted by it").

There is a cruel irony here as well. The Board's own reading of § 133A has, over time, caused the Board itself to violate § 133A. The Board says that non-release hearings are required under § 133A, but by holding these unnecessary hearings year after year it has only fallen further behind on its lifer hearings. Currently, lifer hearings are routinely delayed and parole decisions can take many months, sometimes more than a year. As such, the Board can no longer keep up with the *other* provision of the § 133A, requiring the parole board "*within 60*

days before the expiration of such minimum term [to] conduct a public hearing …," to say nothing of the 10 to 12 months it routinely takes the Board to issue a decision after a lifer hearing. See R. 148-180.[22] Holding these hearings undermines the Board's central mission: conducting hearings and making decisions that actually result in the release of prisoners. An interpretation of the law allowing the Board to forgo these non-release hearings would ease this load considerably. The Board has enough to do. It should not waste its time conducting non-release hearings and "supervising" parolees who are still in prison.[23]

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[22] It is at the point now where a lifer receiving a positive decision may not learn of the decision until a full year after the hearing. This is quite significant when the "step-down" process for second-degree lifers who receive a positive vote is often one year in lower security (meaning that the parolee effective serves two more years). See Clay, 475 Mass. at 139 n. 8 (this practice has become "commonplace"). And where a prisoner receives a denial after a year, the Board has effectively run out the clock on an appeal or reconsideration, because by the time the prisoner receives a decision, the prisoner already needs to begin preparation for the next hearing.

[23] Assuming that the Parole Board actually supervises these "inmate-parolees" still in the custody of the Department of Corrections, are these "inmate-parolees" afforded all the same due process protections as "parolee-parolees" who have actually been released? See Morrissey, 408 U.S. at 477. There do not appear to be any regulations governing such "inmate-parolees".

Third, all other involved parties are hurt by the Board's refusal to interpret the law consistent with G.L. c. 127, § 133's aggregation provision. In the 4 years between 2015 and 2018, the Board released approximately 26 decisions where it considered whether to grant "parole" into non-aggregated consecutive sentences. R. 148-242. If these years are a fair representation, the Board has conducted approximately 6.5 non-release hearings per year over the last 32 years or roughly 200 unnecessary hearings since 1988.

The current system is inefficient, at best. By the Board's own admission, it "applies these same standards and procedures at all parole hearings, regardless of whether the prisoner has a from-and-after sentence." Board's Br. at 52-53. In other words, the Board is deciding whether someone can be safely released to the community when there is no chance that a grant of "parole" could actually result in release to the community. Aside from the work of the Board members themselves,[24] at every non-release hearing:

[24] Pursuant to 120 CMR 300 *et seq.*, the Board Members must be prepared for hearings and must all be present at a lifer hearing, §301.06(1)(b). The Board must notify the Attorney General, the District Attorney, the Chief of Police of the municipality in which the crime was committed, and the Executive Office of Public Safety and

- case managers for the Parole Board must spend time collecting records from the Courts, the Department of Corrections, and from counsel for the parolees;

- the parolees must undergo a risk assessment tool (the "LS/CMI"), fill out a questionnaire and be interviewed by parole staff;

- the DOC must transport the inmate to the Parole Board in Natick;

- in many cases counsel is provided for the parolee;[25]

- District Attorneys' offices must review the records, contact the victims and perhaps provide letters from the victims, send an ADA to the hearing, and provide an official letter of support or objection to parole; and

- a victim-witness advocate must come to the hearing along with the family of the victim.

Security, and the victim(s) of the hearing, §301.06(3); and meet after the hearing in executive session to discuss the outcome and issue a decision with reasons for grant or denial of parole, §301.06(6). After denial, an inmate may appeal or request reconsideration, for which the Board then must issue another decision. 120 CMR §304.00. All of this is true even where actual release is not on the table, due to the non-aggregation regulation at issue here.

[25] See Diatchenko v. District Attorney for the Suffolk District, 471 Mass. at 42 (this Court recognizing that "'lifer hearings' … require considerable preparation"); CPCS Assigned Counsel Manual at §4.106 ("The role of Counsel in parole cases is to be an advocate for parole release as directed by the client"), §4.119 ("Counsel must spend considerable time with the client formulating a re-entry/parole plan").

This is to say nothing of victims of crimes, who are unnecessarily subjected to repeated and meaningless non-release hearings every five years, *at a minimum.*

This waste of precious resources could be avoided by affirming that the legislature's provision, G.L. c. 127, § 133, controls parole eligibility, and 120 CMR 200.08(3)(c) is unlawful.

CONCLUSION

This is not a complicated case: parole is a chance for release, not continued incarceration. The Board's regulation is an arrogation of judicial power predicated on a dubious redefinition of "parole"; it squarely contravenes G.L. c. 127, § 133's aggregation requirement, and it is contributing to the slowdown of the Massachusetts parole system, just at a time when efficiency is needed most. Amici respectfully request this Court restore the power to sentence to the judiciary, and restore efficiency, simplicity and accountability to the parole process by striking down 120 CMR 200.08(3)(c).

Respectfully submitted by the
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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

I, Jeffrey G. Harris, hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure governing the filing of briefs, including, but not limited to: Mass. R. App. P. 16, 18, and 20.

/s/*Jeffrey G. Harris*
Jeffrey G. Harris

CERTIFICATION OF SERVICE

Two true and accurate copies of the foregoing brief were served earlier today by E-File and email upon the parties of records. Signed under the pains and penalties of perjury this 20th day of August 2020.

/s/*Jeffrey G. Harris*
Jeffrey G. Harris