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No. SC97692

IN THE SUPREME COURT OF MISSOURI

JESSICA HICKLIN,

Appellant,

v.

ERIC SCHMITT, et al.,

Respondents.

On Appeal from the Circuit Court of Cole County, Missouri

AMICUS CURIAE BRIEF OF THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF NEITHER PARTY

Filed with consent of all parties

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated persons—including individuals who, as children, received mandatory life without parole sentences.

RSMJC currently represents a plaintiff class in a civil lawsuit regarding the unconstitutional parole review process for individuals who, like the appellant Ms. Hicklin, were sentenced to life without parole under a mandatory sentencing scheme and who were under 18 years of age at the time of the offense (the "*Brown* Class"). *See Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2018 WL 4956519 (W.D. Mo. Oct. 12, 2018). The instant appeal centers around whether Senate Bill 590—the 2016 bill that created the parole review mechanism for the *Brown* Class—is unconstitutional. In considering whether the *Brown* Class members' unconstitutional sentences can be adequately remedied by the parole scheme established by Senate Bill 590, it is important to consider what that process looks like in practice. RSMJC files this brief, in support of neither party, to apprise the Court of how parole hearings for juvenile offenders like Ms. Hicklin have been run since the passage of the Bill, and how those hearings have denied *Brown* Class members a meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation.

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STATEMENT OF JURISDICTION

RSMJC adopts the jurisdictional statements set forth in the parties' briefs.

STATEMENT OF FACTS

RSMJC adopts the statements of facts as set forth in the parties' briefs.

ARGUMENT

Parole hearings, including juvenile parole hearings, have historically been conducted behind closed doors. The Parole Board has impeded prisoners' ability to present mitigating evidence of their youth at the time of the offense in a number of ways, including limiting them to having only a single delegate present and denying them access to their own parole file. In the end, the Parole Board has denied release to the vast majority of juvenile lifers for whom Senate Bill 590 presents the only opportunity to obtain relief from their unconstitutional life without parole sentences. And in each of those cases, it has made its decision in part, if not entirely, based on the circumstances of the underlying offense as opposed to demonstrated maturity and rehabilitation. Laws do not exist in a vacuum. This on-the-ground context is important to this Court's consideration of the constitutionality of Senate Bill 590.

I. The Parole Board is Largely Composed of Former State Representatives

The Parole Board and Division of Probation and Parole are tasked with making parole release decisions for thousands of individuals who are incarcerated. They also supervise the approximately 15,000 individuals who are on parole supervision in the community, and make determinations about when to revoke a person's parole and re-

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incarcerate them. On average, the Parole Board conducts between 11,800 to 15,000 parole hearings each year.

The Board making these critical decisions is a seven-member panel (currently with two vacancies). *See* RSMo. § 217.665.1. The individuals who sit on the Board are gubernatorial appointees with no special training or qualifications other than the requirement that they "be persons of recognized integrity and honor, known to possess education and ability in decision making through career experience and other qualifications for the successful performance of their official duties." RSMo. § 217.665.2.[1] No more than four members of the seven-member panel can belong to any one political party. *Id.*

The majority are all former state representatives or law enforcement, to wit:

(1) Don Phillips is the Chairman and **former Republican state representative**. Before serving as a state representative, Mr. Phillips was a state trooper for 28 years.

(2) Jennifer Zamkus is the Vice Chair and the only woman on the Board. She is a military veteran, the former human resources director for MDOC. She formerly worked as a probation and parole officer, and then managed the Office of Civil Rights at the Missouri Department of Social Services.

(3) Paul Fitzwater is a **former Republican state representative**.

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[1] *See also* https://doc.mo.gov/divisions/probation-parole, last accessed Jan. 7, 2020.

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(4) **Brian Munzlinger** is a **former Republican state representative** with a degree in agriculture.

(5) **Martin Rucker**, Member. Martin Rucker is a **former Democratic state representative**. Mr. Rucker does not have a college degree, and his sole professional experience is with Silvey Containers Corporation.

Indeed, critics have referred to the Parole Board as "a plum place for former lawmakers to land since term limits went into place," with compensation well over $80,000 a year, not counting retirement benefits. *See* Jesse Bogan, *Missouri Parole Board Lumbers on in Secrecy with Unfilled Seats*, ST. LOUIS POST-DISPATCH (Sept. 20, 2015), App. at 001-012 ("*Parole Board Lumbers on in Secrecy*"); Jesse Bogan, *Missouri parole board member resigns amid word game revelations*, ST. LOUIS POST-DISPATCH (Jun. 12, 2017), App. at 013-017 ("*Word game revelations*").

