IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND RESTORATIVE JUSTICE INITIATIVE, *et al.*, *Plaintiffs,*	*	
v.	*	Case No. 1:16-cv-01021-ELH
GOVERNOR LARRY HOGAN, *et al.*, *Defendants.*	*	

* * * * * * * * * * *

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND AN INJUNCTION REGARDING THE UNCONSTITUTIONAL ROLE OF THE GOVERNOR

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TABLE OF CONTENTS

INTRODUCTION

It has been eight years since the Supreme Court first ruled in *Graham v. Florida* that the Constitution forbids lifetime incarceration without possibility of parole for nonhomicide juvenile offenders; five years since the Court ruled in *Miller v. Alabama* that the Constitution forbids lifetime incarceration without possibility of parole for all but the rarest juvenile offender even in homicide cases; and two years since the Court ruled in *Montgomery v. Louisiana* that *Miller* established retroactive, substantive rules of law. Under these decisions, lifetime incarceration without "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham v. Florida*, 560 U.S. 48, 75 (2010); *Miller v. Alabama*, 567 U.S. 460, 479 (2012), is a punishment altogether outside the State's power to impose except in the most exceptional cases. *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718, 736 (2016). As a matter of law, clemency fails to afford this constitutionally required meaningful and realistic opportunity for release. *Graham*, 560 U.S. at 70 (*citing Solem v. Helm*, 463 U.S. 277, 300-01 (1983)). Yet, in Maryland, Plaintiffs Calvin McNeill, Nathaniel Foster, and Kenneth Tucker, as well as hundreds of other people sentenced for crimes they committed as juveniles, languish in prison with no prospect for release except through executive clemency.

This motion addresses a glaring threshold defect in the statutory structure of Maryland's parole system that can be resolved on the pleadings. Specifically, Section 7-301(d)(4) of the Maryland Code, Correctional Services, grants sole authority to parole anyone sentenced to life imprisonment to a single elected official, the Governor, without any substantive limits to guide his or her discretion. On its face, this statute is unconstitutional as to juvenile lifers. It allows the Governor to refuse parole to a juvenile offender for any reason or no reason, even after the Parole Commission has determined that the offender has demonstrated suitability for parole following decades of incarceration, hearings, risk assessments, and consideration by the full Parole

Commission. By giving the Governor this boundless authority, Section 7-301(d)(4) impermissibly eviscerates the most significant distinctions between parole and clemency, transforming the Maryland parole system into one of ad hoc executive clemency.

Governor Hogan's recent statements in Executive Order 01.01.2018.06 about how he intends to exercise his unfettered statutory discretion to approve or to reject recommendations from the Parole Commission cannot salvage the unconstitutional statute. Properly used, an Executive Order directs subordinate executive branch agencies as to how to conduct state business in matters as to which the Governor is entitled to direct them. Here, by contrast, Executive Order 01.01.2018.06 does nothing more than state (in vague terms) the Governor's subjective intent as to how he intends to exercise his own unlimited discretion. By doing so, Executive Order 01.01.2018.06 illustrates how Maryland conflates parole and clemency—and the resulting constitutional defect—perfectly: at any time, any Governor can make self-serving proclamations about his or her intentions at that moment, prompted by any type of political or personal considerations. As a legal matter, these statements have the same force as statements uttered in a press conference; they in no way limit the Governor's statutory power to do whatever he or she chooses to do with no governing standard. The Executive Order does not alter the fundamental structural flaw of Maryland's scheme. As a matter of law, the Governor lacks the power singlehandedly to resolve the statutory defect.

There can be no reasonable dispute. Maryland's statutory framework affording one elected official absolute discretion as to parole decisions cannot be reconciled with two Supreme Court holdings: (i) juvenile lifers must be afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 560 U.S. at 75; *Miller*, 567 U.S. at 479; and (ii) clemency fails to afford this opportunity. *Solem*, 463 U.S. at 300-01. The Court can leave

for another day, after discovery is complete, what procedures and safeguards the other participants such as the Parole Commission must employ to comply with *Graham*, *Miller*, *Montgomery*, and *Solem*. But there is no reason to delay addressing the unconstitutional role of the Governor, which violates the rights of juvenile lifers every day it remains in effect.

