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VIA TRUEFILING

October 6, 2023

Honorable Chief Justice Patricia Guerrero, and
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco CA 94102

Re: *In re Cedric Green*, S279269
Amicus Letter in Support of Petition for Writ of Habeas Corpus

Dear Chief Justice Patricia Guerrero and Associate Justices of the Court:

The American Civil Liberties Union of Northern California submits this letter as *amicus curiae* in support of an Order to Show Cause in the above-captioned matter. This case presents a question of exceptional importance that this Court should resolve on the merits: whether California's standard for release on parole is unconstitutionally vague.

The legal framework governing suitability for parole in California is an inconsistent patchwork of statutes, regulations, and judicial opinions. The resulting standard is amorphous, giving broad discretion to parole commissioners—political appointees within the executive branch. Empirical data shows that parole commissioners use this discretion in predictably troubling ways: to deny many more parole applicants than deserve release, and to deny people of color in disproportionate numbers. These are paradigmatic outcomes of vague laws left to executive branch interpretation, and the central harms that the constitutional vagueness doctrine seeks to redress. It is the duty of this Court, consistent with the separation of powers, to safeguard individual liberties against such arbitrary enforcement.

I. *California's Parole Standard Is an Amalgam of Conflicting Authorities*

The standard for release on parole in California is delineated separately in each of statutory, regulatory, and decisional law. These authorities cannot be reconciled. The Penal Code provides:

The panel or the board, sitting en banc, shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.

(Pen. Code, § 3041, subd. (b)(1).) This language makes clear that suitability for parole turns entirely on convicted conduct. In 2015, the Legislature amended section 3041(a) to remove language directing the Board of Parole Hearings (“Board” or “BPH”) to establish parole suitability criteria by regulation, seemingly making section 3041(b)(1) the sole criteria for parole suitability. (*See* SB 230 (Hancock, 2015).)

Nevertheless, regulations promulgated by the BPH remain in effect. These define the suitability inquiry as whether “the prisoner will pose an unreasonable risk of danger to society if released,” (Cal. Code Regs., tit. 15, § 2281, subd. (a)), and identify the following as relevant:

[T]he circumstances of the prisoner's: social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release.

(Cal. Code Regs., tit. 15, § 2281, subd. (b).) The regulations also specify particular factors tending to show unsuitability¹ and suitability.² (Cal. Code Regs., tit. 15, § 2281, subds. (c)-(d).) Significantly, in direct conflict with section 3041, the BPH regulations require consideration of many circumstances outside of convicted conduct, including the candidate’s social history, mental health, institutional record, and more.

The courts have added another layer of uncertainty. (*See In re Shaputis* (2011) 53 Cal.4th 192, 220 (“*Shaputis II*”) [“Uncertainty is reflected in numerous Court of Appeal decisions reviewing parole suitability determinations.”].) In *In re Sturm*, the California Supreme Court, citing neither the Penal Code nor the BPH regulations, held that parole suitability is “an attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.” ((1974) 11 Cal.3d 258, 266; *accord In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.) What constitute “antisocial acts” has divided the lower courts. Some require evidence of a “risk of future violence,” (*In re Hunter* (2012) 205 Cal.App.4th

¹ There are six unsuitability factors: (1) “heinous, atrocious or cruel” commitment offense, (2) “Previous Record of Violence,” (3) “Unstable Social History,” (4) “Sadistic Sexual Offenses,” (5) “Psychological Factors,” and (6) “Institutional Behavior.” (Cal. Code Regs., tit. 15, § 2281, subd. (c).)

² There are nine suitability factors: (1) “No Juvenile Record,” (2) “Stable Social History,” (3) “Signs of Remorse,” (4) “Motivation for Crime,” (5) “Battered Woman Syndrome,” (6) “Lack of Criminal History,” (7) “Age,” (8) “Understanding and Plans for Future,” and (9) “Institutional Behavior.” ((Cal. Code Regs., tit. 15, § 2281, subd. (d).)

