No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DEMMERICK ERIC BROWN,

Petitioner,

v.

KAREN D. BROWN, HAROLD CLARKE, WENDY BROWN,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner committed several offenses in the 1980s. He received lengthy consecutive sentences, began serving them, and earned credit for good behavior. In 1994, the state legislature amended the applicable statute to allow the parole board to revoke the good time credit of mandatory parolees who violated parole. In 1995, the parole board adopted a policy requiring such revocation. Petitioner received mandatory parole in 2013 and later violated parole. Under the 1995 policy, more than twenty-three years of good time credit he earned while serving the sentences imposed in the 1980s was retroactively revoked and added to his sentence.

The question presented is whether retroactive application of a parole board policy to revoke the good time credits of a parolee violates the *Ex Post Facto* Clause.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF ALL PROCEEDINGS

1. *Denrick Eric Brown, No. 1131268, a/k/a Demmerick Eric Brown v. Ken Stolle*, No. 151904, Supreme Court of Virginia. Judgment entered February 23, 2016.
2. *Denrick Eric Brown, a/k/a Demmerick Eric Brown, No. 1131268 v. Ken Stolle*, No. 151904, Supreme Court of Virginia. Judgment entered May 17, 2016.
3. *Denrick Eric Brown, a/k/a Demmerick Eric Brown. No. 1131268 v. Ken Stolle*, No. 151904, Supreme Court of Virginia. Judgment entered October 6, 2016.
4. *Demmerick Eric Brown, (a/k/a Denrick Brown) v. Karen Brown et al.,* No. 1:17cv52 (CMH/JFA), District Court for Eastern District of Virginia, Alexandria Division. Judgment entered January 24, 2019.
5. *Demmerick Eric Brown (a/k/a Denrick Brown) v. Karen Brown et al.,* No. 1:17cv52 (CMH/JFA), District Court for Eastern District of Virginia, Alexandria Division. Judgment entered March 18, 2020.
6. *Demmerick Eric Brown, a/k/a Demmerick Brown v. Karen D. Brown et al.,* No. 20-6448, United States Court of Appeals for the Fourth Circuit. Judgment entered April 20, 2022

7. *Demmerick Eric Brown a/k/a Demmerick Brown v. Karen D. Brown et al.*, No. 20-6448, United States Court of Appeals for the Fourth Circuit. Judgment entered May 17, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Demmerick Eric Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and found at Pet. 1a-17a. The opinion of the United States District Court for the Eastern District of Virginia is unreported and found at Pet. 18a-35a. The order from the Supreme Court of Virginia is unreported and found at Pet. 36a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit denied Brown's Petition for Rehearing En Banc on May 17, 2022. Pet. 37a. Brown obtained an extension of time to file this Petition for a Writ of Certiorari until September 29, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 10, Clause 1 of the United States Constitution provides that "No State shall . . . pass any . . .ex post facto Law."

STATEMENT OF THE CASE

Petitioner Demmerick Brown earned more than twenty-three years of good time credit while serving consecutive sentences for offenses he committed in the 1980s. In 1995, per a recently amended Virginia statute, the Virginia Parole Board ("VPB") adopted a new rule that good time credit would be revoked for individuals who violated conditions of mandatory parole. Petitioner was released on mandatory

parole in October 2013. In August 2015, after he violated parole, the board revoked all the many years of good time credit he had earned, relying on its 1995 policy. Petitioner has sought relief under the *Ex Post Facto* Clause ever since.

A. Applicable law in the 1980s.

In the 1980s, while Petitioner was in his twenties, he committed a string of larcenies and other offenses. JA 147-48.[1] Petitioner was first sentenced to serve seven years and six months in prison on grand larceny and burglary charges in 1981-82. Pet. 19a. In December 1983, Petitioner was released on discretionary parole, but on January 23, 1984, Petitioner was arrested and subsequently convicted of two more charges resulting in a new sentence of seventeen years. *Id.* In March 1987, Petitioner was again released on discretionary parole; at that time, he had four years and eight months left to serve on his sentences. *Id.* In July 1987, Petitioner was arrested once more and charged in three separate county courts for a string of offences that had occurred in July 1987. *Id.* Petitioner proceeded to spend the next twenty-six years in a Virginia state prison. Pet. 3a.

While serving his sentences, Petitioner earned more than twenty-three years of "good time" credit by participating in rehabilitation, therapeutic, and vocational programs; performing certain work duties; and otherwise maintaining good behavior. JA 95, 143, 150. When he was convicted and sentenced, a then-existing VPB policy entitled a prisoner to complete each consecutive sentence one at a time once they had served the term for that sentence less good time credit. *Woodley v.*

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[1] This Petition cites the Joint Appendix the parties filed below as "JA".