Accordingly, this Court should hold that Section 7-301(d)(4) is unconstitutional as to juvenile lifers. Plaintiffs respectfully request that the Court enter a permanent injunction enjoining the enforcement or application of Section 7-301(d)(4) as to juvenile lifers (inmates who committed their offenses when they were under the age of 18) and directing the Parole Commission to consider juvenile lifers for parole in the normal course, such that the decisions of the Parole Commission regarding juvenile lifers are final without any review or approval by the Governor.[1]

BACKGROUND

This motion addresses the statutory structure of the Maryland parole system. It does not depend on any disputed facts. The very few relevant facts are all admitted in Defendants' Answer. Otherwise, this motion addresses the statutes governing the parole process. The Court therefore need not look outside the pleadings and legal authorities to decide the motion.

As the Court detailed in its earlier Memorandum Opinion, on paper, Maryland law provides two primary mechanisms through which an individual serving a life sentence can obtain release: clemency and parole. Memorandum Opinion re. Motion to Dismiss ("Mem. Op."), ECF No. 65 at 12. As a matter of constitutional law, the Supreme Court has repeatedly held that these distinct mechanisms serve distinct purposes in the Eighth Amendment analysis. Clemency is an ad hoc

[1] By requesting this interim relief, Plaintiffs do not imply that the current procedures used by the Division of Correction and the Parole Commission satisfy the requirements of *Graham*, *Miller* and *Montgomery*. To the contrary, the current procedures fall woefully short, as Plaintiffs will demonstrate in a motion for summary judgment they expect to file after the close of the discovery. This motion seeks interim relief because Maryland's statutory scheme on its face is unconstitutional in that it affords the Governor unconstrained discretion to approve or deny parole.

exercise of executive power. By contrast, "[p]arole is a regular part of the rehabilitative process—[a]ssuming good behavior, [parole] is the normal expectation in the vast majority of cases." *Solem*, 463 U.S. at 300-01; Mem. Op., ECF No. 65 at 12. The Maryland Constitution also generally entrusts these mechanisms to separate branches of the government.

Under the Maryland Constitution, the clemency power lies with the Governor. Md. Const. art. II, § 20 ("He shall have power to grant reprieves and pardons . . . . "); Mem. Op., ECF No. 65 at 12. This authority is codified at Md. Code Ann., Corr. Servs. ("C.S.") § 7-601, which permits the Governor to "pardon an individual convicted of a crime subject to any conditions the Governor requires," or to "remit any part of a sentence of imprisonment subject to any conditions the Governor requires." Mem. Op., ECF No. 65 at 12-13. The latter act of remitting part of a sentence is also referred to as commutation. Mem. Op., ECF No. 65 at 12; C.S. § 7-101(d). In the context of clemency, the Parole Commission's only role is to provide recommendations to the Governor "where the case warrants special consideration or where the facts and circumstances of the crime justify special consideration." Mem. Op., ECF No. 65 at 13; Code of Maryland Regulation ("COMAR") § 12.08.01.15.B (1995).

The parole power, by contrast, lies with the General Assembly. Md. Const. art. III, § 60 ("The General Assembly . . . shall have the power to provide by suitable enactment . . . for release upon parole in whatever manner the General Assembly may prescribe, of convicts imprisoned under sentence for crimes."). The General Assembly in turn delegated this "exclusive power to authorize the parole of an individual sentenced under the laws of the State," *id.*, to the Parole Commission, C.S. § 7-205(a)(1) ("The Commission has the exclusive power to authorize the parole of an individual sentenced under the laws of the State to any correctional facility in the State . . . ."). To guide the Parole Commission in its exercise of this authority, the General

Assembly established when individuals are eligible for parole, C.S. § 7-301, and outlined specific factors the Parole Commission "shall consider" in deciding whether an eligible prisoner should be granted parole, C.S. § 7-305.

Although the legislature delegated the "exclusive power to authorize parole" to the Parole Commission generally, the Governor remains the final decision-maker as to parole for people serving life sentences. Under Section 7-301(d)(4), "an inmate serving a term of life imprisonment may only be paroled with the approval of the Governor." C.S. § 7-301(d)(4); Mem. Op., ECF No. 65 at 10. Thus, for this group, the parole power, like the clemency power, "lies exclusively in the hands of the Governor." ECF No. 1 ¶ 50; ECF No. 69 ¶ 26 (not denying ¶ 50). Unlike for the Parole Commission, however, "[t]here are no substantive statutory or regulatory factors guiding or limiting the Governor's decision-making regarding parole for lifers." ECF No. 1 ¶ 73; ECF No. 69 ¶ 44 (admitting ¶ 73). That means "no statute or regulation requires the Governor to consider an individual's age at time of offense in exercising his discretion concerning parole." ECF No. 69 ¶ 45.

