No. 18-6170

United States Court of Appeals
FOR THE FOURTH CIRCUIT

THOMAS FRANKLIN BOWLING,
Petitioner-Appellant,

v.

DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Virginia

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BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because this case arose under the laws of the United States, namely 28 U.S.C. § 2254, 42 U.S.C. § 1983, or both. Bowling's Eighth and Fourteenth Amendment claims are cognizable under § 2254 because he alleges he is "in custody in violation of the Constitution." *See* 28 U.S.C. § 2254(a). Bowling's claims are also cognizable under § 1983 because "success in the action *would not necessarily* spell immediate or speedier release" from custody but would entitle Bowling to a new parole hearing. *See Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (emphasis in original). To be sure, two circuits have concluded that § 1983 and § 2254 remedies are mutually exclusive. *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 865 (11th Cir. 2017); *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016). But every court to consider the issue has concluded that there is a federal remedy for unconstitutional parole proceedings under one or both of these statutes. *See, e.g., Terrell v. United States*, 564 F.3d 442, 448–49 (6th Cir. 2009).

Nor need this Court decide whether § 1983 or § 2254 provides Bowling's cause of action. The district court dismissed the claim under

both § 1983 and § 2254. J.A. at 113. And even if § 1983 were the exclusive vehicle for Bowling's claims, he alleged facts in his *pro se* habeas petition that set forth § 1983 claims even though he cited only § 2254. *See, e.g.*, *Castro v. United States*, 540 U.S. 375, 381 (2003) (explaining that federal courts may "ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion . . . in order to avoid an unnecessary dismissal"); *see also Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015) ("Liberal construction of the pleadings is particularly appropriate where . . . there is a *pro se* complaint raising civil rights issues."). This is particularly true where, as here, federal courts disagree about whether relief is available under one statute or both, and the two statutes afford Bowling the same relief upon a showing of a constitutional violation.

On January 23, 2018, the district court dismissed Bowling's case. J.A. at 119. The district court's dismissal is a final judgment. Bowling filed a timely notice of appeal on February 20, 2018. *See id.* at 121; FED. R. APP. P. 4(a)(1)(A). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291. On August 23, 2018, this Court granted Bowling a certificate of appealability on the following question: "Whether the

district court erred in denying Bowling's claim that the Virginia Parole Board's decisions result in violation of the Eighth and Fourteenth Amendments." Assuming that Bowling's claims are cognizable under § 2254, this Court's exercise of jurisdiction over the appeal is in accordance with 28 U.S.C. § 2253(c).

STATEMENT OF THE ISSUES

I. Did Bowling plausibly allege that the Virginia Parole Board violated the Eighth Amendment by failing to consider his diminished criminal culpability and his demonstrated maturity and rehabilitation in prison when deciding whether to grant parole?

II. Is Bowling entitled to a new parole review because the Virginia Parole Board arbitrarily deprived him of his due process liberty interest when it denied him parole under guidelines for adults that do not account for his diminished criminal culpability as a juvenile offender and his demonstrated maturity and rehabilitation in prison?

STATEMENT OF THE CASE

Thomas Bowling, a juvenile offender currently in the custody of the Virginia Department of Corrections, filed a petition for a writ of habeas corpus alleging that the Virginia Parole Board violated his Eighth and Fourteenth Amendment rights by denying parole without considering the mitigating qualities associated with his status as a juvenile offender. J.A. at 6–34. The district court dismissed Bowling's petition for failure to state a claim upon which relief can be granted. *Id.* at 119. Bowling appeals that dismissal.

Statement of Facts

Thomas Bowling is currently serving life in prison with the possibility of parole for his role in a botched robbery that ended in a homicide. J.A. at 23. The robbery was conceived and planned by James Ward and Dock Hall—both men in their forties—who wanted to "make some money" before the Christmas holiday. *See Hall v. Commonwealth*, 403 S.E.2d 362, 365 (Va. Ct. App. 1991).[1] Ward and Hall first tried to

[1] *Hall v. Commonwealth* was Dock Hall's appeal of his criminal conviction for his involvement in this crime. 403 S.E.2d 362 (Va. Ct. App. 1991). Hall's appeal was decided on the same day as Bowling's, and the two cases share the same facts.

recruit another juvenile to participate in the robbery. *Id.* After that teenager refused, Ward and Hall persuaded Bowling to commit the robbery. *Id.*; *Bowling v. Commonwealth*, 403 S.E.2d 375, 377 (Va. Ct. App. 1991). Bowling was seventeen years old at the time. J.A. at 23.

On the evening of December 24, 1987, Ward and Hall picked up Bowling, drove him to a local gas station, and parked across the street. *Bowling*, 403 S.E.2d at 377. Hall gave Bowling detailed instructions on how to rob the station, telling Bowling that the station manager was named Glenn West and that he should call Mr. West by name so that Mr. West would be more likely to open the safe. *See id.*; *Hall*, 403 S.E.2d at 365. Ward handed Bowling a loaded 25-millimeter pistol. *Bowling*, 403 S.E.2d at 377. Before Bowling exited the van, Hall told him that he should shoot Mr. West if necessary. *Hall*, 403 S.E.2d at 365.

