SUPREME COURT OF NEW JERSEY
DOCKET NO.

IN THE MATTER OF PETITION FOR RULEMAKING TO AMEND N.J.A.C. 10A:71-3.11	Civil Action On Petition for Certification From a Final Judgment of the Superior Court of New Jersey, Appellate Division
IN THE MATTER OF PETITION FOR RULEMAKING TO AMEND N.J.A.C. 10A:71-3.11, N.J.A.C. 10A:71-2.2, AND N.J.A.C. 10A:71-3.20	Docket Nos. A-0494-22, A-1180-22 Sat Below: Hon. Heidi Willis Currier, P.J.A.D. Hon. Lisa A. Firko, J.A.D. Hon. Ronald Susswein, J.A.D.

PETITION FOR CERTIFICATION AND APPENDIX ON BEHALF OF PETITIONERS RONALD ROBBINS, JOSEPH E. KRAKORA, AND THE NEW JERSEY OFFICE OF THE PUBLIC DEFENDER

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June 13, 2024

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PRELIMINARY STATEMENT

Administrative agencies must follow the law, and courts must review agency decisions to ensure that they do. These bedrock principles, rooted in the separation of powers and our constitutional system of checks and balances, are only magnified in the context of parole release decisions of the State Parole Board ("SPB"). The SPB wields substantial power over potential parolees' release from incarceration, and it does so in administrative hearings in which there is no right to counsel. But that power is not unlimited; it is subject to significant statutory and constitutional constraints, which Petitioners sought to enforce via petitions for rulemaking. Yet the Appellate Division blessed the SPB's unreasonable rejection of those petitions, thereby permitting it to retain procedures that do not comply with the law. Petitioners therefore respectfully request that this Court grant certification to vindicate the Judiciary's vital role in ensuring that administrative agency procedures comply with the law by directing the SPB to conform its regulations that dictate parole release procedures to due process and the SPB's legislative mandate.

The parole release process is mandated by the New Jersey Constitution, governed by legislation, and subject to meaningful judicial review. By statute, the SPB is compelled to release a person eligible for parole unless the evidence satisfies the legislative standard for ongoing detention. Case law also provides

procedural protections to individuals eligible for parole, including a qualified due process right to disclosure of evidence in parole proceedings unless disclosure would interfere with prison security or rehabilitation. Contrary to these legal obligations, the SPB's current rules flout due process by containing a *per se* restriction that prevents a parole seeker from obtaining psychological evaluations that the SPB relies upon in its decisions.

Petitioners asked the SPB to engage in rulemaking to correct this deficiency and ensure the SPB's compliance with the law, but the SPB denied those requests. In affirming the denials, the Appellate Division misread the applicable rules. The panel conflated a Department of Corrections (DOC) rule, N.J.A.C. 10A:22-2.7(a), which appropriately calls for a case-by-case analysis regarding disclosure of DOC medical and mental health records, with the SPB rule at issue, even though the plain language of the SPB rule designates *all* SPB "medical, psychiatric or psychological" information and records as "confidential," N.J.A.C. 10A:71-2.2(a)(1), and then withholds all material "classified as confidential by the [SPB]" from a person seeking parole without exception, N.J.A.C. 10A:71-2.2(c). This plain-language reading of the relevant rules demonstrates why they must be amended: the current rules allow the SPB to withhold access to psychological reports in every case, disregarding the individualized consideration that due process requires.

The Appellate Division further erred in affirming the SPB's rejection of other relief requested by the Petitions. The panel held that the rules need not be amended to require the Board to consider the age-crime curve as relevant evidence in satisfying (or not satisfying) its burden of demonstrating a likelihood of re-offense and to prevent the inappropriate use of youthful misconduct that is not relevant to risk of re-offense as an aggravating factor, despite a wealth of case law and evidence supporting Petitioners' arguments.

The SPB adjudicates thousands of parole release hearings every year, during which a person's liberty is at stake. Petitioners respectfully submit that this Court's review is warranted to provide meaningful judicial oversight and ensure that the procedures governing these hearings comply with the parole statute and the Constitution.