II. Parole Review Generally in Missouri is Highly Secretive and Severely Limits the Inmate's Access to Information

Parole hearings are conducted behind closed doors not by the Parole Board, but by a hearing panel consisting of a single Board member, one parole analyst, and one other parole staff member. Inmates are permitted to have only one delegate present. Thus, they are faced with the choice of having a family member or their attorney present at the hearing. The hearing panel limits an inmate's delegate to speaking only to the inmate's home plan, although State regulations permit the delegate to speak more broadly. *See* 14 CSR § 80-2.010(5)(A)(1) ("Offenders may have a person of their choice at the hearing. The offender's delegate may offer a statement on behalf of the offender, ask questions, and

provide any additional information that may be requested by the hearing panel."). In cases, then, where someone chooses to have their attorney present as their sole delegate, that attorney is reminded by the hearing panel that the hearing is not a lawyering moment.

Victims, victim representatives, law enforcement, and prosecuting attorneys are permitted to attend parole hearings. They are permitted to speak first, and given the choice to speak outside the inmate's presence if they so wish. They are not limited in number of how many can attend, or in substance of what they may say. And in at least one instance involving a *Brown* Class member, a surviving victim made legal arguments in response to court documents the prisoner had filed with the United States Supreme Court. When they choose to speak outside the inmate's presence, the inmate is not provided notice of what was said.

Not every Board member votes on each case. Some cases are determined by the hearing panel, while others are decided by a majority of the Board. Hearing panel members and Board members who do cast votes indicate their vote on a Board Action Sheet. *See* App. at 018-019. Missouri's former Board Operations Manager, Janet Barton, said some Board members never review parole files before voting, instead basing their decisions on how others voted. *See* Beth Schwartzapfel, *Life Without Parole*, THE MARSHALL PROJECT (July 10, 2015) (quoting former operations manager of Missouri's Parole Board referring to Board as "paranoid closed . . . [c]losed to the extreme."), App. at 020-034 ("*Life Without Parole*"). Indeed, nothing in State regulations or the Parole Board's policies and procedures require the Board to review the inmate's parole file prior to voting. Most do not do so.

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Once a decision is reached, it is conveyed to the inmate using a standard two-page form that is used to notify inmates of all manner of events related to parole considerations. The basis for the decision provided in the notice consists of boilerplate language taken from the Board Action Sheet. An example of a decision notice can be found in the appendix, at 035-036. The notice form almost always justifies denial of parole for the stated reason that "Release at this time would depreciate the seriousness of the present offense based on…[c]ircumstances surrounding the present offense." The Parole Board does not provide inmates a copy of their Board Action Sheet.

If an inmate is granted parole, the Board will set an out date as far as five years in the future. Setting out dates so far down the line creates a greater risk that the inmate will receive a conduct violation, even through no fault of their own, which could jeopardize their parole release. They do not provide an explanation for the specific outdate, including why the prisoner could not, for example, be released significantly sooner. And an outdate is not a guarantee of release—outdates may be moved or taken away. If the Board denies parole, it will schedule a reconsideration hearing up to five years in the future. Again, it does not provide an explanation for the specific setback, or guidance as to what the inmate can do to improve their chances of success at their reconsideration hearing. Where decisions are reached by a majority of the Board, they are not subject to appeal.

III. The "Closed to the Extreme" Environment is a Breeding Ground for Misconduct

Historically, parole review in Missouri has been highly discretionary and highly secretive. Inmates are denied access to their own parole files, which contain the material

the Parole Board considers in making its decisions, and are not permitted to have a copy of their hearing recording (which is generally only retained for one year). Outside of a boilerplate decision notice, inmates are given no insight into how and why Board members voted the way they did. Significantly, this means that the inmate does not receive any guidance on how to improve themselves and their chances for parole in the future. Victim representatives are permitted to speak at a parole hearing outside the inmate's presence, without any notice to the inmate. As a result, there are instances where an inmate has no idea that a victim representative came to oppose their request for parole, or what they said in the process. At one point, delegates were even prohibited from taking notes during parole hearings.