Dep't of Corr., 74 F. Supp. 2d 623, 629 (E.D. Va. 1999). After one consecutive sentence was complete the prisoner would serve the next, "and so on" until he began serving the last sentence imposed. *Id.* After a sentence was complete, "it was treated as though the inmate had served it in its entirety when he was paroled." *Id.*

B. Changes to Virginia parole law in 1994-95

The Virginia General Assembly enacted the state's first parole system, which was discretionary parole, in 1942. JA 101. Procedures for revocation of discretionary parole were set out in a statute. *See* VA. CODE ANN. § 53.1-165.

The Virginia General Assembly later created "mandatory parole." *See id.* § 53.1-159. Unlike discretionary parole, which depends on subjective evaluations and predictions of future behavior, "mandatory parole" provides that every inmate "shall be released on parole by the Virginia Parole Board six months prior to his date of final release." *Id.*

In 1994, in response to a "tough-on-crime" initiative, the Virginia General Assembly amended the mandatory parole statute, § 53.1-159. The amended statute provided that for persons released on mandatory parole whose parole was subsequently revoked, "[f]inal discharge may be extended to require the prisoner to serve the full portion of the term imposed by the sentencing court which was unexpired when the prisoner was released on parole." *Id.* "Final discharge" was defined to mean "that a prisoner is released from confinement having satisfied the

full term imposed by the sentencing court *without regard to good conduct credit*." *Id.* (emphasis added).[2]

In 1995, pursuant to this statutory amendment, the VPB adopted a new policy regarding mandatory parole revocation, providing:

> The Virginia Parole Board shall upon revocation of parole pursuant to 53.1-159, require the prisoner to serve the full portion of the term imposed by the sentencing court which was unexpired when the prisoner was released on parole without regard to good conduct credit.

Virginia Parole Board Policy Manual, Part II.J.4 (July 1997). Thus, the purpose and effect of the 1994 statutory amendment and the 1995 parole board policy change was to prolong periods of incarceration for mandatory parole violators by requiring parolees to serve time previously credited to them for good conduct.

C. Petitioner's mandatory parole and loss of good time credit

Petitioner was considered for discretionary parole on his one eligible sentence in October 2011, indicating he had served the six consecutive sentences for which he was not eligible for discretionary parole. *See* JA 60-62, 87-88, 118, 149, 181, 441. He was denied discretionary parole from that sentence in 2011 and in 2012. JA 289.

In October 2013, Petitioner was given mandatory parole under § 53.1-159 and released from confinement. JA 64-65, 123-24, 130-31, 274. In January 2015,

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[2] The Virginia General Assembly also abolished discretionary parole, but only prospectively for felonies committed in and after 1995. *See* Michael A. Fletcher, *Virginia Attacks Crime by Abolishing Parole, Lengthening Prison Sentences*, The Baltimore Sun (Oct. 2, 1994), https://www.baltimoresun.com/news/bs-xpm-1994-10-02-1994275041-story.html. In making the Commonwealth's sentencing laws more severe, the Virginia General Assembly "brushed aside expert testimony and the experiences of other states that have found no correlation between imprisoning more people for longer periods and reducing crime." *Id.*

Petitioner was convicted of a new charge of larceny. JA 150. In August 2015, his mandatory parole was accordingly revoked. JA 155-56, 165. Per the 1994 statutory amendment and 1995 VPB policy change, the twenty-three plus years of good time credit he had previously earned was revoked and imposed on his sentence. JA 155-56, 165, 396, 406.

Virginia Department of Corrections records reveal that the loss of good time credit was solely due to the 1994 amendment to § 53.1-159 and the 1995 parole board policy—not any pre-existing statute or parole board policy. *See* JA 156, 165. A record from September 15, 2015, when Petitioner's good time credit was revoked, states: "Effective 5/11/95, per policy of the Virginia Parole Board under code section 53.1-159, all time not physically served on applicable sentences prior to mandatory parole will be served." JA 156; *see also* JA 165 (identical statement on record dated August 7, 2017).

D. Procedural history

Four months after the loss of all his good time credit, Petitioner timely filed a *pro se* habeas petition in the Virginia Supreme Court in December 2015. JA 278. Because the 1995 VPB policy change enhanced his punishment for crimes he committed and was sentenced for in the 1980s, Petitioner contended in part that the application of the policy to his sentences violated the *Ex Post Facto* Clause. *See* JA 283, 293-94, 296-98, 312-13. The Virginia Supreme Court dismissed Petitioner's state habeas petition on two grounds: first, that his challenge to his release on mandatory parole had accrued more than one year before his petition was filed and

second, that his claim for loss of good time credit was not cognizable in habeas corpus. Pet. 36a.