A few minutes after Bowling went into the gas station, he returned to the van and told Hall that he had decided not to rob the station because there were customers inside. *Id.* Hall convinced Bowling to try again. *Id.* Bowling then returned to the gas station where he found Mr. West standing outside the station waiting to be picked up by his wife. *Bowling*, 403 S.E.2d at 377. As instructed by Hall, Bowling addressed Mr. West

by name and asked him to open the safe. *Id.* Mr. West told Bowling that he was unable to open the safe but offered him the cash in his pocket. *Id.* at 377–78. Bowling took the money and again asked Mr. West to open the safe. *Id.* at 377. When Mr. West said that he could not, Bowling said that he had to kill him. *Id.* Bowling then shot Mr. West in the stomach and ran back to the van. *Id.* at 378.

When Bowling rejoined the others in the van, Hall took the gun back from Bowling. *Hall*, 403 S.E.2d at 366. He also took the money Bowling had stolen from Mr. West. *Id.* As Ward drove the group home, Hall unloaded the gun. *Id.* He then divided up and distributed the money. *Id.* Mr. West died from his injuries. *Bowling*, 403 S.E.2d at 376.

Seventeen-year-old Bowling was tried as an adult for capital murder in Virginia state court. *Id.* Prior to his bench trial, Bowling's attorney moved to admit evidence concerning Bowling's mental state at the time of the crime. *Id.* at 378. His attorney argued that Bowling could not have acted with premeditation because he "functioned at the lower limits of the borderline range of the Adult Intelligence Scale and . . . did not have developed problem solving skills or elaborate abstract thinking capability." *Id.* The trial court denied the motion, found Bowling guilty

of capital murder, and sentenced him to life in prison with the possibility of parole.[2] *Id.*; J.A. at 111. His conviction was affirmed on appeal. *Bowling*, 403 S.E.2d at 381. Now forty-eight years old, Bowling has been incarcerated for the past thirty-one years. *See* J.A. at 23.

After seventeen years in prison, Bowling first became eligible for parole in 2005. *Id.* at 25, 111. Each year, from 2005 through 2016, Bowling applied to the Virginia Parole Board for parole consideration.[3] *Id.* at 25. And each year, Bowling received a letter from the Board denying his application. *Id.* at 25, 37–55.

The Board makes its parole decisions based on fourteen Parole Decision Factors listed in the Board Policy Manual. J.A. at 75, 79–82. These factors have been used by the Board in making parole determinations since July 1997, and the Policy Manual was last updated in 2006. *Id.* at 67; VA. PAROLE BD., POLICY MANUAL (2006) [hereinafter POLICY MANUAL], https://vpb.virginia.gov/files/1107/vpb-

[2] Parole has since been abolished in Virginia for all crimes committed on or after January 1, 1995. VA. CODE ANN. § 53.1-165.1.

[3] Bowling also applied for parole in 2017 and 2018. The Board denied his 2017 parole application, J.A. at 112, and his 2018 application is still pending. These applications and decisions are outside the scope of this appeal because they occurred after Bowling filed his habeas petition.

policy-manual.pdf [https://perma.cc/LF87-P4PL]. The same Parole Decision Factors are used for all parole candidates—both adult and juvenile offenders. *See* J.A. at 67.

The Board has derived standard reasons for denying parole from these Decision Factors. *See About the Parole Board: Parole Denial Reasons*, VA. PAROLE BD., https://vpb.virginia.gov/about-the-parole-boar d [https://perma.cc/2ZG2-V9L5] (last visited Oct. 23, 2018). Each letter that Bowling received denying parole has listed one or more of these reasons. *See* J.A. at 37–55. In Bowling's 2016 parole denial letter, the Board listed the following reasons as grounds for denying parole: "serious nature and circumstances of your offense(s)," "crimes committed," "release at this time would diminish seriousness of crime," and "the Board concludes that you should serve more of your sentence prior to release on parole." J.A. at 54–55. By 2016, these reasons had all appeared, in one combination or another, in each of his ten previous parole denial letters, with "serious nature and circumstances" of the crime appearing in every letter.[4] *See id.* at 37–55.

[4] From 2005 through 2009, this reason was worded as "serious nature and circumstances of crime." J.A. 37–41. In 2010, the wording was changed to "serious nature and circumstances of *offense*," J.A. at 42, and

The Board cited Bowling's conduct during incarceration as a reason for denying parole in only one letter—the 2013 parole denial—which listed "poor institutional adjustment and/or record of institutional infractions indicate that offender is not ready to conform to society." *Id.* at 46–47. Bowling appealed based on his impeccable institutional record which had no disciplinary (or other) infractions since February 2003. *See id.* at 26–27. The Board then issued a new parole denial letter citing only the serious nature of the offense and the Board's conclusion that he needed to serve more of his sentence. *See id.* at 27, 48–49.

When the Board denied Bowling parole in 2016, he filed a petition for a writ of habeas corpus in the Supreme Court of Virginia on November 16, 2016, alleging that the Board had violated his Eighth and Fourteenth Amendment rights. J.A. at 112. On March 10, 2017, the Supreme Court of Virginia dismissed Bowling's petition, stating that his claims were "not cognizable in a petition for a writ of habeas corpus." *Id.* at 36.

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in 2013, the wording was changed to "serious nature and circumstances of *your* offense(s)," J.A. at 48.