It is no surprise, then, that the Parole Board has been publicly criticized as being overly secretive and "closed to the extreme." *Life Without Parole*, App. at 020-034; *see also Parole Board Lumbers on in Secrecy*, App. at 001-012. One example noted in Beth Schwartzapfel's 2015 article involved a Missouri prisoner, Roosevelt Price, who, at a 2013 parole hearing, was told by a panel member: "I think you've been involved in other murders that you haven't been caught for." When Mr. Price responded that he did not know where she was getting that information from, the panel member responded: "There's things in your file I know about that I think you don't know." Of course, without access to his parole file, Mr. Price had no way to know whether this was true, and no true opportunity to confront and correct the record. *See Life Without Parole*, App. at 020-034.

This lack of transparency creates an ideal environment for misconduct and unethical behavior to flourish. In 2016, then-Board member Don Ruzicka and a parole analyst were

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investigated by the Missouri Department of Corrections' Inspector General for playing word games during parole hearings. The two spent their time during numerous proceedings trying to have inmates say a chosen "word of the day," and competing to see who could make inmate say the most chosen words during a day's docket. For example, on June 21, 2016, the words of the day were "hootenanny" and "Peggy Sue." The following day, they were "platypus," "armadillo" and "egg." And the day after that, the words were "biomass" and "manatee."

Mr. Ruzicka's conduct was acknowledged in findings from Inspector General Amy Roderick.[2] According to Ms. Roderick, who listened to a number of hearing tapes as part of an internal investigation into such matters, Mr. Ruzicka and his partner "were trying so hard to embed words or song titles into their questions or statements that they were so focused on the proper questions to ask . . . nor were they actively listening to the responses." For instance, on the day "hootenanny" was the chosen term, Mr. Ruzicka could be heard laughing out loud as it was referenced while his assigned Parole Analyst whispered, "I got four." Ms. Roderick concluded that Mr. Ruzicka had failed to conduct the business of the State of Missouri in a manner that inspires confidence and trust, and failed to conduct work with respect, concern, and courtesy towards inmates, coworker, and the general public. While Ms. Roderick's investigation was ongoing, Mr. Ruzicka did not conduct hearings, but he resumed his full duties shortly after the report was finalized. He was not otherwise

[2] A copy of the Inspector General's report is included in the appendix at 037-054.

disciplined. Indeed, the Board did not make Ms. Roderick's report public until undersigned counsel submitted a Sunshine request in March 2017. Mr. Ruzicka resigned shortly thereafter.[3]

This misconduct is not isolated. Testimony in the *Brown* litigation revealed that other Board members have behaved unprofessionally in the past. For example, after concluding a hearing on behalf of an inmate who practices the Islamic faith, Board member Gary Dusenberg remarked, "I hope that guy doesn't become a terrorist." At his deposition, he defended this comment as a harmless joke: "it was only in -- in joking. Of course, nowadays you can't say anything. It's all too serious." And current Board Operations Manager Steven Mueller testified that, at one point in time, certain hearing panel members would rate delegates during hearings using paperclips.

IV. SB 590 Established a Parole Review Process for Certain Juvenile Lifers Riddled with Flaws, as Proven by the Track Record Thus Far

Despite this public criticism of the Board, when dozens of *Miller*[4]-impacted individuals' JLWOP sentences were invalidated by *Montgomery v. Louisiana*, 577 U.S. ---, 136 S. Ct. 718 (2016), the Missouri Supreme Court and Missouri General Assembly assigned the responsibility of remedying their unconstitutional JLWOP sentences to the Missouri Parole Board.

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[3] *See Word game revelations*, 013-017.

[4] *Miller v. Alabama*, 567 U.S. 460 (2012).

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Senate Bill 590 ("SB 590"), passed in May 2016, created a parole review mechanism for the over 90 individuals who were serving unconstitutional, non-parolable life sentences. Rather than being resentenced in a court of law, with the procedural protections, transparency, and accountability that accompanies that process, these individuals would now have their fate decided by a paroling authority who apparently took inspiration for their motivational interviewing techniques from the raucous comedy *Super Troopers*.[5]

Passed in response to *Miller* and *Montgomery*, SB 590 was touted by some as Missouri's "*Miller* fix" legislation. SB 590 provided, in relevant part, that any person sentenced to JLWOP[6] prior to August 28, 2016, "may submit to the parole board a petition for a review of his or her sentence, regardless of whether the case is final for purposes of appeal, after serving twenty-five years of incarceration on the sentence of life without parole." RSMo. § 558.047.1(1). It does not explain what a review of one's sentence means or how, if at all, it differs from standard parole review in Missouri.