Petitioner then filed a *pro se* habeas corpus petition in the Eastern District of Virginia. The district court held that Petitioner's one-year statute of limitations began to run in October 2013, the date of his mandatory parole, rather than when he lost good time credit in 2015. Pet. 23a. It also reasoned that there was no *ex post facto* violation. Pet. 29a-30a. The district court declined to issue a certificate of appealability. Pet. 35a. Petitioner filed a *pro se* notice of appeal, JA 461-62, and the Fourth Circuit granted a certificate of appealability on four issues, three procedural and one on whether Petitioner's constitutional rights had been violated. *See* Fourth Circuit Case No. 20-6448, ECF Doc. 20.

After briefing and oral argument, a Fourth Circuit panel agreed with Petitioner that the merits should be reached, finding many of his contentions on the first three certified issues "compelling" but held his *ex post facto* claim was controlled and barred by *Warren v. Baskerville*, 233 F.3d 204 (4th Cir. 2000). Pet. 13a. The court reasoned that policy determinations do not carry the force of law for *ex post facto* purposes and did not consider whether the VPB's 1995 policy created a significant risk of increased punishment. Pet. 18a-19a. The court also relied on *Warren*'s conclusion that the VPB had the power under § 53.1-165 to revoke good time credits before Petitioner's original conviction. Pet. 19a. The Fourth Circuit denied rehearing en banc. Pet. 37a.

REASONS FOR GRANTING THE PETITION

The Constitution prohibits States from passing any "ex post facto Law." U.S. Const. art. I, § 10, cl. 1. The *Ex Post Facto* Clause prohibits the application of law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390 (1798); *see also Cal. Dep't. of Corrs. v. Morales*, 514 U.S. 499, 504 (1995) (citing *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)) ("In accordance with this original understanding, we have held that the Clause is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'").

Here, Petitioner contends that a VPB policy change violates his *ex post facto* rights and that his Petition merits this Court's review, for three main reasons. First, the Fourth Circuit's *ex post facto* analysis conflicts with this Court's precedent in two significant ways. Second, the Fourth Circuit's *ex post facto* analysis conflicts with the analysis in five other circuits. Third, how courts should analyze *ex post facto* claims arising from retroactive application of parole board policy changes is an important question.

I. The Fourth Circuit's *Ex Post Facto* Analysis Conflicts With This Court's Decisions.

Whether the retroactive application of a parole law amendment violates the *Ex Post Facto* Clause "is often a question of particular difficulty when the discretion vested in a parole board is taken into account." *Garner v. Jones,* 529 U.S. 244, 249 (2000). But the presence of parole board discretion does not displace *ex post facto* limitations. *See Peugh v. United States*, 569 U.S. 530, 546 (2013) ("[A] law can run

afoul of the Clause even if it does not alter the statutory maximum punishment attached to a crime."). Rather, the "touchstone inquiry" in *ex post facto* challenges is whether a change in law presents a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 514 U.S. at 509. The "bulk" of this analysis focuses on "the effect of the law on the inmate's sentence." *Lynce v. Mathis*, 519 U.S. 433, 444 (1997).

A. Parole board policies are subject to *ex post facto* limitations.

The Fourth Circuit erred in concluding that parole board policy changes "lack the force of law" for *ex post facto* purposes. Pet. 16a. Changes to parole board rules and policies may violate the *Ex Post Facto* Clause. *Peugh*, 569 U.S. at 545 ("This Court's precedents make clear, that the coverage of the *Ex Post Facto* Clause is not limited to legislative acts."); *Garner,* 529 U.S. at 257; *Lynce*, 519 U.S. at 445–46; *Weaver v. Graham*, 450 U.S. 24, 32-33 (1981).

Policy statements and a parole board's actual practices "provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment . . . created a significant risk of increased punishment." *Garner*, 529 U.S. at 256. An agency's policies and practices often "indicate the manner in which it is exercising its discretion." *Id.* Accordingly, parole board policies must be considered in *ex post facto* claims. *Id.* ("The Court of Appeals erred in not considering the Board's internal policy statement.").

Parole board policy decisions have the power to change the application of law to parolees and their sentences. *Id.* at 256-57. If a parole board internally decides to change its enforcement of a parole law against parolees, then the law, in operation, has changed. When that change creates a sufficient risk of a longer period of incarceration than under the earlier application, the law violates the *Ex Post Facto* Clause. *Id.* at 255; *see also Weaver*, 450 U.S. at 30 ("[I]t is the effect, not the form, of the law that determines whether it *is ex post facto*.").

The court below reaffirmed its holding in *Warren* that *ex post facto* protection does not extend to discretionary parole board policy decisions. Pet. 15a. The court relied in part on dicta from a subsequent Fourth Circuit decision, *Burnette v. Fahey*, 687 F.3d 171, 184 n.6 (4th Cir. 2012). The court reasoned that "whether dicta or not—the reasoning in *Burnette* is persuasive." Pet. 16a. In a footnote, and relying on *Warren*, *Burnette* had stated that the *Ex Post Facto* Clause's scope is limited to "enactments of the legislature and to 'legislative rules,' i.e., rules promulgated by administrative agencies pursuant to a delegation of legislative authority . . . administrative policies that merely articulate an agency's interpretation of a statute, however, are not subject to *ex post facto* limitation." 687 F.3d at 184 n.6 (citing *Warren v. Baskerville*, 233 F.3d 204, 207 (2000)). This interpretation directly conflicts with *Garner* and this Court's decisions that retroactive application of parole board policy changes may violate the *Ex Post Facto* Clause.