Governors have exercised this unfettered discretion. For example, in 1995, then-Governor Glendening "ordered the [Parole Commission] to stop sending recommendations to him for parole of any lifer, regardless of the youth of the offender at the time of his criminal act." ECF No. 1 ¶ 106; ECF No. 69 ¶ 77 (admitting ¶ 106). Governor Glendening could unilaterally decide in this manner never to grant parole to anyone serving a life sentence precisely because Section 7-301(d)(4) gave him unfettered discretion, with no governing standards.

In April 2016, MRJI and three individuals serving life sentences for offenses committed as youths brought this action challenging Maryland's parole system for failing to afford them any meaningful or realistic opportunity for release in violation of the Eighth Amendment. Among

other relief, the plaintiffs sought a declaration that Section 7-301(d)(4), which grants the Governor this exclusive, boundless authority to deny parole for any reason to individuals serving life sentences, is unconstitutional as applied to those who were 17 years of age or younger at the time of their offenses. ECF No. 1 at 59.

Shortly thereafter, Defendants moved to dismiss. Addressing that motion, the Court analyzed the Governor's role under Section 7-301(d)(4) and found that it lacked any substantive standards. As the Court explained, "under the unambiguous text of Maryland law, Maryland's Governor possesses unfettered discretion to deny every parole recommendation for *any* reason whatsoever or for no reason at all." Mem. Op., ECF No. 65 at 46 (emphasis in original).

In March 2018, while legislation was pending that would have removed the Governor from the parole process, Governor Hogan issued a press release announcing Executive Order 01.01.2018.06. In the "Background" section of the Order, Governor Hogan proclaimed that "Maryland's parole process affords juvenile offenders . . . a meaningful opportunity for release." He stated that he considers "among other relevant information, the same statutory and regulatory factors and information [as the Parole Commission] in determining whether to approve parole for an inmate serving a term of life imprisonment." Md. Exec. Order 01.01.2018.06, *Gubernatorial Considerations in Parole of Inmates Serving Terms of Life Imprisonment* (Feb. 9, 2018). Governor Hogan further proclaimed that he "shall assesses and consider, among other lawful factors deemed relevant by the Governor, the same factors and information assessed by the Maryland Parole Commission." *Id* ¶ B. Governor Hogan also listed three additional factors that he "shall consider" in deciding whether to grant parole to a juvenile offender. *Id.* ¶ C.

The Executive Order does not, of course, modify Section 7-301(d)(4), nor does it constrain the Governor or any successor. Nothing in an executive order could fix this structural problem.

At best, the Executive Order is a self-serving statement of one Governor's subjective intent as to how he presently intends to exercise his unlimited statutory discretion. Governor Hogan remains free to change his mind at any time and to disapprove grants of parole for any reason or for no reason at all. Governor Hogan issued the Executive Order himself; Governor Hogan may withdraw or change the Executive Order at any time; Governor Hogan alone decides how to interpret and apply the Executive Order; and Governor Hogan is answerable to no one as to how he decides to implement the Executive Order.

ARGUMENT

I. Legal Standard for Judgment on the Pleadings.

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings at any time after the pleadings are closed, as long as it is early enough not to delay trial. Fed. R. Civ. P. 12(c). In reviewing a motion under Rule 12(c), a court applies the same standard as it would under Rule 12(b)(6), which requires it to "assume the facts alleged in the relevant pleadings to be true[] and . . . draw all reasonable inferences therefrom." *Volvo Constr. Equip. N.A., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 591 (4th Cir. 2004). If the movant can show that there is no material issue of fact and it is entitled to relief as a matter of law, then judgment on the pleadings is appropriate. *See Bell Atlantic-Maryland, Inc. v. Prince George's Cty.*, 155 F. Supp. 2d 465, 473 (D. Md. 2001). This standard is like the standard for granting summary judgment, except the record is limited to the pleadings, documents incorporated into the pleadings by reference, and items to which the court may take judicial notice. *See, e.g.*, *Armburster Prods., Inc. v. Wilson*, 35 F.3d 555 (table), 1994 WL 489983, at *2 (4th Cir. 1994). Here, as noted above, the State's admissions in its Answer establish the very few relevant facts, and the question presented is purely an issue of law.