Proceedings Below

Bowling filed this § 2254 petition in the U.S. District Court for the Western District of Virginia on April 4, 2017, alleging violations of his Eighth and Fourteenth Amendment rights. *Id.* at 112. The district court reviewed Bowling's claims *de novo* and dismissed his petition on January 23, 2018. *Id.* at 111. The district court concluded that Bowling was not entitled to relief under the Eighth Amendment because the special protections for juveniles identified in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), do not apply to parole-eligible juvenile homicide offenders. J.A. at 115. The district court also concluded that Bowling was not entitled to relief under the Fourteenth Amendment because the Board's parole procedures "satisfy the minimum requirements of due process and federal courts greatly defer to state parole decision-making." *Id.* at 117. Bowling appealed both of the district court's determinations, and this Court granted a certificate of appealability on both issues.

SUMMARY OF THE ARGUMENT

In 2016, the Virginia Parole Board denied Bowling's parole application. J.A. at 54–55. Despite juvenile offenders' heightened constitutional protections, the Board did not evaluate Bowling as a juvenile offender when deciding whether to grant parole. The Board's failure to weigh the mitigating qualities associated with Bowling's status as a juvenile offender during his parole review violated the Eighth and Fourteenth Amendments. Each constitutional violation provides independent and adequate grounds for this Court to reverse the district court's decision.

As a parole-eligible juvenile homicide offender, Bowling has an Eighth Amendment right to a parole review that meaningfully considers both his diminished criminal culpability at the time of his offense and his demonstrated maturity and rehabilitation since adolescence. The Board must consider these factors because juvenile offenders' lessened culpability and greater capacity for reform make them "constitutionally different" than adults. *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Parole procedures that fail to account for these mitigating qualities of youth violate a "foundational principle" of the Eighth Amendment: "that

imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 474.

Bowling alleges that in denying him parole, the Board failed to consider these mitigating qualities. He alleges that the Board has consistently denied him parole solely due to the serious nature of his crime. Because the district court failed to recognize (1) that Bowling was entitled to enhanced Eighth Amendment protections, and (2) that the Board's actions violated the Eighth Amendment, the court's order dismissing his claims should be reversed and the case remanded for consideration of the Eighth Amendment issue on the merits.

The Board also violated Bowling's Fourteenth Amendment rights when it deprived him of both his constitutional and his statutory liberty interests in parole without due process. As a juvenile offender, Bowling has a constitutional liberty interest in parole. Unlike an adult offender, a juvenile offender like Bowling is likely to mature from the character flaws that contributed to his offense. He thus has a liberty interest in the opportunity to rejoin society as a law-abiding adult.

Because Bowling has that liberty interest, the Board's parole procedures must account for his age at the time of his offense. The

Board's failure to consider the mitigating qualities of his youth arbitrarily deprived Bowling of this constitutional liberty interest. The Board could not accurately assess whether Bowling had served sufficient time in prison and whether he posed a continued threat to the community without weighing his diminished culpability and his subsequent maturation.

Alternatively, Bowling has a statutory liberty interest in parole under Virginia law and is entitled to procedures that require consideration of his age at the time of his offense. The statutory liberty interest in parole extends to both adults and juveniles, but juveniles need additional procedures to safeguard their interest due to the mitigating qualities of youth. The Board denied Bowling's parole application using the factors developed for adult—rather than juvenile—offenders. This Court should hold that the Board arbitrarily deprived Bowling of his constitutional or statutory interest in parole. At a minimum, Bowling has sufficiently alleged that the Board did not consider his juvenile offender status and is entitled to a remand for further review of his Fourteenth Amendment claim. Bowling is also entitled to a remand because the district court erred when it refused to admit Bowling's pre-

2016 parole denials as evidence of the Board's arbitrary procedures and decisions.

STANDARD OF REVIEW

The district court's dismissal of Bowling's claims raises questions of law and is reviewed *de novo*. *See Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 776 (4th Cir. 2013). When reviewing an appeal from a motion to dismiss for failure to state a claim, this Court construes the facts "in the light most favorable to the plaintiff." *Id.* As the district court recognized, the Supreme Court of Virginia dismissed Bowling's petition for a writ of habeas corpus without an adjudication "on the merits," so the Antiterrorism and Effective Death Penalty Act of 1996 affords no deference to that decision. J.A. at 112; *see also Hudson v. Hunt*, 235 F.3d 892, 895 (4th Cir. 2000).

ARGUMENT

I. THE VIRGINIA PAROLE BOARD VIOLATED THE EIGHTH AMENDMENT BY DENYING BOWLING PAROLE WITHOUT CONSIDERING THE MITIGATING QUALITIES ASSOCIATED WITH HIS STATUS AS A JUVENILE OFFENDER.

The Eighth Amendment requires the Board to provide Bowling with parole review that meaningfully considers his diminished culpability for his crime and his demonstrated maturity and rehabilitation while in prison. Bowling alleged that the Board failed to satisfy this constitutional requirement, and dismissal therefore was error. This Court should reverse the judgment of the district court and remand for consideration of Bowling's Eighth Amendment claim on the merits. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that a complaint survives a motion to dismiss if it contains facts sufficient to "state a claim to relief that is plausible on its face").

A. The Eighth Amendment requires the Board to consider Bowling's diminished culpability for his crime and his demonstrated maturity and rehabilitation while in prison when deciding whether to grant parole.