QUESTIONS PRESENTED

Was it arbitrary, capricious, or unreasonable for the State Parole Board to refuse to amend its regulations regarding parole release hearings to:

1. prevent the categorical withholding of psychological records;

2. require consideration of how aging reduces recidivism; or

3. prohibit use of youthful misconduct as an aggravating factor?

STATEMENT OF THE CASE

In June and September 2022, Petitioner Ronald Robbins and Petitioners

Joseph E. Krakora and the New Jersey Office of the Public Defender filed separate Petitions for Rulemaking (the "Petitions") with the SPB.[1] The Petitions requested that the SPB amend its regulations in three ways. First, they asked the SPB to change the rules prohibiting release to people seeking parole of psychological reports and other medical records relied upon by the SPB. Pa38-46.[2] Second, the Petitions proposed amendments to the SPB's regulations that would mandate consideration of how the age of the person seeking parole can decrease their likelihood of recidivating if released. Pa21-26, Pa35-38. Third, the Petitions sought amendments that would prevent the SPB from considering a person's youth as an aggravating factor in parole decisions. Pa31-35.

The SPB denied both Petitions outright. Pa1-12. On appeal, the Appellate Division affirmed the denials of the Petitions in a consolidated opinion. Pca4-36. With respect to the age-related issues, the panel "d[id] not mean to suggest that age is not relevant to the parole decision" because "[n]o one disputes there is an inverse correlation between age and recidivism." Pca23-24. Because a person denied parole can appeal and assert the failure to account for age as error, and because the Legislature has not specifically mandated the use of age in

[1] Jennifer N. Sellitti replaced Krakora as Public Defender on February 1, 2024.

[2] Pb – Petitioners' Appellate Division Brief. Prb – Petitioners' Appellate Division Reply Brief. Pa – Petitioners' Appellate Division Appendix. Pca – Appendix to Petition for Certification.

parole proceedings, the panel "decline[d] to second guess the [SPB's] decision to retain the current list of enumerated parole factors in the administrative code." Pca26. Similarly, the Appellate Division concluded that the right of appeal from denial of parole "is available to address improper consideration of an inmate's subsequent growth and increased maturity during incarceration." Pca30.

In contrast, the Appellate Division found the request to modify the rule about confidential records to "present[] a closer question." Pca6. It emphasized that "a . . . policy to deny disclosure of confidential information in all cases . . . would constitute an abdication of discretion as required in *Thompson* [*v. N.J. State Parole Bd.*, 210 N.J. Super. 107 (App. Div. 1986)] and would thus be arbitrary, capricious, and unreasonable." Pca34. But the court seemed to accept the SPB's erroneous argument that a separate, inapplicable rule, N.J.A.C. 10A:22-2.7(a)—which governs disclosure of DOC, not SPB, records—already "'calls for a case-by-case analysis of whether the materials would compromise safety, security, or the orderly operation of the facility' and therefore satisfies the due process requirements spelled out in *Thompson.*" Pca35. The panel was nonetheless "troubled" by the fact that at oral argument, "[n]o advocate" (including counsel for the SPB) "could recall a single instance where disclosure was granted by the [SPB]." *Ibid.* But it found that the "sparse record" did not "support or contradict" Petitioners' claim that the SPB is "violating the due

process rights of inmates seeking parole by improperly withholding disclosure of relevant confidential information." Pca35-36.

Petitioners filed timely Notices of Petition for Certification on June 3, 2024. Pca1-3.

ERRORS COMPLAINED OF AND COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

I. The Appellate Division Erred by Misinterpreting the Plain Language of the SPB's Current Confidentiality Rules and Failing to Remand for Promulgation of Amended Rules That Protect the Due Process Rights of People Seeking Parole.

The Petitions requested that the SPB modify its existing rules regarding disclosure of psychological evaluations to people seeking parole because the current regulation imposes a *per se* restriction on disclosure of those evaluations, in violation of the due process rights of parole seekers. The categorical nature of this rule is evident from the plain language of the regulations.