II. The Eighth Amendment requires that juvenile offenders serving life sentences receive a meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation.

In the last decade, the Supreme Court issued a trio of decisions holding that the Eighth Amendment forbids a state from subjecting minors to lifetime incarceration without a meaningful opportunity for release, in all but the most exceptional cases. First, in *Graham v. Florida*, the Court categorically prohibited life without parole as categorically disproportionate punishment for juvenile offenders convicted of an offense other than homicide. 560 U.S. at 82 (2010). In *Miller v. Alabama*, the Court extended this categorical prohibition—in all but the most exceptional cases—to juveniles who committed homicide. 567 U.S. at 489 (2012). In *Montgomery v. Louisiana*, the Court expanded upon its decision in *Miller*, holding that *Miller* established a substantive rule of constitutional law that applies retroactively. 136 S. Ct. at 736 (2016).

These decisions flow from three judicially-recognized characteristics that make youth "constitutionally different from adults for sentencing purposes":

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.

Miller, 567 U.S. at 471 (internal citations and markings omitted).

The Supreme Court held that each of these critical differences undermines the four penological justifications offered for sentences of life imprisonment without possibility of parole. First, a juvenile's lack of maturity leaves the individual less culpable, which undermines the government's case for retribution. *Graham*, 560 U.S. at 71-72; *Miller*, 567 U.S. at 472. Second, the same characteristics that "render juveniles less culpable than adults suggest that juveniles will

be less susceptible to deterrence." *Graham*, 560 U.S. at 72; *see also Miller*, 567 U.S. at 472. Third, even expert psychologists struggle, at sentencing, "to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity[] and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, 560 U.S. at 72-73; *Miller*, 567 U.S. at 479-80. But without such a finding that the juvenile is incorrigible, the government cannot justify a life without parole sentence based on its interest in incapacitation. *Graham*, 560 U.S. at 72-73; *Miller*, 567 U.S. at 472-73. Finally, a sentence of life without parole contradicts the government's only remaining interest in rehabilitation. *Graham*, 560 U.S. at 74; *Miller*, 567 U.S. at 472. Indeed, "[t]he penalty forswears altogether the rehabilitative idea." *Graham*, 560 U.S. at 74. For these reasons, life without a "meaningful" and "realistic" opportunity for release upon demonstrated maturity and rehabilitation is constitutionally disproportionate punishment for all juveniles convicted of a non-homicide offense and for almost all juveniles convicted of homicide.

The force of these Supreme Court opinions was highlighted just last week, when in *Malvo v. Mathena*, the Fourth Circuit considered the application of those Supreme Court cases to Lee Malvo, who, at age 17, participated in a series of high-profile homicides in the Washington D.C. area in 2002 that are now known as the infamous "D.C. sniper attacks." After a capital trial that included significant mitigation evidence, Mr. Malvo was sentenced to life without parole. In an opinion written by Judge Paul Niemeyer, the Fourth Circuit held that the Supreme Court's precedent demanded that Malvo receive a new sentencing hearing because, notwithstanding the gravity and enormity of the underlying offenses, he was a juvenile at the time of his crimes. As the Fourth Circuit reiterated, it was outside of the power of the State to impose a life-without-parole sentence except in the rarest case where a court made a specific finding of "irreparable

corruption or permanent incorrigibility," and no such finding had been made in his case. *Malvo v. Mathena*, No. 17-6746, 2018 WL 3058931 at *8 (4th Cir. June 21, 2018).

Put simply, the law is clear: juvenile lifers have a constitutional right to "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75; *Miller*, 567 U.S. at 479.

III. Clemency fails to afford a meaningful and realistic opportunity for release because it lacks substantive standards, and an opportunity for release is the rare and unpredictable exception.

Although the Supreme Court stopped short of fully defining the precise contours of a "meaningful opportunity" for release, it ruled out at least one type of system as insufficient as a matter of law: executive clemency. *Graham*, 560 U.S. at 70. As the Court explained, "the remote possibility of [executive clemency] does not mitigate the harshness of the sentence." *Id.* (*citing Solem*, 463 U.S. at 300-01).