B. The VPB policy created a significant risk of increased punishment.

The Constitution "intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." *Cummings v. Missouri*, 71 U.S. 277, 325 (4 Wall.) (1867). When presented with an *ex post facto* challenge, a court must determine whether a change in law, whatever its form, creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 514 U.S. at 509; *Garner*, 529 U.S. at 255. This standard requires a "rigorous analysis of the level of risk created by the change in law." *Garner*, 529 U.S. at 255.

1. Before the 1994 statutory amendment and the 1995 VPB policy change, the VPB did not have authority to revoke good time credit upon violation of mandatory parole.

When Petitioner was sentenced in the 1980s, neither the mandatory parole statute, § 53.1-159, nor the general parole revocation statute, § 53.1-165, gave the VPB authority to revoke the previously accumulated good time credit of mandatory parole violators and incarcerate them for that time. Although the Fourth Circuit concluded that such authority was rooted in the general parole revocation statute, § 53.1-165, *Warren*, 233 F.3d at 207, there is nothing in the statutory text conferring such authority and that statute does not govern mandatory parole.

Moreover, in amending the mandatory parole statute, § 53.1-159, the Virginia legislature recognized that the VPB did not possess the authority to revoke a mandatory parole violator's good conduct credit prior to its enactment. *See* 1994 General Assemb., Summary of Legis. Proposal ("Amend and reenact Section 53.1-

156 and 53.1-159 of the Code of VA to providing [sic] the Parole Board with statutory authority to revoke releasees' parole and require them to be subject to reincarceration at any time up to the maximum penalty allowed by law, thereby forfeiting their previously accrued good time.").

Thus, it was not until the 1994 amendment to the mandatory parole statute, § 53.1-159, that the VPB became authorized to revoke mandatory parole violators' good time credit. The VPB then passed the policy at issue in 1995. Both the 1994 statutory amendment, the sole statutory authority that the VPB relied on in adopting its 1995 policy, and the 1995 policy were passed years after Petitioner was sentenced for his crimes. They had the effect of increasing his punishment when they were later applied to him, in violation of his rights under the *Ex Post Facto* Clause. *See Johnson v. United States*, 529 U.S. 694, 702 (2000) (stating that, for *ex post facto* analysis, the Court "attribute[s] postrevocation penalties to the original conviction").

In rejecting Petitioner's *ex post facto* claim, the Fourth Circuit repeated its prior historical error from *Warren* that the 1995 VPB policy change "was merely a 'policy decision that was within the parameters of existing state law.'" Pet. 15a (quoting *Warren*, 233 F.3d at 206-07). The court wrongly reasoned that the VPB already had authority to reincarcerate mandatory parole violators for the entire portion of their original sentence under § 53.1-165, which was enacted before Petitioner's convictions. Pet. 15a (citing *Warren*, 233 F.3d at 206–07). As noted

above, it was § 53.1-159, amended in 1994, that provided the VPB with the authority to revoke good time credits of mandatory parolees such as Petitioner.

2. Even if the VPB had authority to revoke good time credit before its 1995 policy change, this Court's precedents require the risk of increased punishment arising from the policy to be considered.

The courts below were required to analyze whether the 1995 policy created a sufficient risk of increased punishment, even if the VPB had possessed authority to revoke the good time credit of mandatory parole violators before 1995. When the upper boundary of a parole board's power to punish remains unchanged, the board's practices and policies may nevertheless create a sufficient risk of increased punishment. *Peugh*, 569 U.S. at 546. If a change in the operation of law significantly alters the consequences attached to crime already completed, the alteration changes "the quantum of punishment," in violation of the *Ex Post Facto* Clause.*Weaver*, 450 U.S. at 32. The *Ex Post Facto* Clause also forbids the States to enhance the measure of punishment by altering the substantive "formula" used to calculate terms of incarceration. *Morales*, 514 U.S. at 506.

Moreover, retroactive alteration of early release provisions implicates the *Ex Post Facto* Clause. *Lynce*, 519 U.S. at 446-47. Good time credit is a determinant of an inmate's prison term, and an inmate's "effective sentence is altered once this determinant is changed." *Weaver*, 450 U.S. at 32. As eligibility for reduced imprisonment is a significant consideration in both plea bargaining and sentence computation, "the removal of such provisions can constitute an increase in punishment." *Id.*

Here, the 1995 policy change plainly altered the legal consequences of crimes committed before its effective date. Even if the VPB possessed the authority under § 53.1-165 to require mandatory parole violators to serve the full remainder of their original sentences without the benefit of good time, it did not routinely exercise that power. *See Woodley*, 74 F. Supp. 2d at 630 (determining that the effect of the 1995 policy change "was that the VPB would now incarcerate all violators and require them to serve the remainder of their sentence").