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[5] In the opening scene of the movie, law enforcement taunt a civilian during a traffic stop by playing a game where they try to work the word "meow" into the conversation as often as possible. *See* https://www.youtube.com/watch?v=NZkKsGtrW88, last accessed Jan. 21, 2020.

[6] As used herein, the term "JLWOP" refers to a mandatory LWOP sentence imposed on an individual who was under 18 years of age at the time of the underlying offense.

SB 590 also set forth certain factors that the Parole Board is required to consider at a "parole review hearing" under RSMo. § 558.047:

> (1) Efforts made toward rehabilitation since the offense or offenses occurred, including participation in educational, vocational, or other programs during incarceration, when available;
>
> (2) The subsequent growth and increased maturity of the person since the offense or offenses occurred;
>
> (3) Evidence that the person has accepted accountability for the offense or offenses, except in cases where the person has maintained his or her innocence;
>
> (4) The person's institutional record during incarceration; and
>
> (5) Whether the person remains the same risk to society as he or she did at the time of the initial sentencing[;]

as well as:

> (1) The nature and circumstances of the offense committed by the defendant;
>
> (2) The degree of the defendant's culpability in light of his or her age and role in the offense;
>
> (3) The defendant's age, maturity, intellectual capacity, and mental and emotional health and development at the time of the offense;
>
> (4) The defendant's background, including his or her family, home, and community environment;
>
> (5) The likelihood for rehabilitation of the defendant;
>
> (6) The extent of the defendant's participation in the offense;
>
> (7) The effect of familial pressure or peer pressure on the defendant's actions;
>
> (8) The nature and extent of the defendant's prior criminal history, including whether the offense was committed by a

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> person with a prior record of conviction for murder in the first degree, or one or more serious assaultive criminal convictions;
>
> (9) The effect of characteristics attributable to the defendant's youth on the defendant's judgment; and
>
> (10) A statement by the victim or the victim's family member as provided by section 557.041 until December 31, 2016, and beginning January 1, 2017, section 595.229.

RSMo. §§ 558.047.5, 565.033.2. The Bill does not indicate what weight should be given to these elements.

The Parole Board started conducting hearings pursuant to RSMo. §§ 558.047.5 and 565.033.2 (referred to herein as "SB 590 hearings") in November 2016. Those hearings (now on hold) were practically identical to standard parole hearings for adult offenders. *See* Section II, *infra*. Hearings were conducted by a hearing panel consisting of only one Board member—not the full Parole Board. *Brown* class members were still limited to having only one delegate present. They were denied access to their parole files or recordings of their hearings. The majority of parole hearings were spent discussing details regarding the facts of the underlying offense, rather than the *Miller* factors or elements delineated in SB 590. Decisions turned on the circumstances of the underlying offense as opposed to the inmate's rehabilitation and maturity over time. As the Western District Court explained in its summary judgment order:

> All parole decisions must be attributed to one of two concededly "barebones, boilerplate" reasons: the seriousness of the offense or inability to live and remain at liberty without again violating the law. These reasons are not specific to Mille[r]-impacted individuals. Indeed, they are the same two reasons for denial that may be provided to any inmate who has a parole hearing. The "circumstances of the offense"

> explanation is directly at odds with the requirement that maturity and rehabilitation be considered.

Brown v. Precythe, No. 2:17-CV-04082-NKL, 2018 WL 4956519, at *9 (W.D. Mo. Oct. 12, 2018) (internal citations omitted). And the Parole Board continued to use non-*Miller*-compliant forms for making parole decisions and conveying those decisions to *Brown* class members. *Id*. ("the very form on which Board decisions are communicated demonstrates that the Board's focus in the parole hearings for those serving JLWOP sentences is not on the *Miller* factors, but on the circumstances of the offense…the denial notices are inadequate"). Although the Bill is silent as to whether *Miller*-impacted individuals will receive reconsideration hearings should their first parole review be denied, the Parole Board has taken the proper position that they are entitled to such continuing review.