First, N.J.A.C. 10A:71-2.2(a) contains a list of SPB "records [that] shall be deemed confidential." The first category of confidential material is "[i]nformation, files, documents, reports, records or other written materials concerning an offender's medical, psychiatric or psychological history, diagnosis, treatment or evaluation[.]" N.J.A.C. 10A:71-2.2(a)(1).

Then, N.J.A.C. 10A:71-2.2(c) describes how adverse material is disclosed to—or withheld from—people seeking parole. It specifically prohibits

disclosure of material that is confidential under the SPB rules: "Inmates or parolees shall be afforded disclosure of adverse material or information considered at a hearing, *provided such material is not classified as confidential by the Board* or the Department." *Ibid.* (emphasis added). Thus, as made explicit by the plain text of the rules, people seeking parole can never access SPB psychological reports that are used against them in parole proceedings because those reports are withheld as "material . . . classified as confidential."

The withholding of psychological materials from people seeking parole has significant real-world consequences. The SPB must order pre-parole psychological evaluations in certain cases. *See* N.J.S.A. 30:4-123.54(b)(1); N.J.A.C. 10A:71-3.7(h). The SPB can also require a pre-parole psychological evaluation of anyone seeking parole "[a]t any time" and "as often as it deems necessary." N.J.A.C. 10A:71-3.7(i). And it uses these evaluations as weighty evidence in its decisions—sometimes improperly, in ways that are later rejected on appeal. *See, e.g.*, *Acoli v. N.J. State Parole Bd.*, 462 N.J. Super. 39, 60 (App. Div. 2019) ("[A] new psychological evaluation . . . played an indispensable part in the [SPB's] final decision."), *rev'd*, 250 N.J. 431 (2022) (rejecting SPB's reliance on psychological assessment to deny parole); *Trantino v. N.J. State Parole Bd.* (*Trantino VI*), 166 N.J. 113, 188 (2001) (rejecting SPB's "highly selective focus only on the psychological evidence supportive of its denial of

parole"); *N.J. State Parole Bd. v. Cestari*, 224 N.J. Super. 534, 549-51 (App. Div. 1988) (rejecting SPB's reliance on psychological assessment to deny parole); *cf. McGowan v. N.J. State Parole Bd.*, 347 N.J. Super. 544, 548 (App. Div. 2002) (requiring disclosure of psychological evaluation "so that appellant may appreciate the extent of the evidence considered by the Board in reaching its determination"). Yet this evidence is uniformly withheld from parole seekers, who thus cannot advocate for themselves in their parole proceedings.

The current *per se* rule is not consonant with the due process protections governing the parole release process. In *Thompson*, the Appellate Division found the "protected liberty interest, rooted in the language of our parole statute, in parole release," 210 N.J. Super. at 120 (citing *N.J. State Parole Bd. v. Byrne*, 93 N.J. 192 (1983)), to be "sufficient to invoke certain procedural protections, among which is a limited right to disclosure of prison records in parole proceedings." *Id.* at 121 (citation omitted). The court therefore approved non-disclosure of materials in parole proceedings only in certain circumstances: where confidentiality is required to ensure "the safe operation of a prison" and to avoid "[d]isclosures threatening to institutional security," such as "evaluations and anonymous reports of fellow prisoners and of custodial staff members," and where "[d]isclosure of therapeutic matters . . . would interfere with prisoner rehabilitation and relationships with therapists." *Id.* at 123. But

any restriction on disclosure of parole-related materials to people seeking parole must be "no broader than its lawful purpose requires" and subject to "good faith determinations" made by the SPB in implementing those standards. *Id.* at 124.