Even assuming the VPB had discretion to revoke the good time credit of mandatory parolees who violated their parole conditions before 1995, in 1995 the VPB changed its policy and began to require *all* mandatory parolees who violated a condition of parole to serve the full remainder of their original sentences. *See Garner*, 529 U.S. at 256 (explaining that the issue presented was whether the law "as applied" to a prisoner's sentence "created a significant risk of increasing his punishment"). As applied to Petitioner, the revocation of his previously earned good time credit altered the terms of his originally imposed sentences, adding an additional twenty-three years to his sentence. Yet, the Fourth Circuit failed to analyze whether the policy change created a significant risk of increased punishment.

Using its delegated lawmaking authority to require all mandatory parole violators to serve the remainder of their unserved sentence without regard for previously earned good time credit, the VPB "effectively eliminated the lower end" of punishment under the law. *See Morales*, 514 U.S. at 506. This Court has

repeatedly held that such changes violate the *Ex Post Facto* Clause. *See Weaver*, 450 U.S. at 34 (invalidating on *ex post facto* grounds a statute that retroactively reduced the amount of "gain time" credits originally available to prisoners at the time of their crimes and sentences); *Miller v. Florida*, 482 U.S. 423, 433-34 (1987) (holding that an increase in presumptive sentencing ranges, which occurred after petitioner committed his crime but before he was sentenced, violated the *Ex Post Facto* Clause); *Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding that a change in law, which occurred between the commission of the crime and petitioner's sentencing, removing the sentencing judge's discretion to impose a sentence below the fifteen year maximum and requiring the maximum fifteen-year sentence violated the *Ex Post Facto* Clause).

In rejecting *ex post facto* challenges to the VPB 1995 policy change, the Fourth Circuit has quoted this Court out of context and reasoned that the *Ex Post Facto* Clause should not be used for "the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures." *Warren*, 233 F.3d at 208 (quoting *Morales*, 514 U.S. at 508). The changes this Court referred to in *Morales*, like limiting the hours of a prison law library or setting page limits on documents seeking gubernatorial pardons, create "only the most speculative and attenuated risk" of increasing the punishment for past crimes. *Morales*, 514 U.S. at 508, 514. In contrast, the 1995 VPB policy change caused the retroactive revocation of twenty-three *years* of good time credit. The risk of increased punishment was not speculative, and the increased punishment is significant. *Greenfield v. Scafati*, 277

F. Supp. 644, 646 (D. Mass. 1967) ("The difference between no penalty, other than a termination of the parole, and a substantial increase in imprisonment for violation, is far from inconsequential."), *summarily aff'd*, 390 U.S. 713 (1968).

Moreover, historical context informs the risk of the increased punishment analysis. The 1994 amendment and 1995 policy change were enacted as part of a Truth-in-Sentencing reform that was explicitly aimed at lengthening incarceration periods for violent or repeat offenders as part of a "hard-on-crime" initiative by a newly elected governor. William P. Barr & Richard Cullen, *Governor's Commission on Parole Abolition and Sentencing Reform, Final Report* 1-5 (Aug. 1994), http://www.vcsc.virginia.gov/1994%20Final%20Report%20Gov's%20Commission%20on%20Parole%20Abolition%20&%20Sentencing%20Reform.pdf. Unlike in *Morales*, where "a prisoner's ultimate date of release would be entirely unaffected by the change," 514 U.S. at 513, the effect of the 1994 statutory amendment and 1995 policy change was postponement of release dates and lengthened periods of confinement across the Commonwealth of Virginia. *See* Brain J. Ostrom et. al., *Truth-in-Sentencing in Virginia*, Nat'l Inst. of Just., Doc. No. 187677 (1999). Failing to analyze the risk of increased punishment arising from the policy change was therefore inconsistent with this Court's precedent.

The 1995 VPB policy change penalizes mandatory parole violators by revoking previously earned good time credit for past crimes. As a result, these individuals are serving additional time they would not have served before 1995. This practice raises clear *ex post facto* concerns. *Greenfield*, 390 U.S. at 713

(affirming that a statute which imposes sanctions for parole violations upon prisoners originally sentenced before the statute's enactment violates the *Ex Post Facto* Clause). Accordingly, the Fourth's Circuit's failure to conduct an *ex post facto* analysis of the increased risk of punishment to Petitioner from the VPB policy change contradicts this Court's precedent. Review is warranted.