The one change implemented by parole staff for the SB 590 process is a superficial one: the use of a supplement to the Board Action Sheet created by the parole analysts' group. *See* App. at 055. This supplement was intended to document evidence in support of each of the elements in SB 590, although it does not identify all the elements SB 590 requires the Board to consider—in fact, it omits the ten elements listed in RSMo. § 565.033.2. Neither the supplement nor the Bill itself indicate what weight should be assigned to any of the elements the Board is required to consider. Some *Brown* Class members had supplements in their parole files which contained few-to-no comments at all; others contained comments which were cursory and redundant. Still, as with standard adult parole hearings, there was no requirement that anyone read the inmate's parole file prior to

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casting a vote on whether and when they should be released from prison. There is no right to appeal from SB 590 hearing decision.

V. Parole Consideration Pursuant to the Process Established by SB 590 Denies *Brown* Class Members a Meaningful and Realistic Opportunity for Release

The outcome of this process has been that the vast majority of *Brown* class members have been denied parole, and the majority of those who have been denied parole have received five-year setbacks—the maximum permitted under Board policy. As of the date of this filing, and according to the Parole Board's own data, 43 *Brown* class members have had SB 590 hearings. **Over 79% of them have been denied parole.** Only one person has actually been released on parole.

It is important to note that this statistic is actually rosier than the true reality because it does not reflect those whom the Parole Board has told are not eligible for parole review due to their consecutive sentences. The Parole Board and parole staff do not interpret the language in SB 590 giving an inmate the right to ask for a review "after serving twenty-five years of incarceration on the sentence of life without parole" to mean that *Brown* class members are eligible for parole after being incarcerated for 25 years. Instead, parole staff are holding individuals to mandatory minimums on each of their consecutive sentences. Take, for example, Donald Steward. Mr. Steward was only 16 at the time of his underlying offense and has been incarcerated since the mid-1980s. He received two consecutive

JLWOP sentences.[7] The Parole Board has told Mr. Steward that he must serve 25 years on each of his JLWOP sentences and is not eligible for parole release until November 2034—the same month he celebrates his 67th birthday. A copy of Mr. Steward's parole hearing notice reflecting this calculation is included in the Appendix at 056. By *Amicus*'s estimate, this issue of consecutive sentences impacts at least one third of the *Brown* class, but was not specifically addressed by SB 590.

Moreover, those who participated in the process had their due process rights violated along the way. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands" and requires looking to "the nature of the interest at stake." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (citing *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972)). Parole reviews for juvenile offenders in particular "demand more procedural protections." *Hayden v. Keller*, 134 F. Supp. 1000, 1010-11 (E.D. N.C. 2015) (citing *Graham*, 560 U.S. at 79); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015). In the context of SB 590 hearings, due process requires, at a minimum, that *Brown* class members be provided an "'opportunity to be heard' … at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The hearings themselves must be meaningful—that is, they must

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[7] Mr. Steward is one of the 40 children who received JLWOP sentences out of the City of St. Louis—39 of whom (or 97.5%), including Mr. Steward, are Black. Most of these, again including Mr. Steward, were convicted and sentenced during the "Super Predator" era.

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"involve real evaluations of the [record and] they consider all of the relevant evidence." *Proctor v. LeClaire*, 846 F.3d 597, 614 (2d Cir. 2017) (involving due process protections for continuous solitary confinement). Class members also must be given the ability to adequately prepare for the parole hearing and receive "a statement of the reasons why parole was denied." *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011) (finding sufficient due process procedural protections where petitioners "were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, and were notified as to the reasons why parole was denied"); *see also Parker v. Corrothers*, 750 F.2d 653, 662 (8th Cir. 1984) (explaining that "if the decisionmaker paroles some inmates convicted of murder, but denied parole to other inmates on the ground that they were convicted of murder, it must explain why").

That explanation must consist of more than "boilerplate generalities" why the underlying offense requires deferral of parole. *Parker*, 750 F.2d at 662 ("[T]he Board may deny [the plaintiff] parole release because of the severity of her criminal act and sentence, but it must explain in more than boilerplate generalities why the severity of her particular offense and sentence requires deferral of parole."); *see also Olds v. Norman*, No. 4:09CV-1782 CAS/TCM, 2013 WL 316017, at *5 (E.D. Mo. Jan. 8, 2013), *report and recommendation adopted,* No. 4:09-CV-1782 CAS, 2013 WL 315974 (E.D. Mo. Jan. 28, 2013) ("A parole board may deny release to an inmate based on the severity of the inmate's criminal act and sentence, but, where a liberty interest is involved, the parole board must explain in more than boilerplate generalities why the severity of the particular offense and sentence requires a deferral of parole.") (citing *Cooper v. Missouri Bd. of Prob. & Parole*,

866 S.W.2d 135, 138 (Mo. banc 1993)).[8] Due process also entitles class members access to adverse information in their parole file. *Williams v. Missouri Bd. of Prob. & Parole*, 661 F.2d 697, 700 (8th Cir. 1981) ("minimum due process requires that an inmate in Missouri seeking parole be advised of adverse information in his file."). To date, these rights have been denied to individuals entitled to relief under SB 590.