Bowling has an Eighth Amendment right to parole procedures that take into account his "lessened culpability" for his crimes and his "greater capacity for change." *See Miller v. Alabama*, 567 U.S. 460, 465 (2012)

(quoting *Graham v. Florida*, 560 U.S. 48, 74 (2010)) (internal quotation marks omitted). This right stems from his status as a juvenile offender and the Supreme Court's recognition that juveniles are "constitutionally different from adults." *See, e.g.*, *id.* at 465, 471.

Bowling is less culpable than an adult offender because, like all juvenile offenders, he had an "underdeveloped sense of responsibility" at the time of his crime and was "more vulnerable . . . to negative influences and outside pressures." *See id.* at 471 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). He is also more capable of change than an adult offender because his character was "less fixed" at the time of his crime and therefore his actions are less likely to be evidence of irretrievable depravity. *See id.* at 471 (quoting *Roper*, 543 U.S. at 570).

These two mitigating qualities of youth—"lessened culpability" and a "greater capacity for change"—are the core justifications for affording juvenile offenders special Eighth Amendment protection. *See Miller*, 567 U.S. at 465 (quoting *Graham*, 560 U.S. at 74) (internal quotation marks omitted). In *Graham*, the Court established a categorical rule that juvenile non-homicide offenders cannot be sentenced to life without parole. 560 U.S. at 75. A sentence of life without parole, the Court

explained, "makes an irrevocable judgment" that the offender will never be fit to reenter society. *Id.* at 74. In light of juveniles' "capacity for change and limited moral culpability," the Court concluded that such an irrevocable judgment is never appropriate for juvenile non-homicide offenders. *Id.*

Miller applied these mitigating qualities of youth to a different class of juveniles—juvenile homicide offenders—and categorically barred mandatory sentences of life without parole for juvenile homicide offenders. *Miller*, 567 U.S. at 465. Although *discretionary* sentences of life without parole remain constitutional for some juvenile homicide offenders, *Miller* made clear that such a punishment should be "rare" and may be imposed only after a trial court conducts an individualized examination of the juvenile and determines that the juvenile's homicide crime "reflects irreparable corruption." *Id.* at 479–80 (quoting *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 573).

Miller's holding, like *Graham*'s, was based on the Court's recognition that "children are different" from adults and "those differences counsel against irrevocably sentencing [juveniles] to a lifetime in prison." *Id.* at 480. As the Court explained, juveniles'

"distinctive (and transitory) mental traits and environmental vulnerabilities" are not crime-specific. *Id.* at 473. Rather, juveniles' lessened culpability and greater capacity for change are "evident in the same way, and to the same degree, when . . . a botched robbery turns into a killing." *Id.* at 473, 476.

To be sure, *Miller* and *Graham* only addressed sentencing of juvenile offenders. But their logic necessarily applies to the actions of parole boards as well. The Court has gone to great lengths to prohibit sentences of life without parole for juvenile offenders unless the juvenile's character is so corrupt as to make the juvenile irredeemable. *See Miller*, 567 U.S. 460. For all other juvenile offenders (*i.e.*, those, like Bowling, whose character *is* redeemable), the Eighth Amendment guarantees a sentence that provides a "meaningful opportunity to obtain release." *See, e.g.*, *Graham*, 560 U.S. at 75. It runs counter to the logic of *Graham* and *Miller* to permit state parole boards to deny parole based only on the serious nature of the offense without considering juvenile offenders' diminished culpability at the time of the offense and demonstrated maturity since then. Because the serious nature of the crime will never change, neither will the Board's parole determination. J.A. at 76, ¶ 8.

The Board would thus be converting nominally parole-eligible sentences into *de facto* life without parole sentences. This the Eighth Amendment forbids. The Board cannot be allowed to circumvent the Constitution by doing precisely what the Eighth Amendment forbids a sentencing court from doing: Denying a juvenile offender a chance to rejoin society based only on the serious nature of a crime he committed when he was a "child in the eyes of the law." *See Graham*, 560 U.S. at 79.

Bowling is a parole-eligible juvenile homicide offender. J.A. at 25. His sentence reflects that he is among those juvenile homicide offenders who are "capable of change" despite having committed a "heinous crime[]." *See Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). The Eighth Amendment therefore requires the Board to provide Bowling a "meaningful opportunity to obtain release" by accounting both for his maturity and rehabilitation and for evidence demonstrating that "the bad acts he committed as a teenager are not representative of his true character." *Graham*, 560 U.S. at 79. Only by considering Bowling's diminished culpability and heightened capacity for reform can the Board fulfill its constitutional duty and make a meaningful determination as to

whether Bowling's release on parole would "best serve the interest of society." *See* J.A. at 76, ¶ 7; POLICY MANUAL at 1.

The application of *Graham* and *Miller* to parole-eligible juvenile homicide offenders is a matter of first impression in this Court. But not in others. The state and federal courts that have addressed this issue uniformly agree that parole boards must consider juveniles' diminished culpability and heightened capacity for change in their parole reviews. *See, e.g.*, *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1009 (E.D.N.C. 2015); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 943 (S.D. Iowa 2015); *Atwell v. State*, 197 So. 3d 1040, 1047–49 (Fla. 2016); *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 30 N.Y.S.3d 397, 400–01 (N.Y. App. Div. 2016). In *Greiman*, for example, the court reasoned that parole boards have an Eighth Amendment obligation to weigh the factors identified in *Graham* and *Miller* because "[i]t is axiomatic that a juvenile offender could only prove increased maturity and rehabilitation warranting release from custody at some time well after a sentence is imposed." 79 F. Supp. 3d at 943.