The Court based this rationale on its earlier decision in *Solem v. Helm*, which rejected another state's argument that its commutation process was a sufficient substitute for the possibility of parole. In *Solem*, the Court stressed that despite "surface similarities," "parole and commutation are different concepts" because they involve different degrees of predictability and discretion:

> Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. Thus, it is possible to predict, at least to some extent, when parole might be granted.
>
> Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.

Solem, 463 U.S. at 300-01 (citations omitted).

In reaching this conclusion, the Court looked beyond labels. Under the system in *Solem*, the board could make recommendations to the Governor, but the Governor retained "unfettered

discretion" to decide whether the individual should be released. *Id.* at 302 n.29. The Court held that the Governor's ability to exercise unfettered discretion left the individual with only a "bare possibility" of release, which the Court found insufficient to alter the proportionality of the sentence under the Eighth Amendment. *Id.* at 302.

Following these decisions, courts around the country have similarly held that systems conditioning release upon clemency fall short of the Eight Amendment's requirement to afford some meaningful opportunity for release. *See, e.g.*, *Funchess v. Prince*, No. CV 14-2105, 2016 WL 756530, at *4–5 (E.D. La. Feb. 25, 2016) (concluding that Louisiana fails to provide a meaningful opportunity for release where individual may not be released by Board of Pardons unless Governor commutes sentence based on favorable recommendation); *State v. Castaneda*, 287 Neb. 289, 311–14 (2014) (rejecting argument that "possibility" of parole was sufficient in scheme where parole required commutation of sentence by Governor); *Bear Cloud v. State*, 294 P.3d 36, 45 (Wyo. 2013) ("[T]he United States Supreme Court has refused to equate the hope of executive clemency and subsequent parole to the realistic possibility of parole."); *see also Parker v. State*, 119 So. 3d 987, 997 (Miss. 2013), *reh'g denied* (Sept. 5, 2013) (holding that statute providing opportunity for release beginning at 65 was akin to clemency and thus failed to provide meaningful opportunity for release).

IV. Section 7-301(d)(4), which enables the Governor to disapprove a parole grant for any reason, effectively abolishes Maryland's distinct parole process for people serving life sentences in favor of an exclusive system of executive clemency.

When it comes to people sentenced to life in prison, Maryland's statutory parole structure is all but indistinguishable from a system of executive clemency. Although Maryland's Constitution generally establishes separate procedures for clemency and parole, with clemency entrusted to the Governor and parole to the General Assembly, Section 7-301(d)(4) eviscerates this distinction for a critical class of individuals: those serving a term of life imprisonment.

In light of the now well-established rulings of the Supreme Court holding that all but the rarest youth offender has the right to a "meaningful opportunity for release," and that clemency fails to satisfy this standard, Maryland's statutory scheme conflating parole and clemency violates the Eighth Amendment. Section 7-301(d)(4) strips the Parole Commission of its authority to grant parole to juvenile offenders serving life sentences, even if the Parole Commission determines that under the statutory and regulatory factors, the person should be granted parole, instead placing that decision in the hands of the Governor.

Section 7-301(d)(4) alters more than just who decides whether to grant parole; it also removes all substantive standards. Unlike the Parole Commission, the Governor is not bound by any statute or regulation. In fact, the State admits that "[t]here are no substantive statutory or regulatory factors guiding or limiting the Governor's decision-making regarding parole for lifers." ECF No. 1 ¶ 73; ECF No. 69 ¶ 44 (admitting ¶ 73). As a result, "under the unambiguous text of Maryland law, Maryland's Governor possesses unfettered discretion to deny every parole recommendation for *any* reason whatsoever or for no reason at all." Mem. Op., ECF No. 65 at 46 (emphasis in original).

By stripping the Parole Commission of its authority to grant parole and transferring that power to the unfettered discretion of the executive, Section 7-301(d)(4) effectively abolishes Maryland's separate parole process for these individuals in favor of a system that amounts to executive clemency. Just like the clemency system in *Solem*, a juvenile lifer's ability to secure parole release in Maryland turns on how the Governor elects to exercise his unfettered discretion—an unknowable, unpredictable, and entirely closed process with no enforceable rights.