The SPB regulations in place when *Thompson* was decided, and for many years thereafter, complied with this mandate. *See* Pb39-45 (tracing history of regulations). The rules that preceded the current rules essentially parroted *Thompson*, permitting a person seeking parole to access their records unless, "if revealed to the inmate/parolee or others, [the records] could [1] be detrimental to the inmate, [2] adversely affect the inmate's rehabilitation or the future delivery of rehabilitative services, [or] [3] jeopardize the safety of individuals who signed the reports, or were parties to the decisions, conclusions or statements contained therein." 21 N.J.R. 767(a) (Mar. 20, 1989) (adopting revised N.J.A.C. 10A:71-2.1(a)(1)). But when the SPB revised its rules in 2011, it deleted the proviso that limited non-disclosure to the circumstances described in *Thompson*. *See* 43 N.J.R. 2144(b), 2146-47 (Aug. 15, 2011). Instead, as described above, the current rule imposes a *per se* bar on the disclosure of SPB records "concerning an offender's medical, psychiatric or psychological history, diagnosis, treatment or evaluation," without regard to the *Thompson* criteria. 44 N.J.R. 270(a), 271 (Feb. 6, 2012) (adopting current version of N.J.A.C. 10A:71-2.2(a)(1)).

The OPD's Petition for Rulemaking sought to remedy the disconnect between the current regulations and the requirements of *Thompson* by proposing to amend N.J.A.C. 10A:71-2.2(c), which provides for disclosure of documents to people seeking parole, to add *Thompson*'s limitations on non-disclosure to that rule. *See* Pa45. The Appellate Division's opinion affirming the SPB's denial of this proposal correctly stated that a "categorical denial" of confidential information to people seeking parole "would constitute an abdication of discretion as required in *Thompson*," which "unequivocally" held that "'[a] Parole Board rule or policy flatly prohibiting prisoner access to parole files would no longer be sustainable.'" Pca34-35 (alteration in original) (quoting *Thompson*, 210 N.J. Super. at 122). Because the plain language of the SPB's current rule operates on exactly this *per se* basis, the Appellate Division's inquiry should have ended there by holding that the categorical rule contained in the current regulations is unlawful under that court's prior precedent. *See R.* 2:12-4 (certification should be granted "if the decision under review is in conflict with any other decision of the same . . . court").

The Appellate Division instead inappropriately raised the burden upon Petitioners to prove not only that the plain language of the rule itself categorically restricts the disclosure of confidential information, but also that there must be "credible evidence in the record" that the SPB is "violating the

due process rights of inmates seeking parole by improperly withholding disclosure of relevant confidential information." Pca36. The court thus found that "the sparse record" as to actual disclosure decisions failed to meet Petitioners' burden that the SPB was acting unlawfully. Pca35. But the Petitions, and the appeal of their denial, were not targeted at any individual disclosure decision; instead, they were aimed at amending the plain language of the rule. When an unlawful agency regulation is challenged and subject to appeal, it is the Judiciary's role to respond by invalidating the rule. *See Lower Main Street Assocs. v. N.J. Hous. & Mortg. Fin. Agency*, 114 N.J. 226, 243 (1989) ("[T]he judiciary's role . . . plainly encompass[es] the duty to set aside agency rulemaking unauthorized by or inconsistent with the agency's enabling legislation." (citing cases)). The Appellate Division's failure to do so in this case was an error that should compel this Court's intervention.

The plain language of the rule, without an analysis of actual practices, was therefore sufficient for the Appellate Division to reject the denial of the Petitions. But even then, the record was not as "sparse" as the Appellate Division claimed. The SPB has never denied withholding all psychological evaluations from every potential parolee; to the contrary, it confessed an erroneous belief in its power to so, stating that it "does not believe that it violates due process by withholding mental health evaluations" and releases them only

if "directed pursuant to a court order." Pa11. And, critically, counsel for the SPB conceded at oral argument that he is not aware of "a single instance where disclosure was granted by the Board," rather than a court. Pca35. The OPD's experience representing people seeking parole, and the experience of the Seton Hall Law School Center for Social Justice described in its amicus brief before the Appellate Division, is consistent with the plain language of the SPB's *per se* rule against disclosure of psychological evaluations. The record is therefore sufficient to find it arbitrary, capricious, and unreasonable for the SPB to deny a petition for rulemaking to amend the plain language of its unlawful categorical rule against disclosure of its psychological evaluations to people seeking parole.