II. The Fourth Circuit's *Ex Post Facto* Analysis Conflicts With The Third, Sixth, Seventh, Ninth, And D.C. Circuits.

The Fourth Circuit's failure to address whether a discretionary parole board policy violates the *Ex Post Facto* Clause by creating a significant risk of increased punishment conflicts with decisions from the Third, Sixth, Seventh, Ninth, and D.C. Circuits. The Court should grant certiorari to resolve the Circuit split over the proper analysis for the retroactive application of parole board policies.

The Third, Sixth, Seventh, Ninth, and D.C. Circuits agree that the primary inquiry in an *ex post facto* analysis is not the form of the law but whether it creates a significant risk of increased punishment. *See Holmes v. Christie*, 14 F.4th 250, 264 (3d Cir. 2021) (noting that "a challenged rule's constitutionality hinges on its effect, not its form"); *Michael v. Ghee*, 498 F.3d 372, 383 (6th Cir. 2007) (holding the primary analysis is not whether the challenged regulation is a law but whether it creates a significant risk of increased time served); *Glascoe v. Bezy*, 421 F.3d 543, 547-48 (7th Cir. 2005) (same); *Himes v. Thompson*, 336 F.3d 848, 855 (9th Cir. 2003) (same); *Fletcher v. Reilly*, 433 F.3d 867, 876-77 (D.C. Cir. 2006) (citing *Garner,* 529 U.S. at 251) (stating the controlling inquiry is whether the Board's exercise of discretion in practice created a significant risk of increasing incarceration).

For example, the Seventh Circuit, following this Court's *Garner* decision, concluded that it must first consider whether the retroactive application of new parole guidelines "create[d] a significant risk of increased punishment." *Glascoe*, 421 F.3d at 547. Upon determining the new guidelines did not create such a risk, the court reasoned that it did not need to evaluate the government's argument that *ex post facto* limitations did not apply to discretionary guidelines. *Id.* at 548 (citing *Warren*, 233 F.3d at 208).

Furthermore, similarly following *Garner*, the Sixth and D.C. Circuits rejected their prior analyses distinguishing between law and policies in *ex post facto* analyses. The Sixth Circuit concluded its prior decision that parole guidelines were not subject to *ex post facto* limitations was inconsistent with *Garner*. *See Michael*, 498 F.3d at 381 (concluding "the Court made clear that guidelines that affect discretion, rather than mandate outcomes, are nevertheless subject to ex post facto scrutiny"). *Id.* Additionally, the D.C. Circuit held that *Garner* "foreclosed our categorical distinction between a measure with the force of law and guidelines [that] are merely policy statements from which the Commission may depart in its discretion." *Fletcher v. D.C.*, 391 F.3d 250, 251 (D.C. Cir. 2004) (internal quotations omitted).

In stark contrast, the Fourth Circuit continues to distinguish between parole board policies and laws. *See Burnette*, 687 F.3d at 185 n.6 ("Administrative policies that merely articulate an agency's interpretation of a statute . . . are not subject to the ex post facto limitation.") That circuit's primary inquiry is whether the parole

board exercised its "previously existing discretionary authority under statute." *Warren,* 233 F.3d 204 at 208; *see also Burnette*, 687 F.3d at 185 n 6; *Brown*, Pet. 15a. In *Warren*, the court's *ex post facto* analysis focused on whether the parole board had the discretion to revoke mandatory parole violators' good time credit "within the parameters of existing state law" prior to conviction. 233 F.3d at 208. The court did not address whether the amendment or policy decision significantly increased the risk of increased punishment.

Here, applying *Warren*, the Fourth Circuit determined that the 1995 policy change, requiring revocation of Petitioner's twenty-three plus years of good time credit, did not violate the *Ex Post Facto* Clause. Pet. 16a-17a. The court reaffirmed its own minority rule that policies interpreting statutes are not subject to *ex post facto* analysis. Pet. 16a-17a (citing *Burnette*, 687 F.3d at 185 n.6). Moreover, it held that the policy "constituted an exercise of the Board's delegated lawmaking authority to adopt general rules governing the granting of parole" that predated Petitioner's conviction. *Id*.

The Second Circuit appears to be the only circuit in agreement . Similar to the Fourth Circuit, the Second Circuit does not apply *ex post facto* analysis to guidelines "promulgated simply to guide the parole board in the exercise of its discretion." *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001); *see also Robles v. Dennison*, 745 F. Supp. 2d 244, 300 (W.D.N.Y. 2010) (noting that the "Second Circuit has explicitly rejected the notion that New York State's parole guidelines

constitute 'laws' within the meaning of the *ex post facto* clause" and citing *Barna*, 239 F.3d at 171), *aff'd*, 449 F. App'x 51 (2d Cir. 2011).