1529, 1544; *see also In re Moses* (2010) 182 Cal.App.4th 1279, 1300 [“current dangerousness”]), while others authorize denial of release on the basis of predicted “financial harm to others if released,” “failure to comply with the conditions of parole,” and even whether the applicant is perceived to “lack[] the discipline necessary to keep a job,” (*In re Reed* (2009) 171 Cal.App.4th 1071, 1082; *see, e.g., In re Montgomery* (2012) 208 Cal.App.4th 149, 164 [upholding parole denial because applicant was found likely to use tobacco].) The courts have never squared the Penal Code’s limited focus on convicted conduct with the regulations’ inclusion of extrinsic factors.

Finally, California’s courts have declined to set guidelines for the “subjective analysis” to be conducted by the Board. How to determine the probability of “antisocial acts,” and what probability is sufficient to deny release, are left entirely to the Board. (*See Shaputis II, supra*, 53 Cal.4th at p. 219 [“while ‘subjective analysis’ is an inherent aspect of the parole suitability determination, it plays a proper role only in the *parole authority’s* determination.”].) Rather, the judiciary has limited itself to identifying “a modicum of evidence” in support of BPH decisions. (*Id.*; *accord In re Lawrence* (2008) 44 Cal.4th 1181, 1212 [“the relevant inquiry is whether some evidence supports the decision of the Board”] (emphasis removed).)

As a result, the pertinent legal authorities suggest numerous, foundational questions regarding the parole standard, namely:

- whether suitability is determined only on the basis of convicted conduct;
- whether the Board’s regulations are operative in whole or part;
- whether the BPH has *any* authority to promulgate regulations regarding the standard for suitability;
- whether “antisocial acts” are limited to prospective violence or include financial harm and failure to comply with parole conditions, even if non-criminal;
- how the likelihood of future “antisocial acts” should be determined; and
- what probability of future “antisocial acts” warrants a finding of unsuitability.

II. *The BPH Wields Its Considerable Discretion Arbitrarily.*

As California Legislative Analyst has recognized, the absence of a clear legal standard for parole suitability invests the Board with enormous discretion. (Cal. Leg. Analyst Report (Jan. 5, 2023) “Promoting Equity in the Parole Hearing Process,” at p.8, *available at* lao.ca.gov/Publications/Report/4658 [“there is overly broad discretion exercised by BPH commissioners”].) Indeed, this Court has characterized the Board’s discretion as “almost unlimited.” (*Rosenkrantz, supra*, 29 Cal.4th at p. 655.)

This degree of discretion over prison release decisions is particularly problematic when located within the executive branch. As the United States Supreme Court held in *Ford v. Wainwright*, “placement of [a criminal penalty] decision *wholly* within the executive branch” is a “striking defect,” as the executive branch is publicly accountable for the law enforcement function. ((1986) 477 U.S. 399, 405 (emphasis added).) Prison release decisions are politically

inflammatory, particularly in the “tough on crime” era,³ with the result that parole commissioners appointed by the governor have a strong incentive to grant release sparingly. Statistics bear this out. According to a report by the Committee on Revision of the Penal Code, only 16% of applicants were granted parole in 2020, although 82% were determined a “low risk” to reoffend by the California Department of Corrections and Rehabilitations’ own examining psychologists. (Cal. Comm. Rev. Pen. Code (2020) Annual Report, at p. 59, *available at* http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf.) Further, as the Committee also noted, criminological research demonstrates that “a personal’s period of criminal involvement generally lasts less than 10 years.” (*Id.* at p. 61 [citing Alex R. Piquero, *et al.* (2013) Bulletin 2: Criminal Career Patterns (Study Group on the Transitions between Juvenile Delinquency and Adult Crime)].) And studies show that criminal activity charts an inverted U-shaped curve with age—the “age-crime curve”—such that by the age of 40, only 5-6% of offenders persist with criminal behavior. (See Terrie E. Moffitt (1993) “Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy,” 100 Psych. R. 674, 676; *see also* John H. Laub and Robert J. Sampson (2001) “Understanding Desistance from Crime,” 28 Crime & Justice 1, 17.) These statistics make clear that the Board’s enormous discretion deprives a great many deserving candidates—under the Board’s own standards in light of their clear rehabilitation—of their freedom arbitrarily.