Governor Hogan's recent statements in Executive Order 01.01.2018.06 only highlight the constitutional defect in Maryland's system. They show that, in Maryland's parole scheme for

lifers, the Governor is a unilateral actor with no constraints. When it comes to parole of juvenile lifers, the Governor can do whatever he wants for any reason he wants. Here, the Governor has chosen to make some unilateral assertions about how he currently intends to exercise his absolute discretion. But including those statements of current subjective intent in an Executive Order does not make them any more enforceable. The Governor is not obligated to follow any particular standards in determining whether to approve or deny parole, and no one has the right to challenge whether he has complied with his own expressed intention. The Executive Order can be withdrawn at any time. *Cf.* Congressional Research Service, *Executive Orders: Issuance, Modification, and Revocation* at 7 (Apr. 16, 2014) ("By their very nature, however, executive orders lack stability, especially in the face of evolving presidential priorities. The President is free to revoke, modify, or supersede his own orders or those issued by a predecessor."). There is no way to enforce the Order. *See, e.g.*, Md. Office of the Attorney General, *State Development Council—Executive Order—Authority to Issue—Effect of Executive Order on Development Policies*, 67 Md. Op. Att'y. Gen. 203, 5 (Feb. 12, 1982) (opining that executive order allowing for discretionary implementation would not create a private right of action). Thus, the Order in no way changes the lack of any statutory authority limiting or guiding the Governor's absolute discretion to grant or deny parole recommendations for any reason or no reason.

Indeed, the two sources of Maryland law authorizing executive orders do not even contemplate gubernatorial proclamations like this one that purport to bind only a person they cannot bind. The Maryland Constitution contemplates only executive orders that reorganize State government, Md. Const. art. II, § 24, and although the relevant statute contemplates the Governor "adopt[ing] guidelines, rules of conduct, or rules of procedure," it does so only for three categories of subordinates: (1) State employees, (2) units of the State government, and (3) persons who are

under the jurisdiction of those employees or units who deal with them, Md. Code Ann., State Gov't § 3-401 (defining "Executive order").

Governor Hogan's statements in his Executive Order do not change his statutory authority. Governor Hogan has total discretion as to how he applies the Executive Order in individual cases; he is answerable to no one. Governor Hogan can change the Executive Order at any time upon a whim with no input from any other source. Thus, the Executive Order reinforces that under Maryland's statutory scheme, the Governor has total discretion.

Reviewing Governor Glendening's earlier pronouncement that the Parole Commission was not to recommend to him any paroles for inmates serving life sentences, the Maryland Court of Appeals held that his statement was merely an expression of the Governor's then-present intent as to how to exercise his statutory discretion, and thus did not violate Mr. Lomax's or any other prisoner's statutory right to be considered for parole. *Lomax v. Warden, Md. Corr. Training Ctr.*, 356 Md. 569, 577 (1999). That Governor Hogan has made his declaration in an "Executive Order" rather than on the front steps of the Maryland penitentiary does not save Section 7-301(d)(4). Just as Governor Glendening was not bound by his public statement about how he intended to exercise his discretion, so too Governor Hogan can revoke or change the Executive Order stating how he intends to exercise his discretion at any time. The Executive Order, like Governor Glendening's public statement, is "simply an announcement of guidelines as to how the Governor would exercise the discretion which he has under the law." *Id.* In both cases, the "Governor's announcement[s] d[o] not bind him, and he can employ different guidelines whenever he desires to do so." *Id.*

As a matter of law, no executive order could change the legal analysis. As long as the Governor has the exclusive, statutory authority to deny parole for any reason or for no reason at all, Maryland's system relies not on any statutory or regulatory requirements, but on the conscience

and political motivations of the person occupying the Governor's office. The system remains in substance one of executive clemency, which cannot be reconciled with the requirements of *Graham*, *Miller*, *Montgomery*, and *Solem*.

V. The proper remedy is entry of an injunction.

Under the traditional four-factor test, to obtain a permanent injunction, a plaintiff must demonstrate that: (1) plaintiff has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. *Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n*, 295 F. Supp. 3d 540, 557 (D. Md. 2017).

Plaintiffs easily satisfy this standard for injunctive relief in light of the unconstitutionality of Section 7-301(d)(4)'s grant to the Governor of unfettered discretion in making parole decisions for juvenile lifers. As matters stand now, the Parole Commission considers juvenile lifers for parole with the understanding that any determination by the Commission that a juvenile lifer should be paroled is a recommendation to the Governor, which could be rejected for any reason or no reason. From the Parole Commission's perspective, with respect to the availability of the opportunity for release and the standard to be met, a recommendation for parole and a recommendation for clemency are indistinguishable, since in either event, the Governor has total discretion. Indeed, under the current scheme, it is arguably more accurate to characterize all of the Parole Commission's recommendations for release of lifers as clemency, since in either case the Governor is unbound by any substantive standards, and there is no enforceable right against him in any individual case.