Accordingly, on October 12, 2018, Judge Laughrey granted the *Brown* class summary judgment on their Eighth Amendment and due process claims. *Graham v. Florida*'s requirement that states provide juvenile offenders a "meaningful opportunity to

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[8] *See also U.S. ex rel. Richerson v. Wolff (Wolff)*, 525 F.2d 797, 800 (7th Cir. 1975) ("We conclude that due process includes as a minimum requirement that reasons be given for the denial of parole release."); *Candarini v. Attorney General of the United States*, 369 F.Supp. 1132, 1137 (E.D.N.Y.1974) ("'(m)ere pro forma language . . . will not suffice" as an explanation for parole denial); *Craft v. Attorney General of the United States*, 379 F.Supp. 538, 540 (M.D.Pa. 1974) (denying due to seriousness of the offense "was tantamount to no reason and afforded the Petitioner none of the safeguards" of due process"); *U.S. ex rel. Brown v. U.S. Bd. of Parole*, 443 F. Supp. 477, 482 (M.D. Pa. 1977) ("Due process requires that, when misconduct is the basis for the denial of parole, the prisoner must be informed in the statement of reasons of that reliance."); *United States ex rel. Johnson v. Chairman of New York State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974); *see also Wolff*, 525 F.2d at 804.

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obtain release based on demonstrated maturity and rehabilitation," 560 U.S. 48, 75 (2010), extends to juveniles serving parolable life sentences and the parole process itself. *See Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2017 WL 4980872, at *12 (W.D. Mo. Oct. 31, 2017); s*ee also, e.g., Greiman v. Hodges*, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015); *Hayden v. Keller*, 134 F. Supp. 1000, 1009 (E.D. N.C. 2015) ("If a juvenile offender's life sentence, while ostensibly labeled as one "with parole," is the functional equivalent of a life sentence without parole, then the State has denied that offender the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" that the Eighth Amendment demands.); *Wershe v. Combs*, 1:12-cv-1375, 2016 WL 1253036, *3 (W.D. Mich. Mar. 31, 2016) (*Graham*'s "discussion of a meaningful opportunity to obtain release . . . suggests that the decision imposes some requirements after sentencing as well."); *Maryland Restorative Justice Initiative v. Hogan*, No. ELH-16-1021, 2017 WL 467731, at *21 (D. Md. Feb. 3, 2017).[9] This means that a juvenile offender must be

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[9] Numerous State courts have reached the same conclusion. *See, e.g., Atwell v. State*, 197 So. 3d 1040, 1042 (Fla. 2016), *reh'g denied*, No. SC14-193, 2016 WL 4440673 (Fla. Aug. 23, 2016) (mandatory life imprisonment sentence unconstitutional under *Miller* and *Graham*, even though it provided for parole, because the Florida parole process "fails to take into account the offender's juvenile status at the time of the offense" and "effectively forces juvenile offenders to serve disproportionate sentences of the kind forbidden by *Miller*."); *Hawkins v. New York State Dep't of Corr. & Cmty. Supervision*, 30 N.Y.S.3d

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provided "more than a *possibility* of parole or a 'mere hope' of parole. *Greiman*, 79 F. Supp. 3d at 945 (emphasis original) (quoting *Graham*, 560 U.S. at 79). Instead, such individuals have "a categorical entitlement to 'demonstrate maturity and reform,' to show that 'he is fit to rejoin society,' and to have a 'meaningful opportunity for release.'" *Id*.

In *Brown*, the Court concluded that the defendants' "policies, procedures, and customs for parole review for *Miller*-impacted inmates violate the constitutional requirement that those inmates be provided a meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation." 2018 WL 4956519 at *10.