The Appellate Division's decision not to order amendments to N.J.A.C. 10A:71-2.2(c) that conform with *Thompson* resulted in part from its decision to credit the SPB's "assurances" that an inapposite regulation, N.J.A.C. 10A:22-2.7(d), "calls for a case-by-case analysis" as required by *Thompson*. Pca35. That separate rule is irrelevant to the question presented in this case. N.J.A.C. 10A:22-2.7(d) is located in a chapter of the Administrative Code concerning "the records of the Department of Corrections." N.J.A.C. 10A:22-1.2. It designates as confidential under the Open Public Records Act (OPRA) "[a]ny information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation," N.J.A.C. 10A:22-2.3(a)(4), but then allows a person to

"obtain a copy of his or her medical records" unless institutional concerns require otherwise. N.J.A.C. 10A:22-2.7(a), (d), (e). The SPB regulation, by contrast, treats SPB records differently than DOC records. It not only makes "materials concerning an offender's medical, psychiatric or psychological history, diagnosis, treatment or evaluation" confidential under OPRA, N.J.A.C. 10A:71-2.2(a)(1); it also provides that any "material . . . classified as confidential by the Board" is not disclosed to people seeking parole, without exception. N.J.A.C. 10A:71-2.2(c). Indeed, SPB regulation refers disjunctively to "material . . . classified as confidential by the Board *or* the Department," *ibid.* (emphasis added), which only serves to make absolutely clear that the SPB rules prohibit disclosure of any of the SPB's pre-parole psychological evaluations described above (as separate from medical records held by the DOC).

The Appellate Division, like the SPB, also erroneously sought refuge in a person's right to seek appellate review of the denial of access to confidential records. The SPB states that it "release[s] mental health evaluations as directed pursuant to a court order" when a person seeking parole files an appeal, Pa11, and the Appellate Division opinion suggested that "an appeal from a denial of disclosure" is the appropriate forum to create "a record with which to scrutinize whether the Board . . . violated the inmate's due process rights." Pca36. But the appellate process is "too little, too late" to cure the constitutional violations.

The due process right established in *Thompson* applies not only at the appellate stage; instead, the law provides for "a limited right to disclosure of prison records *in parole proceedings*." 210 N.J. Super. at 121 (emphasis added). The appellate procedure set forth in *Thompson*, *id.* at 126, therefore presupposes that the SPB has carried out its obligation to conduct "good faith determinations" of whether confidential records must be withheld from the person seeking parole. *Id.* at 124. It is all the more important that the SPB regulations are faithful to the legal standard because there is no right to counsel in parole proceedings, either before the SPB or on appeal. *Byrne*, 93 N.J. at 211. The Petitions thus sought enforcement of the *Thompson* right in the regulations itself, rather than requiring people seeking parole to appeal in every single case to have a chance, months or years later, of enforcing their rights to due process. It is not sufficient, or compliant with the law, for the SPB to promulgate a deficient regulation governing its hearings and leave it to the courts to sort everything out on appeal.

Even when it comes to appeals, the SPB further complicates matters by insisting upon "a consent protective order/agreement" when providing mental health evaluations to attorneys representing people seeking parole. Pa9. These protective orders permit counsel to obtain confidential psychological evaluations only if the attorney agrees not to share, or even discuss, the contents of the document with the client. *See* Pb49 (citing cases). But *Thompson*

squarely rejected a proposed rule that allowed sharing confidential documents with attorneys but not their clients because "counsel cannot effectively evaluate materials purporting to report on the client without consulting the client about them." 210 N.J. Super. at 125.[3]