The Supreme Court's cases have established, unambiguously, that juvenile lifers are entitled to a meaningful opportunity to obtain release upon showing requisite maturity and rehabilitation, and clemency fails to provide this opportunity. Without that meaningful opportunity, juvenile lifers are being subjected to constitutionally disproportionate punishment—a punishment that is outside of the state's power to impose because it is a punishment without any legitimate penological objective. In Maryland, Section 7-301(d)(4) makes that "meaningful opportunity" unattainable as a matter of law by permitting the Governor the ability to deny any juvenile lifer parole even if he or she has demonstrated the requisite maturity and rehabilitation to be entitled to it.

In short, with each passing day, juvenile lifers (including the individual Plaintiffs) are sitting in prison without the meaningful opportunity for release to which the Supreme Court has held is their right, subjected to imprisonment that lacks any legitimate penological purpose. They are, in every sense of the words, losing days of their lives. That is irreparable harm. The appropriate remedy is an injunction enjoining the enforcement or application of Section 7-301(d)(4) as to juvenile lifers (inmates who committed their offenses when they were under the age of 18) and directing the Parole Commission to consider juvenile lifers for parole in the normal course, such that the decisions of the Parole Commission regarding juvenile lifers are final without any review or approval by the Governor. No other remedy is either adequate or equitable, and Defendants face no hardship in being required to honor the Constitution. Likewise, the public interest compels Maryland to cease this blatantly unconstitutional process for blocking juvenile lifers from parole. Ruling that the statute is unconstitutional does not open any floodgates. It means that people who committed crimes when they were juveniles, and who have proven

themselves deserving of a release recommendation from the Maryland Parole Commission after decades of incarceration, might actually be able to spend some part of their lives outside of prison.

Accordingly, the Court should declare Section 7-301(d)(4) unconstitutional, and enter a permanent injunction enjoining the enforcement or application of Section 7-301(d)(4) as to juvenile lifers (inmates who committed their offenses when they were under the age of 18) and directing the Parole Commission to consider juvenile lifers for parole in the normal course, such that the decisions of the Parole Commission regarding juvenile lifers are final without any review or approval by the Governor. *See Reaching Hearts Int'l, Inc. v. Prince George's Cty.*, 584 F. Supp. 2d 766, 795 (D. Md. 2008) (holding religious congregation bringing religious discrimination action against county and county council would likely suffer irreparable harm in absence of permanent injunction enjoining application of new zoning legislation and requiring county and county council to approve congregation's new zoning application); *Hill v. Snyder*, No. 10-cv-14568, 2018 WL 1782710, at *18 (E.D Mich. Apr. 9, 2018) (permanently enjoining the enforcement or application of the statute at issue and ordering defendants to calculate the good time credits and disciplinary credits for each subclass member for purposes of determining parole eligibility dates); *Doe ex rel. Frazier v. Hommrich*, No. 3-16-07992017, WL 1091864, at *1 (M.D. Tenn. Mar. 22, 2017) (granting plaintiff's motion seeking to enjoin "Defendants Rutherford County and Duke from placing John Doe or any member of the Rutherford County Class in solitary confinement, seclusion, 'loss of privileges' or other status that involves prolonged separation from peers or isolation as punishment or discipline").

CONCLUSION

MRJI members Calvin McNeil, Nathaniel Foster, and Kenneth Tucker, like many others who were sentenced to life imprisonment for offenses committed as juveniles, have for decades been denied the meaningful opportunity for release that the Constitution guarantees.

There is no reason to delay any longer resolution of the critical issue regarding the Governor's statutory role in the parole process as it presents a pure question of law. Section 7-301(d)(4) cannot be saved. Accordingly, this Court should enter an Order declaring that Section 7-301(d)(4) is unconstitutional. It should also permanently enjoin the enforcement or application of Section 7-301(d)(4) as to juvenile lifers (inmates who committed their offenses when they were under the age of 18) and direct the Parole Commission to consider juvenile lifers for parole in the normal course, such that the decisions of the Parole Commission regarding juvenile lifers are final without any review or approval by the Governor.

Respectfully submitted,

/ s

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