Nor is the Supreme Court's decision in *Virginia v. LeBlanc* to the contrary. 137 S. Ct. 1726 (2017). That case came before the Court on

habeas review under AEDPA. The Virginia Supreme Court had held that a sentence of life without parole for a juvenile non-homicide offender was constitutional because the defendant had an opportunity for release under the state's geriatric release program. *Id*. at 1727–28. In *LeBlanc v. Mathena*, this Court held that the Virginia Supreme Court had unreasonably applied the Supreme Court's holding in *Graham*. 841 F.3d 256, 259–60 (4th Cir. 2016), *rev'd sub nom. Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017). The Supreme Court reversed, emphasizing AEDPA deference and holding that *Graham* did not clearly establish this point. *LeBlanc*, 137 S. Ct. at 1728–29. But that AEDPA decision "express[ed] no view on the merits of the underlying Eighth Amendment claim." *Id.* at 1729 (internal punctuation omitted).

In granting the State's motion to dismiss, the district court here failed to engage with the underlying rationale of *Graham* and *Miller*. Instead, it concluded: (1) *Graham* only applies to juvenile non-homicide offenders, (2) *Miller* only applies to juvenile homicide offenders serving mandatory sentences of life without parole, (3) Bowling is a juvenile homicide offender sentenced to life with parole, and therefore (4) "*Miller* and *Graham* do not apply." J.A. at 115. In the district court's view, this

meant that Bowling was not entitled to enhanced parole review procedures. *Id.* The district court's failure to recognize that Bowling falls within *Graham* and *Miller*'s heightened Eighth Amendment protection is reversible error.

B. The Board failed to consider Bowling's diminished culpability and his demonstrated maturity and rehabilitation when deciding whether to grant parole.

The Board's 2016 parole denial violated Bowling's Eighth Amendment rights because it failed to consider either (1) the mitigating qualities associated with his youth at the time of his offense, or (2) his maturity and rehabilitation while in prison. Instead, the Board treated Bowling the same as an adult offender. It based his parole denial on the same fourteen "Parole Decision Factors" it uses for adult offenders. J.A. at 67–69. Those factors have remained virtually unchanged since their enactment in 1997, do not differentiate between juvenile and adult offenders, and do not instruct the Board to give any special consideration to an inmate's status as a juvenile offender. *See* J.A. at 70, 79–82.

First, in spite of abundant evidence that Bowling's crime was the product of his youth and immaturity, Bowling alleges that the Board denied parole without weighing his lessened culpability for his crime. *Id.*

at 32–34. Two forty-year-old men, James Ward and Dock Hall, conceived of and planned the robbery that resulted in Mr. West's death. *See Hall v. Commonwealth*, 403 S.E.2d 362, 365 (Va. Ct. App. 1991). Ward and Hall persuaded Bowling to participate in the robbery. *See Bowling v. Commonwealth*, 403 S.E.2d 375, 377 (Va. Ct. App. 1991). Ward gave Bowling a loaded gun and instructed him to shoot Mr. West if necessary. *Id.*; *Hall*, 403 S.E.2d at 365. And when Bowling initially walked away from the robbery because there were customers in the store, Hall then had to convince Bowling to attempt the robbery a second time. *Hall*, 403 S.E.2d at 365. These facts establish Bowling's reduced culpability based on his juvenile status.

But the Board did not consider any of this mitigating evidence. *See* J.A. at 37–55. Instead, the Board denied Bowling parole only because of the nature of the crime he committed. *Id.* at 54–55. Three of the four reasons the Board gave for Bowling's 2016 denial—"serious nature and circumstances of your offense(s)," "crimes committed," and "release at this time would diminish seriousness of crime"—are based solely on the nature of his crimes. *Id.* They do not acknowledge that Bowling is less-

culpable because he was seventeen when he committed that crime.[5] *Id.* "Serious nature and circumstances" of the offense has been used to explain every parole denial since Bowling was first eligible for parole in 2005.[6] *See id.* at 37–55. Because serious crimes do not become less serious with the passage of time, the Board cannot rely on that factor alone without also considering Bowling's diminished culpability.

Second, Bowling alleges that the Board denied parole without considering his "greater capacity for change" or his maturation while in prison. *Id.* at 34. Bowling's conduct while in prison demonstrates that his crime was the result of "unfortunate yet transient immaturity" rather than "irreparable corruption." *See Miller*, 567 U.S. at 479–80 (quoting *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 573). To be sure, the Board considers offenders' "conduct and positive adjustment while in prison"

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[5] In a "textbook display of circular reasoning," J.A. at 117, the Board's fourth reason—"the Board concludes that you should serve more of your sentence prior to release on parole"—merely restates the Board's conclusion that he needed to serve more time before being paroled, *id*. at 54-55.

[6] The district court erroneously refused to consider any of the Board's parole denial letters from 2005 through 2015 on the grounds that "every parole proceeding prior to 2016 is time-barred" under 28 U.S.C. § 2244(d)(1)(A). J.A. at 117. This error is explained in full *infra* Section II.C.

during parole review. J.A. at 76, ¶ 8. But this is an incomplete assessment of juveniles' maturation. For juvenile offenders like Bowling, the Board must evaluate not just his conduct now but also his growth from the person he was at seventeen.