The SPB's insistence on withholding disclosure of psychological evaluations to parole seekers on appeal—both those who are *pro se* and those represented by counsel who must sign a protective order—is particularly absurd because the appellate decisions adjudicating these appeals regularly discuss the evaluations at length. In one recent example, an OPD attorney represented a person seeking parole on appeal and, to expedite the litigation, signed the consent protective order without litigating whether the psychological report could be disclosed to the client. The Appellate Division reversed the SPB's denial of parole in an opinion that spent several paragraphs describing a report from Dr. Jan Segal. *B.J. v. N.J. State Parole Bd.*, Docket No. A-3779-21, 2024 WL 1262852, at *1-2 (App. Div. Mar. 26, 2024) (reprinted at Pca37-44).[4] Thus, appellant B.J. learned the contents of the report used to deny him parole at the same time the general public obtained the information when the opinion was

[3] *Thompson* noted, but did not evaluate, a "second objection, that the suggestion would interfere with the attorney-client relationship." 210 N.J. Super. at 125.

[4] No contrary unpublished decisions are known to counsel. *R.* 1:36-3. The opinion is not relied upon as legal precedent, but to provide "factual evidence" relevant to the case. *In re D.L.B.*, 468 N.J. Super. 397, 401 n.2 (App. Div. 2021).

posted on the court's website. That type of public disclosure is not consistent with the SPB's promulgation and application of a categorical *per se* rule against ever disclosing these evaluations to people seeking parole.

If the SPB's rules already called for the type of case-by-case analysis required by *Thompson*, and the OPD's objection was to the SPB's failure to follow its own rules, then the Appellate Division's opinion would make sense. But the very reason that the OPD filed a rulemaking petition is because the SPB's rules do not comply with *Thompson*. The plain language of the regulation categorically makes the SPB's psychological evaluations confidential, N.J.A.C. 10A:71-2.2(a)(1), and categorically denies parole seekers access to this material, N.J.A.C. 10A:71-2.2(c). This codified policy is the polar opposite of the document-by-document "good faith determinations" required by *Thompson*, 210 N.J. at 124. The SPB's refusal to amend its rules in response to the Petitions, and the Appellate Division's affirmance of that refusal, violate the due process rights of people seeking parole. This Court should therefore grant certification to reverse the Appellate Division's decision and remand to the SPB so that it can amend its regulations to comply with *Thompson*.

II. The Appellate Division Erroneously Affirmed the Denial of Petitioners' Request to Mandate that the SPB's Decisions Consider How Increased Age Reduces the Risk of Recidivism.

The Appellate Division rejected Petitioners' request to amend the SPB's

rules to account for the inverse relationship between age and recidivism. In support of their Petition for Certification, Petitioners rely primarily upon their briefs filed in the Appellate Division. *See* Pb16-27; Prb2-6. In particular, the Appellate Division's reliance on the SPB's catch-all discretion to "consider any other factors deemed relevant" in addition to those listed in the Administrative Code, *see* Pca26 (quoting N.J.A.C. 10A:71-3.11(b)), does not adequately account for the fact that "age, as a variable, is always relevant, applicable evidence to the appropriateness of parole release," Pb16, such that "[i]f . . . the SPB is going to list factors relevant to its decisions, then age must be one of those factors for the reasons set forth in the Petitions." Prb4; *see also* Pca23 ("We do not mean to suggest that age is not relevant to the parole decision[.]").

The Appellate Division also believed that "to the extent the judiciary has a role to play in setting or revising parole policy, our Supreme Court is better suited than an intermediate appellate court to consider the effects of the policy shift petitioners and amici urge us to impose on the executive branch without the imprimatur of legislation." Pca21. But the "imprimatur of legislation" comes from the Parole Act itself, which mandates release unless the SPB establishes a reason to deny it. *Byrne*, 93 N.J. at 205-06 (describing "shall . . . unless" language of N.J.S.A. 30:4-123.56). The Judiciary's role is to ensure that the SPB "render[s] its decision by application of the statutory criteria to all of

the relevant evidence," *Trantino VI*, 166 N.J. at 175 (cleaned up)—including age, for the reasons discussed in the Petitions and Petitioners' Appellate Division briefing. Respectfully, this Court should accept the Appellate Division's invitation, grant certification, and reverse the decision affirming denial of the Petitions.