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397 (N.Y. App. Div. 2016) (at the parole release hearing stage, defendant who was sentenced to 25-years-to-life entitled to a *Miller*-type hearing where "youth and its attendant characteristics" are considered) (internal citations omitted); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013) (juveniles should have their unconstitutional JLWOP sentences modified to reflect parole eligibility after serving fifteen years); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349 (Mass. 2015) (at parole hearings, those juvenile homicide offenders were entitled to certain procedural protections, including the right to counsel, access to funds for expert witnesses, and the availability of judicial review).

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VI. The Western District Court's Declaratory and Injunctive Order Reforming the Juvenile Parole Process for *Brown* Class Members like Ms. Hicklin

Following its October 2018 decision, the Court gave the Parole Board the opportunity in the first instance to propose a compliance plan to remedy the constitutional deficiencies with the SB 590 parole process. The deficiencies identified by the Court include the Parole Board's policies and practices: (1) prohibiting class members from reviewing their parole file, including their pre-hearing report; (2) limiting class members to having only one delegate at their hearing, restricting what that delegate may speak about at the hearing, and prohibiting them from taking notes during the hearing; (3) utilizing a Board Action Sheet which is not specific to individuals serving JLWOP and demonstrates a focus on the circumstances of the offense; (4) denying parole to class members based on the circumstances of the offense alone, which "necessarily authorizes the Board to disregard evidence of the inmate's subsequent rehabilitation and maturity—in contravention of the Supreme Court's edict," *Brown*, 2018 WL 4956519 at *9; (5) failing to provide adequate explanation in its parole decision notices; and (6) failing to use any objective tools, matrices, or criteria to evaluate class members.

After extensive briefing on competing compliance plans and an evidentiary hearing where the *Brown* class presented expert testimony, the Court entered a Declaratory and Injunctive Relief Order, a copy of which is included in the Appendix at 057-079 (the "Injunctive Order"). The Injunctive Order orders changes to pre-hearing events, including removing impediments to programming that are unique to the class, and requiring institutional parole officers to actively assist inmates in gathering records relevant to their

parole review, such as school records or records from the Department of Social Services. It also gives the class member the right to have an attorney present during the pre-hearing interview, albeit not at the State's expense. The Injunctive Order also increases class members' access to information, requiring the Parole Board to provide a class member their parole file no less than 180 days before their parole hearing, and giving class members access to recordings of their hearings. It requires training for all parole staff involved in SB 590 hearings.

The Injunctive Order also requires the Parole Board and parole staff to change how hearings are to be conducted and decisions made. *Brown* class members should be permitted to have four delegates at their hearing, Judge Laughrey concluded, and delegates should be permitted to take notes. Hearing panels should have at least two, not just one, Board member. Class members must be made aware of statements made by victims or victim representatives, and prosecutors can only give statements in the presence of the inmate.

Critically, the Injunctive Order prohibits the Board from denying parole based solely on the seriousness of the offense. It prohibits the Board from using the biased Ohio Risk Assessment System or any other risk assessment tool unless it has been developed to specifically address inmates affected by *Montgomery* or *Miller*. Finally, it commands parole staff to provide new hearings to all class members who were denied a release date.

The Missouri Department of Corrections and Parole Board filed a notice of appeal, and briefing is underway in the Eighth Circuit Court of Appeals. At this point, *amicus* cannot say with certainty whether the Injunctive Order will withstand review on appeal.

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But what is certain is that SB 590, far from being a "*Miller* fix," created a whole new slew of problems for *Miller*-impacted juvenile offenders, the Parole Board, and parole staff.

CONCLUSION

In determining the constitutionality of SB 590, *Amicus* asks this Court to consider the real-world implications of the law, including how the law has been used, to date, to violate the constitutional rights of Ms. Hicklin and others similarly situated.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE, CONSENT, AND SERVICE

The undersigned hereby certifies that pursuant to Rule 84.06(c):

(1) This brief includes the information required by Rule 55.03;

(2) This brief complies with the limitations in Rule 84.06(b);

(3) This brief contains 6,248 words, as determined using the word-count feature of Microsoft Office Word;

(4) This brief complies with Rule 84.05(f)(2) in that counsel for *Amicus Curiae* has obtained consent of all parties to file this brief; and

(5) on the 7th day of February, 2020, a true and correct copy of this brief was filed electronically using the Court's online case filing system, which will send notice to all counsel of record pursuant to Rule 103.08.

The undersigned further certifies that the electronic file has been scanned and was found to be virus-free.

By: /s/ Amy E. Breihan