Bowling's growth illustrates the point. During his thirty-one years of incarceration, Bowling has matured and been rehabilitated to a point where he is no longer susceptible to the same negative influences that contributed to his crime. He has consistently demonstrated exemplary conduct during incarceration. He has taken advantage of the available vocational and educational programs, he has maintained employment throughout his imprisonment, and he does not have a single disciplinary infraction since February 2003. J.A. at 34. But the Board failed to consider, let alone give any weight to, his demonstrated maturity and rehabilitation while in prison.

The only time the Board considered Bowling's maturity and rehabilitation, it erroneously used his record to *deny* him parole. In 2013, the Board denied Bowling parole in part because his "poor institutional adjustment and/or record of institutional infractions indicate that [he] is not ready to conform to society." *Id.* at 46–47. Pointing to his impeccable

institutional record—he had not had a single disciplinary infraction since 2003—Bowling appealed that decision. *Id.* at 26. The Board then issued a new denial letter listing only "serious nature and circumstance of your offense(s)" and "the Board concludes that you should serve more of your sentence prior to release on parole" as the reasons for denial. *Id.* at 48–49.

The Board's failure to consider the mitigating qualities of youth in making parole decisions is particularly troubling in light of statutory reforms enacted by other states to ensure constitutional parole procedures. The Supreme Court directed states to "explore the means and mechanisms for compliance" with juvenile offenders' heightened Eighth Amendment protections. *See Graham*, 560 U.S. at 75. In response, six states with parole systems—Arkansas, California, Connecticut, Louisiana, Nebraska, and West Virginia—enacted statutes requiring their parole boards to use special criteria during parole hearings for juvenile offenders.[7] *See* ARK. CODE ANN. § 16-93-621(b)

[7] Thirteen other states responded to *Graham* and *Miller* by enacting sentencing reform for juvenile offenders rather than changing parole procedures. *See* DEL. CODE ANN. tit. 11, § 4209A (2013); FLA. STAT. § 921.1401 (2014); HAW. REV. STAT. § 706-656(1) (2014); 730 ILL. COMP. STAT. 5/5-4.5-105 (2017); MASS. GEN. LAWS ch. 279 § 24 (2014); NEV. REV.

(2017); CAL. PENAL CODE §§ 3051, 4801(c) (2018); CONN. GEN. STAT. § 54-125a(f)(4) (2015); LA. STAT. ANN. § 15:574.4 (2018); NEB. REV. STAT. § 83-1,110.04 (2013); W. VA. CODE § 62-12-13b (2014). For example, Arkansas now requires its parole board to "take[] into account how a minor offender is different from an adult offender," including the "diminished culpability of minors as compared to that of adults" and the juvenile's "participation in available rehabilitative and educational programs while in prison." ARK. CODE ANN. § 16-93-621(b). To be sure, statutory reform may not be the only means by which to ensure a constitutionally adequate parole system. But the fact that other states have taken affirmative steps to ensure that parole boards consider the differences between juvenile and adult offenders while Virginia continues to use the same criteria for both, *see* J.A. at 79–82, supports Bowling's claim that the Board violated the Eighth Amendment.

The Board based its 2016 parole decision on a snapshot of Bowling's character as a seventeen-year-old. That is an incomplete, and therefore

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STAT. § 176.025 (2015); N.C. GEN. STAT. § 15A-1340.19B (2012); 18 PA. CONS. STAT. § 1102.1 (2012); S.D. CODIFIED LAWS § 22-6-1 (2016); TEX. PENAL CODE ANN. § 12.31(a)(1) (2013); UTAH CODE ANN. § 76-3-209 (2016); VT. STAT. ANN. tit. 13, § 7045 (2015); WYO. STAT. ANN. § 6-2-101(b) (2013).

inaccurate, assessment of who Thomas Bowling is today. The Board cannot have fairly weighed Bowling's culpability for his offense without recognizing his youthful susceptibility to corrosive adult influence at the time. Nor can the Board have accurately assessed Bowling's risk to the community without considering his demonstrated maturity and growth during thirty-one years of incarceration.

To be sure, Bowling is not guaranteed release on parole. *See Graham*, 560 U.S. at 75. But the Eighth Amendment does guarantee Bowling a right to be considered for parole under a constitutional procedure. This means that a state parole system must function so that "[t]he opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736. At a minimum, Bowling has plausibly alleged that the Board failed to provide him with such an opportunity. This Court should reverse the judgment of the district court and remand for consideration of Bowling's Eighth Amendment claim on the merits.

II. THE VIRGINIA PAROLE BOARD VIOLATED THE FOURTEENTH AMENDMENT BY ARBITRARILY DENYING BOWLING PAROLE WITHOUT CONSIDERING THE MITIGATING QUALITIES ASSOCIATED WITH HIS STATUS AS A JUVENILE OFFENDER.

The Board unconstitutionally deprived Bowling of his liberty without due process when it arbitrarily denied him parole without considering his youth at the time of his offense. Independent of his Eighth Amendment claim, Bowling has a Fourteenth Amendment right to a non-arbitrary parole decision by the Board. As a juvenile, Bowling has a constitutional liberty interest in obtaining parole and is entitled to procedures protecting against arbitrary denials by the Board. *See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."). He thus has a due process right to have his youth considered in the Board's parole decision.