The Fourth Circuit's *Warren* analysis results in a different outcome than similar *ex post facto* cases in the Third, Sixth, Seventh, Ninth, and D.C. Circuits. *Compare Mickens-Thomas v. Vaughn*, 321 F.3d 374, 393 (3d Cir. 2003) (holding *ex post facto* limitations applied to a parole board's exercise of its amended authority to revise parole eligibility guidelines) *with Warren*, 233 F.3d at 208 (holding *ex post facto* limitations did not apply to the parole board's exercise of its amended authority to change parole board policies revoking good time credit).

Because the Fourth Circuit's *ex post facto* analysis of discretionary parole policies is contrary to the significant risk of increased punishment test in five other circuits, review is warranted.

III. The Application Of *Ex Post Facto* Limitations To Parole Board Policies Is Important.

Parole is a critical part of this country's criminal justice system. It decreases the prison population, reduces the costs of incarceration, and, most importantly, affects the amount of time a person serves in prison. *See* Amy Robinson-Oost, *Evaluation as the Proper Function of the Parole Board: An Analysis of New York State's Proposed Safe Parole Act*, 16 CUNY L. Rev. 129, 134 (2012) (noting an increase in availability of parole and probation would decrease prison populations by 10% saving $3 billion in costs); Paul D. Reingold & Kimberly Thomas, *Wrong Turn on the Ex Post Facto Clause*, 106 Cal. L. Rev. 593, 630 (2018) (stating parole affects the time served in prison reducing costs).

With nearly two million individuals currently incarcerated, a parole board's exercise of discretion potentially impacts the amount of time served by hundreds of thousands of prisoners. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie,* Prison Pol'y Initiative (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie 2022.html. Because parole board policies carry the force of law and those policies, such as the 1995 VPB policy, are often intended to be punitive, this case is important and merits review.

A. Like legislatures, parole boards have the power to increase the measure of punishment attached to crimes.

In most states, "no court or state agency holds greater power than parole boards over time actually served by the majority of offenders sent to prison." Kevin R. Reitz & Edward E. Rhine, *Parole Release and Supervision: Critical Drivers of American Prison Policy*, 3 Ann. Rev. Criminology, 281, 281 (2020); *see also* Beth Schwarzapfel, *Parole Boards: Problems and Promise*, 28 Fed. Sent'g Rep. 79, 79 (2015) (noting parole boards in twenty-six states have "almost unlimited discretion" in determining parole). Thus, more than 800,000 people rely primarily on parole boards to protect their constitutional right against *ex post facto* incarceration. *See* Danielle Kaeble, *Probation and Parole in the United States, 2020*, Bureau of Justice Statistics (Dec. 2021), https://bjs.ojp.gov/content /pub/pdf/ppus20.pdf (determining there were 862,100 individuals on parole in 2020).

Parole boards, like state legislatures, sometimes exercise their power punitively, such as by revoking good time credit for parole violations. Reitz & Rhine, *supra* at 282. This power has been used to punish parole violators with

reincarceration. *See id.* at 288 (the number of revocations increased by 918% from 1980 to 2008); *see also* Sawyer & Wagner, *supra* (finding 1 in 5 inmates are in prison for violating parole or probation); *Confined and Costly: How Supervision Violation are Filling Prisons and Burdening Budgets*, Council of State Governments Justice Center (June 18, 2019), https://csgjusticecenter.org/publications/confined-costly/ (finding 45% of state prisoners were admitted due to parole or probation violations). Parole boards also use their discretion to determine the likelihood of recidivism and existence of parole violations. Michael Ostermann, *How Do Former Inmates Perform in the Community? A Survival Analysis of Rearrests, Reconvictions, and Technical Parole Violations*, 61 Crime & Delinq. 163, 163 (2015).

While Petitioner's case involves parole revocation due to criminal recidivism, parole boards often revoke for technical violations as well. *Id.* In fact, studies indicate that nearly half of parole revocations are based on technical violations as opposed to criminal recidivism. Kelli Stevens-Martin et al, *Technical Revocations of Probation in One Jurisdiction: Uncovering the Hidden Realities*, 78 Fed. Prob. 16, 17 tbl. 1 (2014). Moreover, technical parole violations have a disproportionate impact on vulnerable mentally impaired parolees. Ryken Grattet & Jeffrey Lin, *Supervision Intensity and Parole Outcomes: A Competing Risks Approach to Criminal and Technical Parole Violations*, 33 Just. Q. 565, 576 (2016) (stating mental health diagnosis increases the likelihood of a technical violation by 95%).

Given the power that parole boards possess, parole board policies have an arguably bigger impact on criminal justice than laws passed by state or federal

legislatures. *See* Reitz & Rhine, *supra*, 285 (noting that "[w]ithout any formal changes in the law, low-visibility shifts in the exercise of release discretion could turn a state's prison policy on a dime"). Recognizing how easily this power can be abused by legislatures, the Framers created the *Ex Post Facto* Clause to prevent such punitive actions. Federalist No. 84 (A. Hamilton) ("[T]he practice of *arbitrary imprisonments*, have been, in all ages, the favorite and most formidable instruments of tyranny.") (emphasis added).