III. The Appellate Division Erroneously Affirmed the Denial of Petitioner's Request to Prevent the Improper Use of Youthful Misconduct in Parole Release Decisions.

Finally, the Appellate Division incorrectly affirmed the SPB's rejection of amendments designed to prevent the inappropriate use of youthful misconduct against a person seeking parole. Petitioners rely on their Appellate Division briefing, *see* Pb27-36; Prb6-10, and add the following comments. First, although the Appellate Division rejected application of case law regarding criminal sentencing to parole release decisions, *see* Pca29, Petitioners explained that they relied on criminal sentencing law that was specifically "tied to the likelihood of recidivism and thus bears directly on parole release decisions." Prb8. Second, the Appellate Division wrongly stated that Petitioners "cannot identify a single case where the [SPB] considered an inmate's youth improperly." Pca30. In fact, Petitioners' reply brief discussed such a case at length. *See* Prb8-9 (discussing *Kiett v. N.J. State Parole Bd.*, No. A-0894-21 (App. Div. July 18, 2023) (reprinted at Pa70-112)).

REASONS FOR GRANTING CERTIFICATION

This Court should grant certification because this case "presents a question of general public importance." *R.* 2:12-4. A system of parole is mandated by the New Jersey Constitution. *N.J. Const.* art. V, § 2, ¶ 2. The SPB adjudicates over 3,000 parole release hearings per year. *See* N.J. State Parole Bd., *Annual Report 2023* 23 (Mar. 1, 2024), https://tinyurl.com/ye263w75. The decisions made at those hearings determine whether the incarcerated person seeking parole will be entitled to liberty. *See Byrne*, 93 N.J. at 208 ("[I]t is undeniable that '[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" (quoting *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part))). The Petitions raise substantial issues regarding due process and fair decision-making in those hearings, which call for "an exercise of the Court's supervision." *R.* 2:12-4.

This case further warrants certification as a vehicle for the Court to clarify the Judiciary's role in reviewing a denial of a rulemaking petition. The Appellate Division believed that unless "the [SPB] was obligated to promulgate regulations to implement a new or amended statute," an appellate court need not apply "de novo review of a question of statutory construction." Pca20. That determination is in tension with this Court's prior precedent, which holds that

"it remains the province of courts, under their traditional review powers, to determine what are the express or implied legislative policies in an enactment," and therefore assess "whether the . . . inaction" of denying a petition for rulemaking "violates the enabling act's express or implied legislative policies." *In re Petition for Rulemaking, N.J.A.C. 10:82-1.2 & 10:85-4.1*, 117 N.J. 311, 325 (1989). Judicial review of agency action is a constitutional right, *see N.J. Const.* art. IV, § 5, ¶ 4, and traces back New Jersey's early common law, as later codified in the State Constitutions of 1844 and 1947. *See Monks v. N.J. State Parole Bd.*, 58 N.J. 238, 248-49 (1971). The Court's review of agency conduct is "designed to insure procedural fairness in the administrative process and to curb administrative abuses." *Id.* at 249 (citing cases); *see generally* Ronald K. Chen, *How Two Constitutional Reforms Gave New Jersey Government More Streamlined Authority and Judicial Review*, *N.J. Lawyer*, Oct. 2022, at 53-54 (describing how the 1947 constitution "has been vigorously interpreted in a way to provide a unique mechanism by which administrative agency action is subject to judicial review in New Jersey"). The Court should grant certification to reiterate these principles in the context of a petition for rulemaking.

CONCLUSION

For the reasons described above, Petitioners respectfully submit that the Court should grant certification in this matter.

Respectfully Submitted,

JENNIFER N. SELLITTI, Public Defender
Attorney for Petitioners

BY: *s/ Michael R. Noveck*
MICHAEL R. NOVECK
Dated: June 13, 2024 Deputy Public Defender

CERTIFICATION

I hereby certify that the foregoing petition presents substantial questions and is filed in good faith and not for the purpose of delay.

s/ Michael R. Noveck
MICHAEL R. NOVECK
Dated: June 13, 2024 Deputy Public Defender