Though the Constitution provides a sufficient liberty interest guaranteeing Bowling Fourteenth Amendment procedural safeguards, Bowling also has a state-created liberty interest in parole under Virginia law. *See Franklin v. Shields*, 569 F.2d 784, 790 (4th Cir. 1977). The State cannot deprive Bowling of either his constitutional or statutory liberty interest without affording him procedures tailored to protect those

interests. *See Vitek v. Jones*, 445 U.S. 480, 488–89, 494 (1980) (recognizing that a deprivation of either an inmate's constitutional liberty or statutory liberty required procedural due process protections). These procedures, at a minimum, must fairly reflect his diminished culpability as a juvenile offender and his growth since he committed this crime.

The Board's procedures do not require it to consider youth at the time of the offense. The Board therefore arbitrarily denied Bowling parole. This Court should reverse the district court and hold that the Board violated Bowling's Fourteenth Amendment rights. In the alternative, Bowling has plausibly alleged that the Board failed to consider his youth when it denied him parole, and he is entitled to a remand for further development of the factual record. Finally, Bowling is independently entitled to a remand because the district court erred by refusing to consider Bowling's prior parole denials as evidence of the Board's arbitrary decision.

A. The Board arbitrarily deprived Bowling of his constitutional liberty interest in parole by failing to consider his status as a juvenile offender.

The Fourteenth Amendment guarantees Bowling protections against arbitrary decision-making by the Virginia Parole Board because juvenile offenders have a "significant liberty interest" in obtaining parole. *See Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (finding a constitutional guarantee of procedural due process where an inmate could demonstrate that he had a "significant liberty interest" in avoiding being administered antipsychotic drugs). Bowling established a due process violation because, as a juvenile offender, he is constitutionally entitled to the opportunity to reenter society as a mature adult. And the Board arbitrarily deprived Bowling of his liberty when it denied him parole without accounting for his juvenile offender status.

Bowling has a constitutional liberty interest in obtaining parole because he is a juvenile offender. In *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, the Supreme Court held that inmates have no constitutional liberty interest in release on parole because a state "has no duty" to release defendants before the end of their valid sentences. 442 U.S. 1, 7 (1979). But *Greenholtz* turned on states'

discretion to afford (or not afford) *adult* offenders a system of parole. States do not have similarly unfettered discretion with juvenile offenders. Rather, states must provide juvenile offenders a "meaningful opportunity to obtain release."[8] *See supra* Section I.A.; *Miller*, 567 U.S. at 479; *Graham*, 560 U.S. at 75. Accordingly, the Court's reasoning in *Greenholtz* does not apply to juvenile offenders.

The Court's recent decisions in *Graham* and *Miller* support the conclusion that juvenile offenders—unlike adults—have a liberty interest in being paroled so that they can rejoin society. Neither the State's interest in retribution nor its interest in incapacitation justifies denying juveniles parole, as it may for adults. *See Graham*, 560 U.S. at 71–73. Unlike adult offenders, juveniles like Bowling are less culpable, and the State's interest in retribution is similarly diminished. *Id.* Juveniles' increased capacity for growth and maturity likewise reduce the State's interest in incapacitation. *Id* at 72–73. They are likely to mature from the character flaws that contributed to their delinquency. They become more responsible. *See id.* at 68. They can resist negative

[8] This is true for all juvenile offenders except the narrow category of incorrigible homicide offenders sentenced to life without parole. *See Miller*, 567 U.S. at 479.

influences. *See id.* And their maturation makes it less likely they will "be a risk to society" for the rest of their lives. *See id.* at 73. Because the State has no interest in preventing Bowling from rejoining society as a law-abiding adult, he has a liberty interest in parole.

The Board deprived Bowling of his liberty interest in parole when it arbitrarily evaluated him using the same factors as adult offenders and failed to consider a key factor—his age at the time of his offense—in denying parole. *See supra* Section I.B. Due process protection of Bowling's liberty interest in parole required the Board to fairly weigh his application. *See Wolff*, 418 U.S. at 558. To avoid arbitrariness, the Board must assess accurate facts and make reasonable decisions about whether Bowling has served sufficient time in prison and whether he poses a continuing threat to the community. But the Board could not make this assessment without accounting for Bowling's juvenile offender status.

The Board's procedures that evaluate adult and juvenile offenders using identical factors are constitutionally deficient. It is arbitrary to ignore Bowling's age and to treat him like an adult offender because doing so presents an incomplete picture of his past crimes and his potential for growth. Though a juvenile offender's age at the time of his

offense will not "be a determinative, or even a significant, factor in every case," it is "a reality that courts cannot simply ignore." *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011).

Because the Board decided Bowling's parole application using the same factors it uses for adult offenders, *see supra* Section I.B., this Court should hold that the Board arbitrarily deprived Bowling of his constitutional liberty interest in parole. At the very least, because Bowling has sufficiently alleged that the Board arbitrarily deprived him of his liberty by failing to consider this mitigating evidence, this case should be remanded for further review.

B. Bowling's statutory liberty interest in parole required the Board to consider his juvenile offender status before denying his parole application

Even if Bowling has no constitutional liberty interest in parole, Virginia law provides him with a liberty interest. *See Franklin v. Shields*, 569 F.2d 784, 790 (4th Cir. 1977); *see also Vitek v. Jones*, 445 U.S. 480, 488–89, 494 (1980) (requiring procedural protections for a liberty interest deriving from *either* the Constitution or state law). This Court has long recognized that Virginia's parole scheme creates a statutory liberty interest in parole protected by the Due Process Clause.