The Fourth Circuit, however, does not place those same limitations on parole boards, even when parole rules clearly enhance the measure of punishment for certain crimes. By this reasoning, parole boards may retroactively postpone the release of prisoners without regard for constitutional limitations. Put another way, in the Fourth Circuit, the *Ex Post Facto* Clause prevents legislatures from retroactively enhancing punishment through new legislation but allows parole board policy to achieve the same result.

Because parole boards have the power to retroactively punish hundreds of thousands of individuals each year by postponing their release dates, this is an issue of significant importance meriting review.

B. Punitive and retroactive parole board policy changes are inconsistent with the purpose of the *Ex Post Facto* Clause, affect multitudes, and occur too often.

Because the Fourth Circuit's *ex post facto* jurisprudence is inconsistent with the protections of the Clause as understood by the Framers, *see* The Federalist No. 44 (J. Madison) (describing *ex post facto* limitations as a "constitutional bulwark in

favor of personal security and private rights"); *id.* No. 84 (A. Hamilton) (describing *ex post facto* laws as "formidable instruments of tyranny"), review is warranted. *See Morales*, 514 U.S. at 521-22 (Stevens, J dissenting) (noting that "[i]n light of the importance that the Framers placed on the *Ex Post Facto* Clause, we have always enforced the prohibition against the retroactive enhancement scrupulously").

Prohibiting *ex post facto* legislation while at the same time allowing parole boards—vested with lawmaking authority by state legislatures—to retroactively increase the punishment does not serve the values the *Ex Post Facto* Clause was designed to protect. *See Ross' Case,* 19 Mass. 165, 170 (1824) ("A party ought to know, at the time of committing the offence, the whole extent of the punishment; for it may sometimes be a matter of calculation, whether he will commit the offence, considering the severity of the punishment."); *see also Peugh*, 569 U.S. at 561 (Thomas, J., dissenting) (explaining how laws that retroactively increased punishment for certain crimes were "understood to be *ex post facto* at the time of the founding").

In response to "tough-on-crime" political campaigns beginning in the 1960s, parole statutes and policies have harshened treatment of prisoners, resulting in the exact harm the *Ex Post Facto* Clause was intended to prevent. *See* Reingold & Thomas, *supra*, at 629 ("[N]early all the statutory and policy changes regarding parole over the past fifty years have been in the direction of harsher treatment for prisoners, as a result of political shifts from the 1960s to the 2000s."); Reitz &

Rhine, *supra*, 285, 288 (stating that a 918% increase in parole revocation was "an important driver of American incarceration growth" from 1980 to 2000).

Parole board changes like the 1995 VPB policy were intended to punish offenders, prolong periods of incarceration, and reduce availability for parole for certain classes of criminals, such as violent, repeat offenders or murderers. *See* Governor's Commission on Parole Abolition and Sentencing Reform, *supra*, at 2; *Lynce*, 519 U.S. at 892. While such tough-on-crime initiatives are "legitimate when they operate prospectively, [ ] their importance and prevalence surely justify careful review when those measures change the consequences of past conduct." *Morales*, 514 U.S. at 521-22 (Stevens, J., dissenting).

Punitive parole board policies do not merely punish parolees; they also punish innocent individuals within their communities, their families, and most importantly their children. More than 2.5 million children in this country have at least one parent in prison. Peter van Agymael, *Incarceration's Impact on Kids and Families, The Human Toll of Jail* (2016) http://humantollofjail.vera.org/the-family-jailcycle/#:~:text=Studies%20show%20that%20the%20growth,care%2C%20separated%20from%20their%20family. Children whose parents are behind bars suffer from higher rates of homelessness, experience increased rates of poverty, and often find themselves in an overcrowded foster care system. *Id.* The effects on the families of incarcerated individuals follow them from arrest, to sentencing, to parole, and in many instances, to reincarceration.

Punitive and retroactive parole board policy changes occur too often. A survey of *ex post facto* claims between 1992 and 2002 found there were more than 200 challenges to custody modifications such as revocation of good time credit, making these claims the second most common *ex post facto* challenges after sentence enhancement provisions. Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 W&M Bill of Rts. J. 349, 466, 469 (2004). Among the more successful claims were parole-based claims involving the retroactive forfeiture of "imprisonment time credits." *Id.* at 479.

In sum, based on this Court's *ex post facto* decisions, the circuit conflict, and the question's importance, this Court's review is warranted. The Court should take this opportunity to clarify how the *Ex Post Facto* Clause applies to the retroactive application of parole board policy changes.

CONCLUSION

The petition for a writ of certiorari should be granted.

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