Equally concerning, parole outcomes vary by candidate race. A random sample of 700 California lifers found that, between 2007 and 2010, white applicants were granted parole 17% of the time, while Latino candidates were released in 14% of cases and Black candidates only 9%. (Kathryne M. Young and Jessica Pearlman (2022) “Racial Disparities in Lifer Parole Outcomes: The Hidden Role of Professional Evaluations,” 47 L. & Soc. Inquiry 783, 801.) Controlling for several variables, this study nonetheless found that white candidates were nearly twice as likely to be found suitable for parole than Black candidates. (*Id.* at 805-06.) The researchers posited a likely cause of implicit bias, specifically, “that Black men are more readily seen as culpable and judged less deserving of empathy than white men,” with the corollary that “Black men may be seen as less ‘truly’ rehabilitated than identically situated white men.” (*Id.* at 808.) Such findings were foreseeable. As the Legislative Analyst cautioned, “[t]he wide discretion afforded to key actors in the parole hearing process creates the potential for cognitive biases to affect their decisions,” such as the implicit bias that “associate[s] Latino and Black men with danger and white men with safety.” (Cal. Leg. Analyst Report, *supra*, at p. 9.)

In short, statistical evidence confirms the consequences of the BPH’s extensive discretion. Many deserving candidates are being denied parole, and parole is disproportionately denied to Black and brown applicants.

³ The most striking example, which haunts executive branch officials to this day, is the so-called “Willie Horton” affair, wherein Massachusetts Governor Michael Dukakis’s presidential campaign was derailed by racist ads highlighting crimes committed by William Horton, a prison furlough recipient in Massachusetts. (See Beth Schwartzapfel and Bill Keller (May 13, 2015) “Willie Horton Revisited,” The Marshall Project, *available at* <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited> [“Politicians] learned a bad lesson: not to go out on a limb.”].)

III. *Vagueness Doctrine Is Designed to Prevent the Harms Present Here*

The core purposes of the vagueness doctrine are to provide fair notice, and to “guard against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.” (*Sessions v. Dimaya* (2018) 138 S.Ct. 1204, 1212.) The U.S. Supreme Court has called the latter purpose “the more important aspect of vagueness doctrine,” condemning standards that “vest[] virtually complete discretion in the hands of [law enforcement].” (*Kolender v. Lawson* (1983) 461 U.S. 352, 358.) As Justice Black observed long ago in *Gregory v. City of Chicago*:

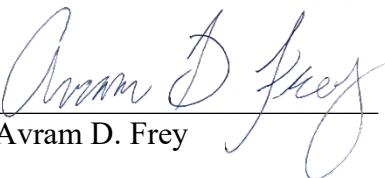
[U]nder our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat. Laws, that is valid laws, are to be made by representatives chosen to make laws for the future

((1969) 394 U.S. 111, 120 (Black, J., concurring.)

In this sense, the vagueness doctrine serves two bedrock principles of our constitutional system. First, it ensures basic fairness, or equal protection of the laws—the notion that the same law, knowable to everyone, will be applied equally in all cases. (*See, e.g., Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 171 [striking down a vague ordinance because of its potential for discriminatory enforcement, holding, “the rule of law implies equality and justice in its application”].) Second, the vagueness doctrine achieves the end of equal application through the separation of powers, by “requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.” (*Dimaya, supra*, 138 S.C. at p. 1212.) Vague laws offend this principle by “impermissibly delegat[ing] basic policy matters to [executive officials] on an *ad hoc* and subjective basis.” (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-09.) In such cases, consistent with the separation of powers, it is the role of the courts to intervene and preserve individual liberty. (*See Marbury v. Madison* (1803) , 177 [“It is emphatically the province and duty of the judicial department to say what the law is.”].)

For these reasons, we urge the Court to issue an Order to Show Cause in the present matter. The standard for parole suitability is confused and uncertain, leaving release decisions to the unfettered discretion of executive branch officials, with predictably arbitrary and discriminatory results. Our constitutional system assigns the judiciary with the obligation to forbid such delegation of the legislative function. To protect the rights of parole candidates and assure administration of parole without bias, this Court should review this petition on the merits and ultimately hold the statutory parole standard void for vagueness.

Respectfully Submitted,


Avram D. Frey

Supreme Court of California Case No. S279269

PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On October 6, 2023, I served the attached,

**Amicus Letter in Support of Petition for Writ of Habeas Corpus in
*In re Cedric Green, Case No. S279269***

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 6, 2023 in Fresno, CA.


Sara Cooksey