See Franklin, 569 F.2d at 790. This statutory interest in parole entitles all Virginia inmates—both adults and juveniles—to the "minimum requirements of procedural due process appropriate for the circumstances." *Id.* Among these procedural requirements, the Board must: (1) publish criteria governing their parole decisions; (2) afford parole-eligible inmates with reasonable notice and a personal hearing; (3) allow inmates to access the information in their files considered by the Board; (4) permit inmates to present evidence and witnesses supporting their parole application; and (5) provide inmates a statement of reasons explaining the Board's decision. *Id.* at 791–98. Bowling is entitled to each of these procedural safeguards under the Due Process Clause.

But those requirements do not meet Fourteenth Amendment scrutiny for juvenile offenders. Bowling is entitled to additional procedures to ensure that the Board does not arbitrarily deny him parole. The procedural requirements of due process are "flexible" and must be tailored "as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The procedures protecting adult offenders from

arbitrary parole decisions may—and do—differ from those necessary to protect juveniles' rights.

Bowling's statutory interest in parole requires the Board to consider additional criteria that account for his youth at the time of his offense. The Supreme Court often requires states to afford juveniles greater procedural safeguards than adults, even when the same right is at stake. *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (Fifth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (Fifth Amendment). For example, law enforcement must consider a juvenile's age to decide if *Miranda* warnings are needed. *See J.D.B.*, 564 U.S. at 264. All suspects share the same Fifth Amendment rights, but not accounting for the suspect's youth would "deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults." *Id.* at 281. The Court echoed this reasoning when it required judges to weigh a defendant's age when determining whether a juvenile's confession was voluntary, *see Gallegos*, 370 U.S. 49, and when sentencing juvenile offenders, *see, e.g.*, *Graham*, 560 U.S. at 76 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take

defendants' youthfulness into account at all would be flawed."). The Court's decisions consistently recognize that juveniles require additional procedural protection—consideration of their age—to guarantee them the same rights afforded adults.

In the same way, protection of a juvenile offender's liberty interest in parole requires that additional criteria be considered in the parole decision—namely, criteria that reflect the juvenile offender's age at the time of the crime. The parole decision "would be nonsensical absent some consideration of the [offender's] age." *See J.D.B.*, 564 U.S. at 275. Bowling's culpability for his crime, his rehabilitation and maturation while in prison, and his future risk to society cannot be properly understood without taking account of the context of his youth at the time of his offense. *See supra* Section I.B. But nothing in the Board's procedures requires the Board to evaluate juvenile offenders any differently from adult offenders.

Because the Board was not required to consider youth as a mitigating factor in its parole decisions, its procedures inadequately protected Bowling's statutory right to parole. This Court should thus hold that the district court erred in finding that the Board provided

Bowling with sufficient procedural safeguards to protect his statutory interest in parole. At a minimum, Bowling has sufficiently alleged a deprivation of his statutory liberty interest and this Court should remand this case for further review.

C. The district court erred in failing to admit Bowling's previous parole denials as evidence of arbitrariness

Bowling is also entitled to a remand because the district court erred by refusing to consider his parole denials from 2005 through 2015 as evidence of the Board's arbitrary procedures and decisions. *See* J.A. at 117. Bowling challenges the constitutionality of his 2016 parole denial. The Board's previous denials demonstrate a pattern of behavior that suggests the Board did not, and has never, considered his juvenile offender status as part of its parole decision. Nothing in § 2244(d)(1)(A) prohibits the district court from reviewing past parole proceedings as evidence in its evaluation of the constitutionality of the 2016 proceedings. Because the district court's consideration of the previous eleven years of parole denials make Bowling's Fourteenth Amendment claim more plausible, this Court should remand for reconsideration of Bowling's due process claim.

CONCLUSION

Bowling plausibly alleged that the Virginia Parole Board denied his parole application without considering his diminished culpability for his crime and his demonstrated maturity and rehabilitation while in prison. By denying parole without weighing these factors, the Board violated Bowling's Eighth Amendment rights. This Court should reverse the district court's order dismissing Bowling's claims and remand for consideration of the Eighth Amendment issue on the merits.

This Court should also hold that the Board arbitrarily deprived Bowling of his constitutional or statutory liberty interest in parole in violation of his Fourteenth Amendment rights. At minimum, Bowling has sufficiently alleged that the Board violated his Fourteenth Amendment rights and this Court should remand for further review.

STATEMENT REGARDING ORAL ARGUMENT

Bowling respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Rule 34(a). This Court has never addressed whether a parole-eligible juvenile homicide offender has a constitutional right to parole review that considers the "mitigating qualities of youth." *Miller*, 567 U.S. at 476. Oral argument will provide this Court with the opportunity to determine whether, and to what extent, a parole-eligible juvenile homicide offender is entitled to consideration of his "lessened culpability" for his crime and "greater capacity for change" during parole review. *Id.* at 465.

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October 23, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7638 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on October 23, 2018, a copy of Appellant's Brief and Joint Appendix was served via the Court's ECF system on: Toby J. Heytens and Matthew R. McGuire.

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Statutory Supplement

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

Effective: April 24, 1996

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the

Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub.L. 104-132, Title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Effective: October 19, 1996

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)